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REPORTS

OF CASES RELATING TO

MARITIME LAW CASES

CONTAINING ALL

DECISIONS OF THE COURTS OF LAW AND EQUITY

IN

The United Kingdom.

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REPORTS

OF

Cases Argued before and Determined by the Superior Courts

RELATING TO

MARITIME LAW.

H.L.] Re an arbitration between SUZUKI AND CO. LIM. AND T. BEYNON AND CO. LIM. [H.L.]

House of Lords.

Dec. 3 and 4, 1925, and Jan. 29, 1926.

(Before LORDS CAVE, L.C., DUNEDIN, SHAW, SUMNER, and BUCKMASTER.)

Re an arbitration between SUZUKI AND CO. LIMITED AND T. BEYNON AND CO. LIMITED. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—Clause providing that captain shall prosecute his voyages with the utmost dispatch—Exception in charter-party of negligence, default, or error in judgment of the master—Construction—Claim for damages—Reference to arbitration—No finding of negligence.

By a charter-party dated the 22nd Nov. 1919 the appellants agreed to let and the respondents agreed to hire a named steamship for a period of six calendar months. The charter-party provided as follows: "Clause 3: The charterers shall provide and pay for all the coals, fuel, water for boilers. . . . Clause 9: The captain shall prosecute his voyages with the utmost dispatch and shall render all customary assistance with the ship's crew. . . . Clause 14: Throughout this charter losses or damages whether in respect of goods carried or to be carried or in other respects arising or occasioned by the following causes shall be absolutely excepted, viz.: negligence default or error in judgment of the pilot, master or crew or other servants of the owners in the management or navigation of the steamer."

The charterers alleged that the captain had not prosecuted a voyage with the utmost dispatch. The owners contended that the breach (if any) of clause 9 was occasioned by the negligence of the master in the management or navigation of the steamer, and that they were therefore exempted by clause 14 from liability. There was no shortage of coal, and it appeared to be

common ground that the lack of speed of the vessel was due to insufficient coal consumption on the voyage. The dispute having been referred to arbitration the umpire found that the speed of the steamer was generally less than it would have been if the master had exercised due diligence and that the failure of the master to prosecute the voyage with the utmost dispatch resulted from a general slackness in the performance of his duty or an inability properly to perform his duty in accordance with the charter-party. And the umpire awarded damages to the charterers subject to the question whether the owners were exempt from liability in respect of the master by reason of clause 14 or of other provisions of the charter-party.

Bailhache, J. having affirmed the award in favour of the charterers, the Court of Appeal referred the award back to the umpire who, in answer to the questions put by the court, said that he intended the court to draw the inference that the master was not competent in the sense of his inability properly to perform his duty in accordance with the provisions of the charter-party and (or) that he was guilty of "general slackness," but not slackness amounting to negligence in management or navigation. Upon this answer the Court of Appeal by a majority affirmed the decision of Bailhache, J.

Held, per Lords Cave, L.C., Dunedin, and Sumner (Lords Shaw and Buckmaster dissenting), that, quite apart from any question of construction of the provisions of the charter-party, it was impossible to hold that the owners had established that species of negligence which was required in order to make good their defence. They had, therefore, been rightly held liable for the damages awarded.

Decision of the Court of Appeal affirmed.

APPEAL from a decision of the Court of Appeal, dated the 28th Nov. 1924, affirming, by a majority, a judgment of Bailhache, J., dated the 28th March 1924, whereby he upheld an award in the form of a special case made by an umpire in favour of the respondents.

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

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The question in dispute upon the appeal was whether, upon the true construction of a charter-party made between the appellants as owners and the respondents as charterers and upon the facts found by the umpire, the respondents were entitled to recover from the appellants damages for a breach of the obligation imposed by the charter-party on the captain to prosecute his voyages with the utmost dispatch or whether the appellants were protected from the consequences of this breach by an exception in the charter-party of negligence, default, or error in judgment of the master in the management or navigation of the steamer.

The facts, which are sufficiently summarised in the headnote, appear fully from the opinion of the Lord Chancellor.

The umpire found that the master did not prosecute the second voyage, namely, Bahia Blanca to Dunkirk, with the utmost dispatch, and that such failure resulted from a general slackness in the performance of his duty or an inability properly to perform his duty in accordance with the charter-party. He further held that the owners were not excused by clause 14 of the charter-party for the failure of the master, and he awarded the charterers the sum of 2414*l.* 8*s.* 4*d.* as damages in respect of the second voyage.

Bailhache, J. upheld the award, and his decision was affirmed by the Court of Appeal (Bankes and Sargant, L.J.J.; Scrutton, L.J. dissenting).

The owners appealed.

S. L. Porter, K.C. and *David Davies* for the appellants.

Langton, K.C. and *Carpmael* for the respondents.

The House took time for consideration.

LORD CAVE, L.C.—The difficulty in this case appears to me to arise partly from an ambiguity in a charter-party and partly from an obscurity in an award.

By a charter-party dated the 22nd Nov. 1919, the appellants agreed to let and the respondents agreed to hire the steamship *Keifuku Maru* for a period of six calendar months. The material portions of the charter-party are as follows:—

Clause 3: The charterers shall provide and pay for all the coals, fuel, water for boilers . . .

Clause 9: The captain shall prosecute his voyages with the utmost dispatch and shall render all customary assistance with the ship's crew . . .

Clause 14: Throughout this charter losses or damages whether in respect of goods carried or to be carried or in other respects arising or occasioned by the following causes shall be absolutely excepted, viz.:— . . . negligence, default, or error in judgment of the pilot, master, or crew, or other servants of the owners in the management or navigation of the steamer.

The ship performed four voyages under the charter-party, and it is the second of these voyages, a voyage from Bahia Blanca to Dunkirk, which is alone in question on this appeal. The charterers alleged that the captain had not prosecuted the voyages with the

dispatch required by clause 9 of the charter-party. The owners, while disputing that allegation, contended that the breach (if any) of clause 9 was occasioned by the negligence or default of the master in the management or navigation of the steamer, and that they were, therefore, exempted by clause 14 from liability. There was no shortage of coal, and it appears to be common ground that the lack of speed of the vessel was due to insufficient coal consumption on the voyage.

The umpire to whom the dispute was ultimately referred made an award, in which he stated his conclusions as follows:—

26. After taking into consideration the relative qualities of the bunker coals used throughout the whole of the four voyages together with a comparison of the weather conditions in respect of each voyage and other facts, I hold, (a) that the master did not prosecute the voyages in question with the utmost dispatch and render all customary assistance with the ship's crew, so that the speed of the steamer was generally less than it would have been if the master had exercised due diligence, whereby time was lost; (b) that the failure of the master to prosecute the voyages in question with the utmost dispatch resulted from a general slackness in the performance of his duty or an inability properly to perform his duty in accordance with the provisions of the charter-party in this connexion; (c) that in consequence the charterers suffered damage in respect of the second voyage to the extent of 2414*l.* 8*s.* 4*d.*;

And he awarded that sum to the charterers, subject to the opinion of the court on a question of law which he stated in the following terms:—

Whether the owners are exempt from liability in respect of the master not having prosecuted his voyages with the utmost dispatch as provided for in clause 9 of the charter-party on the ground that this resulted from the negligence, default, or error in judgment of the master or crew in accordance with clause 14 of the charter-party or by other specific provisions of the general terms of the charter-party.

Upon the argument of the case before the late Bailhache, J. he expressed the opinion that the failure to keep up a sufficient head of steam in order to keep the speed which the vessel was reasonably capable of keeping was negligence in the management or navigation of the steamer within the meaning of clause 14 of the charter-party; but he held that clause 14 was not intended to "wipe out" clause 9, and on the authority of a case decided by a divisional court, upheld the award in favour of the charterers. The owners having appealed to the Court of Appeal, that court was not unnaturally perplexed by the language of the award and referred the award back to the umpire for answers to the following questions:—

(1) Whether by his finding in par. 26 (a) and (b) he intends this court to draw the inference that he has found that the master, in reference to the due prosecution of the voyage, was not competent; (2) or was guilty of slackness only, and if the latter; (3) whether the slackness amounted to negligence in the navigation or management of the steamer.

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These questions the umpire answered as follows :—

I intended the court to draw the inference that the master was not competent in the sense of his inability properly to perform his duty in accordance with the provisions of the charter-party and (or) that he was guilty of slackness—namely, “general slackness,” but not slackness amounting to negligence in management or navigation.

Upon this answer the Court of Appeal affirmed the judgment of the late Bailhache, J. and the owners have appealed to this House.

The first question which arises is as to the construction of the charter-party. Assuming that the loss of speed which caused a breach of clause 9 resulted from the master's failure to use sufficient bunker coal, and that this failure amounted to negligence or default in the management or navigation of the steamer within the meaning of clause 14, what is the legal result? Is clause 9 to have effect, or is clause 14 to prevail over clause 9 and to excuse the owner from liability? Upon this point I am impressed by the reasoning of the late Bailhache, J. If the contract means that the captain is to prosecute his voyages with the utmost dispatch, but that if by reason of his negligence, default, or error in judgment in the management or navigation of the ship he does not so prosecute his voyages, the owner is exempt from liability, then the effect of clause 14 is practically to nullify clause 9 of the charter-party. It is true, as Scrutton, L.J. pointed out, that the speedy prosecution of a voyage may be affected by matters other than management or navigation, such as undue delay in a port of call; but I cannot doubt that clause 9 was intended to include an undertaking by the owners that the captain should maintain a reasonable speed while the vessel was at sea, and I find it difficult to understand how a failure on the captain's part to comply with that obligation could be due to any cause other than his negligence, default, or error of judgment in management or navigation. Upon the whole, I should be disposed to hold that the general words of clause 14 were not intended to exempt the owners from the consequences of a breach by the captain of the definite and specific obligation imposed by clause 9.

But assuming that construction to be wrong, and that a breach of clause 9 is not actionable if caused by negligence within the meaning of clause 14, the appellants are still in great difficulty. In order to succeed in their defence, they must at least establish negligence within the meaning of clause 14 to the satisfaction of the judge of fact, and this they have failed to do. No doubt, the original award of the umpire was obscure, and it might have been possible to spell out of it a finding of negligence in management or navigation; but the further answer of the umpire negatives any such finding. The first part of that answer, in which the umpire uses the compound conjunctive “and (or)” — an expression which may have its uses in commercial contracts but is wholly out of place in a judicial finding—is by no means helpful; but

the latter part of the answer, in which the umpire finds that the master was not guilty of slackness amounting to negligence in management or navigation, is definite and, I think, conclusive. Your Lordships have not been asked to send the award back for a further answer, and the answer must be taken as it stands; and, having regard to its terms, I think it impossible to hold that the appellants have established that species of negligence which is required in order to make good their defence. If so, it follows that on this ground, and quite apart from any question of construction, the appellants have been rightly held liable for the damages awarded.

For these reasons I am of opinion that this appeal fails and should be dismissed with costs, and I move your Lordships accordingly.

LORD DUNEDIN.—The thoroughly unsatisfactory feature of this case is that we are compelled to consider not what were the true rights of the parties in the circumstances which occurred under the charter-party which formed the contract between them, but what the arbitrator has determined, his determination being couched in language which has all the appearance of stultification of expression resulting from confusion of thought. I do not repeat the articles of the charter-party on which the question to be decided arose, as that has already been done by his Lordship on the Woolsack. I ask myself what is it that the arbitrator meant when he framed this special case; He found :—

(a) That the master did not prosecute the voyages in question with the utmost dispatch and render all customary assistance with the ship's crew, so that the speed of the steamer was generally less than it would have been if the master had exercised due diligence, whereby time was lost.

To this he added :—

(b) That the failure of the master to prosecute the voyages in question with the utmost dispatch resulted from a general slackness in the performance of his duty or an inability properly to perform his duty in accordance with the provisions of the charter-party in this connexion.

And accordingly, as a result,

(c) That in consequence the charterers suffered damage in respect of the second voyage to the extent of 2414l. 8s. 4d.

But he went on to state :

The question of law for the opinion of the court is whether the owners are exempt from liability in respect of the master not having prosecuted his voyages with the utmost dispatch as provided for in clause 9 of the charter-party on the ground that this resulted from the negligence, default, or error in judgment of the master or crew in accordance with clause 14 of the charter-party or by other specific provisions of the general terms of the charter-party.

Now what I think he meant by that was to say : “Does my finding (b) amount in law to negligence, default, or error in judgment, and if so, does clause 14 excuse the breach found under clause 9?” The judge of first instance

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upheld the award as made upon the ground that if you read clause 14 as being brought into operation by finding (b), you would annihilate clause 9, and that as that could not be allowed, therefore the negligence which was the class of negligence which went straight in the teeth of the undertaking under clause 9 could not form an excuse under clause 14.

The Court of Appeal took a different view. They thought that negligence was a question of fact, and they accordingly remitted the case to the arbitrator, with this instruction :

(1) Referred back to arbitrator for him to inform this court whether by his finding in pars. (a) and (b) he intends this court to draw the inference that he has found that the master, in reference to the due prosecution of the voyage, was not competent ; (2) or was guilty of slackness only, and if the latter ; (3) whether the slackness amounted to negligence in the navigation or management of the steamer.

I take the clear meaning of the question, omitting the part as to incompetence, to be this : Is the only fault that you find in the master that of slackness, and if that is the only fault, did it amount to negligence in navigation or management ? The Court of Appeal might, I think, have construed for themselves his findings as they originally stood, but their view in sending the case back was, I think, this (and I cannot say I think it was wrong) : If you take finding (a) as equivalent *per se* to a finding of negligence, then the difficulty felt by the late Bailhache, J. does arise, for you cannot say the master failed without at the same time saying he was negligent, seeing that every assertion under clause 9 was at the same time an excuse under clause 14. To this the arbitrator replied as follows :

I intended the court to draw the inference that the master was not competent in the sense of his inability properly to perform his duty in accordance with the provisions of charter-party and (or) that he was guilty of slackness, namely, "general slackness," but not slackness amounting to negligence in management or navigation.

Writ large, that seems to me to be this : You have asked me whether the master's only fault—the fault which led to my finding that he had not prosecuted the voyage with due diligence—was slackness. I say it was his only fault, and then, further, I say that this fault did not amount to negligence in navigation or management. That seems to me a positive finding in fact—however wrong it may be—to the effect that the class of error which the master made was not an error which amounted to negligence in navigation or management.

The real difficulty I have felt is whether it is possible to say that this answer, though negating negligence, does not negative default through that word not being mentioned. It would be possible to say so, but I feel that it would be really to misconstrue what the arbitrator said. I think when he found that he had to decide as a matter of fact and not as a matter of law, whether the expression "master's

conduct" fell within the words of the exception, he decided that it did not, and if that is so, however wrong he may be, his award must stand. I greatly regret to have to come to this conclusion, all the more as there has been such a difference of opinion upon the case. In no view can it ever be treated as a precedent, for it is nothing but the interpretation as best one can of the ambiguous words used by a confusedly thinking man. I ought to add that I have taken no notice of the case of *The Kibi Maru*, because there is no report which presents a sufficiently intelligible view of the facts or judgment as to make it possible to deal with it. In any view it would not bind this House, but whether the decision was right or wrong I have not the slightest conception. I assume it was right, but its application is impossible.

LORD SHAW.—I am of opinion that the judgments of the courts below are erroneous, that the appeal should be allowed, and that the question put by the arbitrator should be answered in the affirmative—that is to say, that the owners are exempt from liability.

I think the judgment pronounced in the Court of Appeal by Scrutton, L.J. to be in all points correct.

I think it is necessary to see with some carefulness how it is that the question comes before the Law Courts at all. It does so in respect of the provisions of the Arbitration Act 1899, and the submission of an arbitrator of a question for the opinion of a court is that that question is a question of law. It is no part of the function of a court to review the judgment of the arbitrator upon a question of fact. This is perfectly familiar ground. I only mention it so that one may have it in view in looking at what is before your Lordships as a question. The arbitrator states it thus :

The question of law for the opinion of the court is whether the owners are exempt from liability in respect of the master not having prosecuted his voyages with the utmost dispatch as provided for in clause 9 of the charter-party, on the ground that this resulted from the negligence, default, or error in judgment of the master or crew in accordance with clause 14 of the charter-party, or by other specific provisions of the general terms of the charter-party.

I am of opinion that the only meaning which can be attached to the question so submitted as a question of law is that negligence, default, or error in judgment by the master is assumed to have taken place ; that is the ground, in fact, upon which the arbitrator proceeds to put his question in law. The point which the arbitrator did submit and alone submitted, to the court was : Assuming the fact to be so, did clause 14 of the charter as to the master's negligence, &c., exempt the owners from liability under clause 9 ? I most entirely agree with Scrutton, L.J. that that must be so.

If the arbitrator meant to submit that he found there was no master's negligence in the case, and yet he proposed a question of law—namely, whether the owners were exempted

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from their obligations under clause 9, by reason under clause 14 of a negligence which did not exist in fact, then the whole proceeding was an absurdity. But it was not an absurdity to ask the opinion of the court as he did—namely, “Assuming negligence under clause 14, which I find as a fact, does clause 14 exempt the owners from their liability under clause 9?”

In my opinion that was a question of law quite suitable for presentation to the court, and I think mischance and confusion have arisen because it was not answered as put. Had it been so answered, negligence being assumed as a fact—without which indeed there was no question of law to present at all—then the case would have been at an end.

Instead of doing this, however, the Court of Appeal (unquestionably embarrassed by *The Kibi Maru* case, to which I shall presently refer), remitted the case to the arbitrator with practically the suggestion that although the only question of law which he had sent forward assumed negligence yet he might not be of opinion that there was negligence. Would he explain what he really did mean? This was a psychological essay not unfitted to result in the confusion which unfortunately the case now presents. It was in effect saying to the arbitrator: “Are you sure that the negligence, default, or error of judgment which you have assumed in the management and navigation of the vessel really was negligence, default, or error of judgment?” But it was not even saying this; for the remit to him by the Court of Appeal did not put the full material words before him—namely, “negligence, default, or error of judgment,” but tied him up to the word “negligence.”

The arbitrator thereupon added to the confusion by introducing the possibility that it was the master's incompetence which was in his mind, as well as or even as an alternative to slackness, particular or general. It is difficult to imagine a less satisfactory clearing up even of a question of fact.

Before proceeding further I may say that I am humbly of opinion that clauses 9 and 14 of the charter-party can stand together. I think that the late Bailhache, J. rightly held that the arbitrator's findings amounted to an affirmation of negligence on the part of the master in the navigation or management of the ship. I think, however, that he erred in holding clause 14 to be a comprehensive negation of clause 9 and concluding, therefore, that clause 14 should practically stand out of the charter-party.

There might be a variety of other faults on the part of the master and crew—faults connected either with the navigation or the management of the vessel, and there might indeed be gross and wilful mismanagement, or other instances, such as those cited by Scrutton, L.J. The repugnancy between two clauses in a contract which would lead to the deletion or ignoring of one of them must be a complete repugnancy, and wherever that is not manifest the clause ought to stand, and the contract be

read as a whole. I think that the latter is the situation of the present case.

Further, I think that the assumption of negligence, which was the sole basis for the presentation of a question of law, was rightly made, for I am of opinion that the true reading of the whole award leads inevitably to the result that the arbitrator has found that there was negligence in fact. Too little attention has been given to sect. (a) of his award which still stands. Sect. (a) is as follows:

I hold that the master did not prosecute the voyages in question with the utmost dispatch, and render all customary assistance to the ship's crew, so that the speed of the steamer was generally less than it would have been if the master had exercised due diligence, whereby time was lost.

There is here a sufficiently clear affirmation that the loss of speed arose from the lack of due diligence in the handling of the steamer.

When the case was remitted back to the arbitrator two further errors, in my opinion, crept into the proceedings. A reference was made to sect. (b) of the award. Sect. (b) is to the effect:

That the failure of the master to prosecute the voyages in question with the utmost dispatch resulted from a general slackness in the performance of his duty or an inability properly to perform his duty in accordance with the provisions of the charter-party in this connexion.

In presenting the question of law to the court the arbitrator had taken it to be a fact on which the court could proceed—namely, that there was negligence arising under clause 14. The court then asked whether the slackness referred to in (b) was slackness only or whether it amounted to negligence in the navigation of the steamer—that is to say, the court confronted the arbitrator with a situation which negated the only condition upon which a question of law could have arisen for the court to settle.

The arbitrator, accepting the position, stated that he intended the court to infer that there was not slackness amounting to negligence in navigation or management. I think no court should by the restriction of the question have either made such an answer legitimate or, when the answer was given, should have taken it off his hands. The findings of the arbitrator, in my humble judgment, must be taken as a whole. They are definite to the effect that the loss of speed was due to a lack of due diligence and to general slackness upon the master's part. Nobody has any idea of what this general slackness was, and I agree with Scrutton, L.J. and my noble and learned friend Lord Buckmaster, in thinking that the whole result of the findings is that negligence in the management or navigation of the vessel was in fact and truth found by the arbitrator, and there was no reason for avoiding calling it negligence by name. I go the length of holding that for a man to affirm that lack of due diligence and general slackness resulting in the lowering of the speed of this vessel did not mean that negligence occurred in the master's

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navigation or management of the ship, is truly absurd. So viewing the findings, I decline the attempt to rationalise the absurd and call it law.

The mischance in this case is largely attributable to the decision in the case of *The Kibi Maru*. That appears from the judgment both of Bailhache, J., and of the learned judges of the Court of Appeal; and I further suspect the confusion and error of that case reached the proceedings in the arbitration themselves. With great respect to the learned judges who decided *The Kibi Maru* case, I think it to have been erroneously decided in law; and it is manifest that that decision is introducing embarrassment into the law of arbitration, and even into the conduct and deliverances of arbitrators.

I respectfully dissent from the judgment proposed from the Woolsack. I share the opinions of Scrutton, L.J. in the court below and of Lord Buckmaster in this House.

LORD SUMNER.—Without quoting his words at length the umpire awards to the charterers 2414l. 8s. 4d. as damages for breach of clause 9 of the charter, reciting that, according to the charterers' contention, this breach resulted from the master's neglecting to increase the speed of the steamer by an increased coal consumption. This award he makes subject to the opinion of the court on a question of law—namely, whether the master's failure to prosecute his voyages with the utmost dispatch resulted from his negligence, default, or error in judgment in accordance with clause 14—that is, in the management or navigation of the steamer, so as absolutely to except losses occasioned thereby. The umpire adds: "If the opinion of the court upholds my findings, as above, then my award shall stand."

The findings referred to, so far as concerns the present purposes, are these:

(a) That the master did not prosecute the voyages with the utmost dispatch . . . so that the speed of the steamer was generally less than it would have been if the master had exercised due diligence, whereby time was lost; (b) that the failure of the master to prosecute the voyages in question with the utmost dispatch resulted from a general slackness in the performance of his duty, or an inability properly to perform his duty, in accordance with the provisions of charter-party in this connexion.

So far it might seem that the award finds, as facts, a failure of the master under clause 9 and also a failure to exercise due diligence. If failure is the same as default—and I must say that I see small difference between the words here—it might then be said, that the award finds as the cause of insufficient dispatch, default, and negligence of the captain and that the explanation of his want of due diligence by the slackness of his understanding is interesting, but irrelevant.

I am satisfied that negligence of the master and this alone was the case made and fought throughout. The statement of claim pleaded

the cause of the failure to prosecute the voyages duly as neglect to increase speed by means of coal consumption. The findings of the umpire deal with this neglect and with no other cause for the lack of dispatch. There is nothing in the award to suggest a case of wilful default or of failure consisting of diligent effort unattended by success, and in the courts below it is clear that negligence alone was understood to be the matter relied on. Accordingly I have to ask myself whether the award should be read as a finding of negligence owing to the umpire's reference to what the captain could have done by the exercise of due diligence. His finding (c), given by way of supplement in answer to questions by the Court of Appeal, leads me to the conclusion that the answer is "No." This finding is as follows: "I intended the court to draw the inference that the master was not competent, in the sense of his inability properly to perform his duty in accordance with the provisions of charter-party and (or) that he was guilty of slackness—namely, general slackness, but not slackness amounting to negligence in management or navigation." Here for the first time management or navigation of the steamer are dealt with. In the face of this express disavowal I do not think that the award can be treated as finding negligence, and, further, as it disavows the particular kind of negligence, namely, in management or navigation, which the shipowners must establish or fail, it seems to me that the umpire, as judge of fact, has stated the appellants out of court.

Whether his finding is unsatisfactory or not, it is hardly for me to say. Your Lordships were not asked to send the award back to be restated in any respect, nor would there be much use in doing so, as it is already about two years old, and the umpire has attempted once already to elucidate it, not perhaps as successfully as might have been wished. I see no ground for bringing the captain's action or inaction under the head of navigation. I speak with humility after what has just been said, but I still think that there is a real field in which the captain's shortcomings would not fall within the exception clause 14, and yet would constitute a breach of his obligation to use dispatch under clause 9. The maintenance of full speed may often be part of the duty, which those responsible for navigation have to perform, directly or by others, as, for example, in order to save a tide at a bar or to correct excessive leeway or deflection by currents, or to make the ship quick to answer her helm, or to make a course good against head winds, or what not. Here, however, it is not pretended that the ship was handled in an unseamanlike manner, or that either ship or cargo was imperilled by the navigation that took place. The term "management" may better fit the present case, but it is not a term of art; it has no precise legal meaning, and its application depends on the facts, as appreciated by persons experienced in dealing with steamers. There is a management which is of the shore, and a

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management which is of the sea. I do not think the award states the facts sufficiently to enable us to say that the evidence is all one way to show mismanagement of the steamer, in the sense of clause 14, and without more facts before us we could not in any case deal with the question as a practical matter. Clause 9 is emphatically a merchants' clause. Its object is to give effect to the mercantile policy of preferring a saving of time to a saving of coal. It constitutes an instruction to the captain, like a clause about telegraphing so many hours' notice of his time of sailing and such matters; but if he forgets it, the sound business view quite possibly may be that he has neglected his duty and the interests of the steamer's managers, though he has not been negligent in the management of the ship. It may not have been a thing of which one must necessarily say that a good skipper could not have done it. I think this is what the umpire meant by speaking of general slackness in antithesis to negligence in management, and in so doing he was no doubt endeavouring to give effect to the distinction made by the Divisional Court in *The Kibi Maru*. I am accordingly of opinion that this was a question for the umpire, as to which he is not shown to have fallen into any error of law, and as to which also we have not sufficient knowledge of the facts to decide (if it were for us to decide) whether he may not have been right after all. Accordingly I think the appeal fails.

The practice of incorporating arbitration clauses into charter-parties and many similar standard forms of contract is now inveterate and is not likely to be changed. I suppose that men of business find that arbitration works well in the main and satisfies their requirements. This case, however, is not by any means the first to make me doubt whether the law as to stating special cases in arbitrations for the opinion of the court is altogether satisfactory. In mercantile transactions, at any rate, questions are constantly raised which are questions both of law and fact, and they constantly fail to find a satisfactory answer because of the exceedingly artificial line which practice draws in appellate proceedings between law and fact. The selection and framing of the questions for the opinion of the court is a task as responsible as it is delicate. The success of a judge in telling a jury what questions there are for them and what law they are to take from himself is often doubtful, but in stating a case for the opinion of the court, it is the juryman who has to tell the judge what questions of law there are for him and what facts he is to assume without question. I doubt if the results are altogether happy.

I wish, however, to deprecate any strictures on the umpire or on the course taken by him in this case. It is only fair to him, as a layman, that every allowance should be made for the difficulty of appreciating exactly what findings of facts would be required and exactly where questions of fact end and questions of law

begin. I am far from thinking that the umpire, for his part, was either lacking in care or deficient in the intelligence which so difficult a case required.

LORD BUCKMASTER (read by Lord Shaw of Dunfermline).—The difficulty that I find in reaching a decision in this case is due more to the obscurity of the award than to uncertainty in the terms of the charter-party. Of this latter document clauses 9 and 14 are the only ones relevant to the present appeal. Clause 9 renders the owner liable if the captain does not prosecute his voyages with the utmost dispatch. The award finds in terms that this has not been done, and the owner is therefore liable unless he is exempted from liability by the provisions of clause 14. It would, at first sight, appear as though this latter clause would relieve the owner from all the obligations cast upon him by clause 9 and so render it nugatory, but it appears to me that the two clauses may be reconciled by considering that clause 9, when the exceptions have been taken away, might still leave the owners liable for delay attributable to their action. The fact that the captain is under the orders and directions of the charterers might still enable the owners to give such directions as would prevent the voyage being prosecuted with the utmost dispatch, thus leaving them responsible for the consequence of their own actions while exempting them from all delay due to the negligence and defaults of the captain himself in the management or navigation of the steamer. It remains to be considered whether such default or negligence has been established. It appears to me that the findings of the award amount to this: that the master did not exercise due diligence and that this caused loss of time; that he did not perform his duty as he was bound to do, and that his inability so to perform it was due to general slackness. The final conclusion that this slackness did not amount to negligence in management or navigation can, in my opinion, only be interpreted as meaning that the negligence which I think has been definitely found was not, in the opinion of the arbitrator, negligence in management or navigation. In this I think he is attempting to construe the charter-party in the light of his findings, and I think he has construed it wrongly. It may well be that the negligence was not negligence in navigation, for that may relate to acts of seamanship, but I cannot escape from the conclusion that he was, upon the findings, guilty of default or negligence in the management of the vessel. Due diligence can only mean the reasonable and proper diligence to be expected of a competent officer and that the charterers are entitled to obtain. If it was not rendered, and I think it is clear from finding (a) that it was not, the delay was due either to the master's negligence or default, and in either case there was a neglect of duty, and that is sufficient. If once it be accepted that the meaning of the arbitrator was, having found the facts, to leave the conclusion of law to the court, much, if not all, of the ambiguity

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of the award disappears, and the finding that the negligent acts fall under one or other branch of the provisions of clause 14 relieves the owners of liability. This disposes of the main arguments in the case, but there was another point ingeniously raised and attractively argued by Mr. Carpmal which merits attention. It is that the whole of clause 14 relates to losses or damages in respect of goods only, but I do not think this is the true interpretation of the clause, which should be read as referring to losses or damages whether in respect of goods or in other respects.

For these reasons I think that the appeal should be allowed.

Appeal dismissed.

Solicitors for the appellants, *W. and W. Stocken.*

Solicitors for the respondents, *Downing, Middleton, and Lewis*, agents for *Downing and Handcock*, Cardiff.

Judicial Committee of the Privy Council.

Nov. 3, 5, 6, 1925, and Feb 25, 1926.

(Present: Lords DUNEDIN, SUMNER, and WRENBURY.)

HIRJI MULJI AND OTHERS v. CHEONG YUE STEAMSHIP COMPANY LIMITED. (a)

ON APPEAL FROM THE SUPREME COURT OF HONG-KONG.

Hong-Kong — Ship — Charter-party — Time charter—Requisition by Government—Arbitration—Award by single arbitrator—Jurisdiction of arbitrator—Action on award.

The appellants chartered a steamship from the respondents for ten months from the date of delivery which was stated to be the 1st March 1917. The charter-party contained a cancelling clause and an arbitration clause. On the 31st March 1917 the ship was requisitioned by His Majesty's Government and remained under requisition until the 1st March 1919. In May 1917 the appellants stated that they would require the steamer when she was released. In March 1919 the respondents offered delivery of the steamer to the appellants, but the latter refused to accept her upon the ground that the charter had expired. Notice of the appointment of an arbitrator was thereupon given by the respondents to the appellants who declined to take any part in the arbitration and an award was made in favour of the respondents.

Held, that as the objects of the charter-party had been frustrated by the Government requisition the charter no longer existed when a dispute first arose. By its very terms as well as by the fact that it was only one part of the indivisible charter, the arbitration had come to an end also.

The arbitrator had therefore acted without jurisdiction and the action on his award ought to have failed.

Bank Line Limited v. Arthur Capel and Co. (14 *Asp. Mar. Law Cas.* 370; 120 *L. T. Rep.* 129; (1919) *A. C.* 435) followed.

Judgment of the Supreme Court of Hong-Kong (19 Hong-Kong L. R. 12) reversed.

APPEAL by the charterers from a decision of the Supreme Court of Hong-Kong upon an award by a single arbitrator.

By a time charter made between the respondents as owners and the appellants as charterers on the 17th Nov. 1916 it was provided that the *Singaporean* should be placed at the appellants' disposal on the 1st March 1917 at Singapore and should be employed by them for ten months in sundry specified trades. The charter contained the usual terms, including a cancelling clause, an arbitration clause, and a clause providing that the charter should be construed and governed by "British" law. And by the arbitration clause it was provided that "any dispute arising under this charter shall be referred to the arbitration of two persons in Hong-Kong. . . ." Shortly before the time at which the ship was to have entered upon the performance of the charter, she was requisitioned on behalf of His Majesty's Government. The *Singaporean* continued in Government service until late in Feb. 1919. On the 2nd March 1919 the shipowners' agents informed the charterers of her release and asked who would take delivery of the ship on their behalf at Singapore. The charterers replied on the 4th March that it was now useless to offer delivery, giving as their reason that the charter had long expired. Notice was given to the charterers that the owners claimed arbitration and had named their arbitrator. This notice was disregarded by the charterers and, no second nomination having been made, the owners proceeded before their own arbitrator who, upon hearing evidence, made an award in their favour. The owners thereupon sued upon the award and judgment was given in their favour. On appeal to the full court, the appeal was eventually dismissed by a majority (Sir W. Rees-Davies, C.J. and Gompertz, J.; Sir Skinner Turner, J. dissenting). The charterers appealed.

Jowitt, K.C., Porter, K.C., and Geoffrey Shaw for the appellants.

Clauson, K.C. and A. C. Nesbitt for the respondents.

The considered opinion of their Lordships was delivered by

*Lord SUMNER.—In this case the respondents, owners of the steamship *Singaporean*, sued in the Supreme Court of Hong-Kong on an award made there in their favour by a single arbitrator. Notice had been given to the charterers, the present appellants, that the respondents claimed arbitration upon a dispute alleged to arise

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

under a time charter made between them on the 17th Nov. 1916, and had named their arbitrator. This notice they disregarded, and, no second nomination having been made, the respondents proceeded before their own arbitrator, who made this award on the information which they laid before him. It was not contended before their Lordships that this procedure was not regular and in accordance with the local ordinances dealing with the subject.

The charter-party provided that the *Singaporean* should be placed at the appellants' disposal on the 1st March 1917, at Singapore, and should be employed by them for ten months in sundry specified trades. It contained the usual terms, including a cancelling clause, an arbitration clause, and a clause providing that the charter should be construed and governed by "British" law.

Shortly before the time at which the ship was to have entered upon the performance of the charter, she was requisitioned on behalf of His Majesty's Government. For some reason the shipowners thought that after a few months she would be again placed at their disposal and on the 5th April 1917 they wrote to the charterers to ask whether they would be prepared to take up the charter after the release of the vessel. The charterers, whether on independent information of their own or on these expressed anticipations of the owners, replied on the 12th May that they would require the steamer when released. Some correspondence passed in the autumn, which showed that the charterers then desired to know when the ship would be free, and that the shipowners were unable to find this out. Then there followed a long silence. From the 11th Oct. 1917 to March 1919 no communication passed between the parties.

The *Singaporean* continued in Government service until late in Feb. 1919. On the 2nd March 1919 the shipowners' agents informed the charterers of her release and asked who would take delivery of the ship on their behalf at Singapore. The charterers replied on the 4th March that it was now useless to offer delivery, giving as their reason that the charter had long expired. To this contention they adhered until and at the trial, when it was decided against them by the Chief Justice, who gave judgment for the plaintiffs in the action.

By the charter the ten months for which it was to be in force did not run from any specified date, but from the time at which the ship was placed at the disposal of the charterers. It was clearly a misapprehension on the charterers' part to say simply that the charter had expired by effluxion of time. The trial judge, on the other hand, says that an admission was made before him that the correspondence amounted to an exercise of the cancelling option in favour of maintaining the charter. This must be a mistake, for the only option mentioned is an option to cancel, and a decision to maintain the charter would not be an exercise of any

option under this clause. Nevertheless he made use of this to support his view, repeated by him on the appeal but with some hesitation, that, by affirmatively electing not to cancel the charter, when the 1st March 1917 passed without the ship being placed at their disposal, the charterers, who had full knowledge of the fact of the requisition, so conducted themselves as to oust the doctrine of frustration. He thought that they must be deemed to have relied on arrangements of their own to provide for such a case, so that no implication could arise. The charterers had agreed to take the ship, and therefore were ready to protect themselves.

This view may be shortly disposed of. Their Lordships think that on the facts it was untenable, and in argument before them it was not supported. The cancelling clause clearly was never put into operation by the charterers, and the term of the charter therefore remained unaffected by it. Counsel admitted before the board, and rightly on the materials, that the communications which passed on the 5th April and the 12th May 1917 did not amount to a new contract or in any way vary the contract contained in the charter-party. No new promise was made nor, if there had been any new promise in form, was there any consideration to support it. The parties were oversanguine. If they thought that the delay would not frustrate the charter, events showed that they were wrong and their error left their position unaffected.

On appeal to the full court there was a considerable divergence of opinion among the judges (see 19 Hong-Kong L. R., p. 12), the appeal being eventually dismissed by a majority (the Chief Justice and Gompertz, J.; Sir Skinner Turner dissenting).

The case made by the appellant charterers was throughout that the arbitrator had no jurisdiction. The claim made against them, with which he had purported to deal, could not be said to be a dispute "arising under this charter" in the words of the clause, seeing that, before it was made or any question arose, the whole charter had come to an end by frustration of its objects in consequence of the requisitioning of the ship. The shipowners supported the view above set out, and, further said (in addition to points arising out of the state of the pleadings, which are not now material), that there had been no frustration, and that, even if this were not so, the clause continued to apply and was a submission effective to give the arbitrator jurisdiction. On this point, on which he had expressed no opinion at the trial, the Chief Justice agreed with Gompertz, J., on the appeal. Their conclusion, as expressed in the judgment of the latter learned judge may be thus summarised. Frustration of a contract depends upon the express and implied terms of the contract itself. Such a question is therefore within a clause which refers "any dispute under the contract" to arbitration. Here the decision is not on a point collateral to the merits—the finding is on the merits—and on

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the very matters as to which the parties have agreed that the award should be final. Many authorities were cited, and much reliance was placed on *Scott v. Del Sel* (1923) S. C. (H. L.) 38, of which, unfortunately, the court had only a brief note and not the full report before them. Sir Skinner Turner held that the contract having been still executory when the requisition occurred, the effect on the contract was that its object was frustrated by the delay caused thereby, and consequently the whole charter, including the arbitration clause, had come to an end before the shipowners raised their claim that it was still in force.

Upon the question of frustration the case is a typical one, and is governed both in its facts and its law by the *Bank Line Limited v. Arthur Capel and Co.* (14 Asp. Mar. Law Cas. 370; 120 L. T. Rep. 129; (1919) A. C. 435). A great many charter-parties have been dealt with during the last few years on indistinguishably similar facts and have been held to have been frustrated by reason of the requisition. The facts of the present case are *a fortiori* to those in the case of the *Bank Line* (*sup.*), and no court of law could have held upon them that the charter had not been frustrated at latest when, in the latter part of 1917, it had become plain that the first expectations of a speedy release of the ship were unfounded.

The arbitrator thought otherwise. His award is not clearly expressed, no doubt owing to the fact that only one party appeared before him, but their Lordships do not think that any objection can be reasonably taken to its form. It means that the charter-party had not been frustrated at all. So regarded, it was wrong in law and fact.

As the arbitrator was the judge, if at all, both of law and fact, the sole question is whether he had any jurisdiction to decide, as he purported to do, between the parties. This depends on the question whether or not there was any submission, and that again on the question whether, at the time when it purported to be submitted to him, there was a dispute, subsisting between the parties, "under this contract," that is, a contract then subsisting. That a person before whom a complaint is brought cannot invest himself with arbitral jurisdiction to decide it is plain. His authority depends on the existence of some submission to him by the parties of the subject-matter of the complaint. For this purpose a contract that has determined is in the same position as one that has never been concluded at all. It founds no jurisdiction.

Lord Parker of Waddington sums up this subject in *Produce Brokers Company Limited v. Olympia Oil and Cake Company Limited* (114 L. T. Rep., at p. 97; (1916) 1 A. C., at p. 327) in the following words: "The arbitrator cannot make his award binding by holding, contrary to the true facts that the question which he affects to determine is within the submission. . . . Where, however, the submission is contained in the contract it may be a question

of construction whether such expressions as 'all disputes arising under this contract' include questions as to the ambit of the submission itself. *Primâ facie* I do not think that they would." "A court," says Lord Loreburn in the same case (114 L. T. Rep., at p. 95; (1916) 1 A. C., at p. 322), "will decide for itself whether an inferior court has clothed itself with jurisdiction by an erroneous finding on something vital to the jurisdiction" (see, too, *Attorney-General of Manitoba v. Kelly and others*; and *cross appeal* (126 L. T. Rep., at p. 714; (1922) 1 A. C., at p. 276). Accordingly, if it be the law that when a contract is frustrated it is brought forthwith to an end as regards matters thereafter arising, and if it was the fact that the contract had so come to an end before 1919, when for the first time an offer of the ship for service was effectively made, then the arbitrator could not clothe himself with jurisdiction by finding that there had been no frustration at all.

With regard to the reasoning of the majority in the court below, their Lordships must observe, with very great respect, that they hardly appreciated the difference, which is made by holding that the entire charter had come to an end. An arbitrator under an ordinary arbitration clause may have jurisdiction to construe the contract which contains the submission, and to find for or against trade customs said to be incorporated with it (*Produce Brokers' case* (*sup.*), or to adjudicate upon breaches of a contract, partly or wholly performed, but still in existence, for the purpose of awarding damages for such breaches already committed, even though it is determined as regards future performance by repudiation on one side and acceptance on the other (*Sanderson and Sons v. Armour and Co. Limited*, 127 L. T. Rep. 597; (1922) S. C. (H. L.) 117; *Champsey Bhara and Co. v. Jivray Balloo Spinning and Weaving Company Limited*, 129 L. T. Rep. 166; (1923) A. C. 480). This proposition is quite different from saying that a dispute, which might have arisen under the contract containing the submission, if it had not come to an end without fault on either side, is a dispute submitted thereunder, when the contract itself no longer exists. *May v. Mills* (30 Times L. Rep. 287), though alluded to, was disposed of by assuming that it only excluded from the submission matters collateral to the main issue. Their Lordships venture to think that the question whether there is jurisdiction is not collateral; it is essential and fundamental, though, if the point is once got over, the merits may bulk so large as to make it seem a minor matter.

The respondents raised before their Lordships two somewhat refined arguments, to which their Lordships trust no real injustice is done by the following summary. The doctrine of frustration rests upon a term or a condition implied in the contract. In contemplation of law the parties, if they had anticipated and had taken into consideration the events which ultimately frustrated the object of their adventure, would

have made provision for it, and, again in contemplation of law, the legal operation of those events upon the contract is the very thing for which that term would have provided. Hence, in implying that term to give a foundation for a legal conclusion, the law is only doing what the parties really (though subconsciously) meant to do themselves. Accordingly, the respondents asked why must one mode of dealing with an unanticipated event be adopted rather than another? At any rate, why should not an arbitrator, in passing upon the questions raised by the implication, adopt a conclusion not in all respects identical with the decision in the *Bank Line Limited v. Arthur Capel and Co. (sup.)*? If, for example, he thought that the parties would have said (had they thought of it) that the contract should continue after the happening of the event, at least so far as to submit to his arbitration the question whether or not there had really been any frustration at all, would he not have been competent to do so? Or, putting it in another way, if the term which he thought fit to imply had been that in the event of frustration the contract as a whole should not be void, but that the parties should merely be relieved from further performance of acts, which under the charter they severally undertake to do, if so, must the court not intend that his award was based on this kind of view and accordingly support it *ut res magis valeat quam pereat*?

The alternative argument was that, even if frustration occurred and so brought the contract to an end, the arbitration clause is not one of those matters which are affected by the event or are frustrated. On the contrary, it is precisely such an event that requires the continuance of the agreement to refer, so that, in case of difference as to the character of the event or the date from which frustration must be deemed to have arisen, the conventional tribunal, originally provided, may be available for its solution. Though further performance is excused, how is this contract discharged, unlimited as it is in time?

All these arguments, it will be seen, resolve themselves, on examination, into the fundamental inquiry, whether in law and fact frustration had been brought about before any dispute arose with regard to frustration or its cause or its consequences. The arbitration clause is but part of the contract and, unless it is couched in such terms as will except it out of the results which follow from frustration, generally, it will come to an end too. This must be so, if the law is that the legal effect of frustration is the immediate termination of the contract as to all matters and disputes which have not already arisen.

Throughout the line of cases, now a long one, in which it has been held that certain events frustrate the commercial adventure, contemplated by the parties when they made the contract, there runs an almost continuous series of expressions to the effect that such a frustration brings the contract to an end forthwith, without more and automatically. They are too numerous

to be cited exhaustively, but there are few expressions to the contrary and none in recent cases. By way of illustration, reference may be made only to the following.

In *Jackson v. The Union Marine Insurance Company Limited* (2 Asp. Mar. Law Cas. 435; 31 L. T. Rep., at p. 793; L. Rep. 10 C. P., at p. 145), at one end of the series, Bramwell, B., delivering the judgment of the majority in the Exchequer Chamber, describes the result of what happened by the words "the contract is at an end." In *Re Arbitration between F. A. Tamplin Steamship Company Limited and Anglo Mexican Petroleum Products Company Limited* (13 Asp. Mar. Law Cas. 467; 115 L. T. Rep., at p. 316; (1916) 2 A. C. 397), at the other, Lord Loreburn says that, if the parties had considered the matter when making the contract, "they would have said 'if that happens, it is all over between us.'" Accordingly, the implied term as to frustration may be expressed in these words. "The contract," says Lord Haldane, "must be looked upon as being wholly dissolved and the courts cannot take any course which would in reality impose new and different terms on the parties. . . . The Court of Appeal below gave judgment to the effect that the contract remained in existence, and that the 'restraint of princes' clause kept the contract alive. . . . I think that the entire contract was avoided. . . . The contract is gone and the clause with it." A statement of the general principle by Lord Parker of Waddington is expressed in the same case as follows: "The principle which really underlies all cases in which a contract has been held to determine upon the happening of some event which . . . frustrates the object which the parties to the contract have in view, . . . applies also to charter-parties, where some commercial adventure contemplated by the parties . . . is brought to an end. . . . It was easy to imply a condition that if the voyage became impossible of completion within that season the contract should be at an end." Finally, in *Bank Line Limited v. Arthur Capel and Co.* (14 Asp. Mar. Law Cas., at p. 371; 120 L. T. Rep., at p. 130; (1919) A. C., at p. 441), Lord Finlay sums up the law in these words: "The doctrine that a contract may be put an end to by a vital change of circumstances has been repeatedly discussed. . . . The law of the subject is well settled . . . the doctrine of frustration of the adventure as terminating the contract is excluded by the terms of the charter-party. . . . Neither of these clauses (26 and 31) can have the effect of preventing the termination of the charter-party by the requisition."

That requisition, or at any rate requisition for so long as showed that it was to endure for a considerable though indefinite time (which-ever be regarded, in fact, as the event defeating the adventure), of itself terminates the charter and all its parts, as soon as it happened, is a conclusion, which though warranted and binding in view of these and other passages, does not depend merely on the language, which a

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long sequence of the highest authorities have happened to use. It rests on principle, and is the only way of reconciling the special rule as to frustration with the general rules as to the obligation of contracts.

An event occurs, not contemplated by the parties and therefore not expressly dealt with in their contract, which, when it happens, frustrates their object. Evidently it is their common object that has to be frustrated, not merely the individual advantage, which one party or the other might have gained from the contract. If so, what the law provides must be a common relief from this common disappointment and an immediate termination of the obligations as regards future performance. This is necessary, because otherwise the parties would be bound to a contract, which is one that they did not really make. If it were not so, a doctrine designed to avert unintended burdens would operate to enable one party to profit by the event and to hold the other, if he so chose, to a new obligation. Lord Blackburn (*Dahl and Co. v. Nelson, Donkin, and Co.*, 4 Asp. Mar. Law Cas. 392; 44 L. T. Rep., at p. 386; 6 App. Cas., at p. 53) summarises the effect of *Jackson's* case (*sup.*) in these words: "A delay in carrying out a charter-party, caused by something for which neither party was responsible, if so great and long as to make it unreasonable to require the parties to go on with the adventure, entitled either of them, at least while the contract was executory, to consider it at an end." It should be noted that, although at first sight this right to consider the contract as "at an end" might seem, from this language, to be in the option of either party but not to arise till that option is exercised, this is not really the gist of the opinion. The passage gives the effect of two cases, *Geipel and others v. Smith and another* (1 Asp. Mar. Law Cas. 268; 26 L. T. Rep. 361; L. Rep. 7 Q. B. 404) and *Jackson v. The Union Marine Insurance Company Limited* (*sup.*). In both cases there had been an actual refusal to perform after the event in question happened, in the former by the shipowner and in the latter by the charterer, and in each case the formal question was whether the refusal could be justified, but there is nothing in Lord Blackburn's language to support the view that the contract does not terminate till a party to it says so. Lord Blackburn himself had said when a party to the judgment in *Geipel and others v. Smith and another* (1 Asp. Mar. Law Cas. 268; L. Rep. 7 Q. B., at p. 414), "It is possible the blockade might be raised within a reasonable time. . . . If the defendants chose to run the risk, and in the event turn out right, they are in the same position as if they had waited the reasonable time and had then sailed away," a passage which strongly supports the principle, that it is the event that frustrates, though time may be required in order to appreciate its effect on the contract, the event in such a case as the present being requisition for a time

inconsistent with the objects of the adventure. Brett, J. puts the principle thus in *Jackson's* case (*sup.*) in the Common Pleas (2 Asp. Mar. Law Cas. at p. 437; L. Rep. 8 C. P., at p. 581): "Where a contract is made with reference to certain anticipated circumstances, and where, without any default of either party, it becomes wholly inapplicable to or impossible of application to any such circumstances, it ceases to have any application; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made." When this was affirmed in the Exchequer Chamber (2 Asp. Mar. Law Cas., at p. 442; 31 L. T. Rep., at p. 792; L. Rep. 10 C. P., at p. 144), Bramwell, B., speaking of the exception of "perils of the seas," says: "The words are there. What is their effect? I think this: they excuse the shipowner, but give him no right. The charterer has no cause of action, but is released from the charter. When I say 'he' is, I think 'both' are." Again, in *Bensaude and Co. v. Thames and Mersey Marine Insurance Company* (8 Asp. Mar. Law Cas. 315; 77 L. T. Rep. 282; (1897) A. C. 609), Lord Watson's extempore phrase, "Such delay in the prosecution of her voyage as entitled the charterer to determine the adventure" is explained, partly by the fact that the charterer had done so, and partly by comparing with it Lord Halsbury's language, 8 Asp. Mar. Law Cas., at p. 316; 77 L. T. Rep., at p. 283; (1897) A. C., on p. 611, "It underlies the whole judgment of Collins, J., that the right to insist upon payment of the insurance money as upon a total loss of the freight was consummate at the moment the main shaft broke. Now there is a fallacy underlying that form of the argument, namely, that there must be a sufficiently ascertained condition of damage to shew at once that the loss must have accrued, because the damage was of such a character that it could not be repaired in the time. The facts here have been ascertained, and we know why the freight was lost. Why was it? Not *simpliciter*, but because the main shaft was broken under special circumstances—that is, at a distance from any place where it could be repaired within such a time as would have enabled the vessel to prosecute her voyage."

Evidently, therefore, whatever the consequences of the frustration may be upon the conduct of the parties, its legal effect does not depend on their intention, or their opinions or even knowledge, as to the event, which has brought this about, but on its occurrence under such circumstances as show it to be inconsistent with further prosecution of the adventure. Sometimes the event is such as to speak for itself, like the outbreak of war on the 4th Aug. 1914, in *Horlock v. Beal* (per Lord Wrenbury (3 Asp. Mar. Law Cas., at p. 270; 114 L. T. Rep., at p. 213; (1916) 1 A. C., at p. 528). Sometimes the frustration is evident, when the gravity and the circumstances

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of the breakdown can be known, as in *Bensaude's case (sup.)*; sometimes, as in the case of requisition, when it can be known that in all reasonable probability the delay will be prolonged and *a fortiori* when it has continued so long as to defeat the adventure. Frustration is then complete. It operates automatically (*Larrinaga and Co. v. Société Franco Américaine des Phosphates de Medulla*, 27 Com. Cas. 160). What the parties say and do is only evidence, and not necessarily weighty evidence, of the view to be taken of the event by informed and experienced minds.

Language is occasionally used in the cases which seems to show that frustration is assimilated in the speaker's mind to repudiation or rescission of contracts. The analogy is a false one. Rescission (except by mutual consent or by a competent court) is the right of one party, arising upon conduct by the other, by which he intimates his intention to abide by the contract no longer. It is a right to treat the contract as at an end, if he chooses, and to claim damages for its total breach, but it is a right in his option and does not depend in theory on any implied term providing for its exercise, but is given by the law in vindication of a breach. Frustration, on the other hand, is explained in theory as a condition or term of the contract, implied by the law *ab initio*, in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable, having regard to the mutual interests concerned and of the main objects of the contract (see per Lord Watson in *Dahl and Co. v. Nelson, Donkin, and Co. (sup.)*). It is irrespective of the individuals concerned, their temperaments and failings, their interests and circumstances. It is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands.

There is, however, this point of contact between the two cases. Though a party may exercise his right to treat the contract as at an end, as regards obligations *de futuro*, it remains alive for the purpose of vindicating rights already acquired under it on either side. So with frustration. Though the contract comes to an end on the happening of the event, rights and wrongs, which have already come into existence remain, and the contract remains too, for the purpose of giving effect to them.

No question of this sort, however, arises here. The contract was wholly executory. The ship was requisitioned before she was placed at the charterers' disposal; the performance of the charter never began, and the failure to begin it by tendering the ship at Singapore was excused in the owners' favour by the excepted Restraints of Princes. Under these circumstances, by the year 1919, when a dispute first arose, "this charter" no longer existed. The dispute was not one of which it could be predicated that it was one arising under "this charter," since that had terminated by frustration a year before. An arbitration clause is not a phoenix, that can be raised again by one of the parties from the dead ashes of its former self. By its very

terms, as well as by the fact that it was only one part of the indivisible charter, it had come to an end also, and it is unnecessary to consider in what terms, if any, a clause might have been framed which would have saved the clause alive in the event of the frustration of the adventure and the charter. It may be noted that in practically all the numerous cases of frustration of charters by requisitioning during recent years, the charter must have contained an arbitration clause, yet no point of this kind has apparently been raised on any ordinary form of charter. The cases in general afford little support to the idea that any form of clause would survive the contract as a whole: (see *Edward Grey and Co. v. Tolme and Bunge*, 31 Times L. Rep., at p. 138, and *Re an Arbitration between Hohenzollern Actien Gesellschaft für Locomotivbau and the City of London Contract Corporation, and the Common Law Procedure Act 1854* (54 L. T. Rep., at p. 597) and conversely *Kennedy v. Barrow* in the Court of Appeal, reported in *Hudson on Building Contracts* (ii. 415).

Sundry special authorities were cited in this connection, but they do not carry matters any further. They are either cases of repudiation and rescission, or of approbation and reprobation, or of continuing obligations under a contract still in being. In the case of *Municipal Council of Johannesburg v. Stewart and Co. (1902) Limited* (1909 S. C. (H. L.) 53), it was admitted on the pleadings that the contract had been repudiated and the matters in dispute arose out of this, but at 1909, Sess. Cas. H. L. p. 53, the Lord Chancellor is reported as saying: "If the course of action which is established be that there has been a repudiation or a breaking of the contract in the sense that the contract has been frustrated by the breach, then it would not be within the arbitration clause." Whatever exactly this sentence means, at any rate it does not help the appellants now. Conversely in *Sanderson and Sons v. Armour and Co. Limited (sup.)* though repudiation of the contract by the defenders was pleaded by the pursuers and the case had, of course, to be dealt with on the footing that this would be duly proved it was denied, and the defenders relied on the arbitration clause and were held entitled to it. A mere allegation that they had thrown the contract up could not deprive them of the right to have the dispute dealt with by the tribunal constituted by it. In *Scott v. Del Sel (sup.)* Lord Cave, L.C. expressly laid aside the question of frustration, since by virtue of its terms the contract continued in existence even in the events which had happened. As for the case of *Jureidini v. National British and Irish Millers' Insurance Company Limited* (112 L. T. Rep. 531; (1915) A. C. 499), insurers pleaded the absence of an award as to quantum only as a fatal non-fulfilment of a condition to the right to sue on a policy. As they had themselves repudiated the claim *in toto*, it was held that they could not insist on the absence of an award. It is a case of approbation and reprobation (see *Macaura v. Northern Assurance*

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Company Limited and others (133 L. T. Rep., at p. 156 ; (1925) A. C., at p. 631).

Their Lordships' conclusion is that the arbitrator acted without jurisdiction and that the action on his award ought to have failed, and they will humbly advise His Majesty that the two judgments below should be set aside and that judgment in the action should be entered for the appellants, with costs here and below.

Appeal allowed.

Solicitors for the appellants, *Gibson and Weldon*.

Solicitors for the respondents, *Markby, Stewart, and Wadesons*.

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 2 and 3, 1926.

(Before BANKES, WARRINGTON, and ATKIN, L.JJ.)

THE SHEAF BROOK. (a)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Practice—High Court action not within the jurisdiction of the Probate, Divorce, and Admiralty Division—Wrongly assigned to that division—Application to transfer to King's Bench Division—Jurisdiction of judge of the Probate, Divorce, and Admiralty Division to retain such action—Supreme Court of Judicature (Consolidation) Act 1925 (15 & 16 Geo. 5, c. 49), ss. 4, 22, 56, and 58.

By the Supreme Court of Judicature (Consolidation) Act 1925, s. 4, it is provided that there shall be in the High Court three divisions, namely, the Chancery Division, the King's Bench Division, and the Probate, Divorce, and Admiralty Division. By sect. 22 (1) (a) (xii.) the High Court has in relation to admiralty matters jurisdiction to hear and determine any claim relating to the carriage of goods in a ship unless it is shown to the court that at the time of the institution of the proceedings any owner or part-owner of the ship was domiciled in England. By sub-sects. (b) (c) the High Court may exercise all other jurisdiction formerly vested in the High Court of Admiralty and all admiralty jurisdiction exercised before the commencement of the Act under or by virtue of any Act coming into force after the commencement of the Act of 1873 by the High Court constituted by the Act of 1873.

By sect. 56 there shall be assigned to the Probate Division all causes or matters which if the Act of 1873 had not passed would have been within the exclusive cognisance of the High Court of Admiralty.

By sect. 58, proviso (2), every person by whom any cause or matter is commenced in the High Court may assign it to such division as he thinks fit, provided that if a plaintiff assigns his cause to any division to which according to the rules of court or the provisions of the Act it ought not to be assigned, the court may transfer it to the proper division or retain it in the division in which it has been commenced.

The respondents, owners of the cargo *ex* steamship *S.*, commenced an action in personam against the appellants, the *S. Steam Shipping Company*, owners of the steamship *S.*, claiming damages for injuries sustained by their cargo. The appellants were admittedly domiciled in England. The respondents assigned their action to the Probate Division. Upon an application by the appellants to transfer the action to the King's Bench Division, in order that it might be tried in the commercial court,

Held, that the Probate, Divorce, and Admiralty Division had no jurisdiction to entertain the action, and that sect. 58, proviso (2), gave the court no discretion to retain a matter with which the statute expressly said that the division should have no jurisdiction to deal. There is no jurisdiction to retain a case which a litigant, in defiance of the statute, has assigned to the Probate, Divorce, and Admiralty Division, but with which, under the statute, that division has no jurisdiction to deal.

THE plaintiffs, owners of the cargo *ex* steamship *Sheaf Brook*, brought their action against the defendants, the *Sheaf Steam Shipping Company*, claiming damages for injuries sustained by the cargo whilst laden on the *Sheaf Brook* in pursuance of a contract of carriage. The *Sheaf Steam Shipping Company* was an English company whose registered office was situate at Newcastle-on-Tyne, and it was therefore domiciled in England. The plaintiffs assigned their action to the Probate, Divorce, and Admiralty Division. The action was in personam. Upon application by the defendants that the action should be transferred to the King's Bench Division in order that it should be tried in the commercial court, Lord Merrivale, P. held that it could more conveniently be retained in the Probate, Divorce, and Admiralty Division, and dismissed the application. The defendants appealed.

The Supreme Court of Judicature (Consolidation) Act 1925 provides as follows :

Sect. 4. (1) For the more convenient despatch of business in the High Court there shall be in the High Court three Divisions, namely : (i.) The Chancery Division . . . ; (ii.) The King's Bench Division . . . ; (iii.) The Probate, Divorce, and Admiralty Division. . . . (3) Nothing in this section shall operate to prevent a judge of any Division from sitting whenever required in a divisional court or for any judge of another Division.

Sect. 22. (1) The High Court shall, in relation to admiralty matters, have the following jurisdiction (in this Act referred to as "admiralty jurisdiction"), that is to say (a) Jurisdiction to hear and determine any of the following questions

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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or claims . . . (xii.) any claim . . . (2) relating to the carriage of goods in a ship . . . unless it is shown to the court that at the time of the institution of the proceedings any owner or part-owner of the ship was domiciled in England; (b) Any other jurisdiction formerly vested in the High Court of Admiralty; (c) All Admiralty jurisdiction which under or by virtue of any enactment which came into force after the commencement of the Act of 1873 and is not repealed by this Act was immediately before the commencement of this Act vested in or capable of being exercised by the High Court constituted by the Act of 1873.

Sect. 56. Without prejudice to any other provision of this Act, there shall be assigned . . . (3) To the Probate Division (a) All causes or matters which if the Act of 1873 had not passed would have been within the exclusive cognisance . . . of the High Court of Admiralty.

Sect. 58. Subject to rules of court and to the provisions of this Act, any person by whom any cause or matter is commenced in the High Court shall assign the cause or matter to such Division as he thinks fit by marking the document by which the cause or matter is commenced with the name of that Division and giving notice thereof to the proper officer: Provided that . . . (2) If any plaintiff or petitioner assigns his cause or matter to any Division to which, according to the rules of court or the provisions of this Act, it ought not to be assigned, the court or any judge of that Division, on being informed thereof, may, on a summary application at any stage of the cause or matter, direct the cause or matter to be transferred to the Division to which, according to those rules or provisions, it ought to have been assigned, or may retain it in the Division in which it was commenced. . . .

Carpmael for the appellants.—This action was not within the original jurisdiction of the High Court of Admiralty: (see, e.g., *Cargo Ex Argos*, 1 Asp. Mar. Law Cas. 365; 1873, 28 L. T. Rep. 745; L. Rep. 5 P. C. 134). Sect. 6 of the Admiralty Court Act 1861, conferred jurisdiction in claims for damage to cargo, but such jurisdiction was confined to cases where no owner or part-owner was domiciled in England or Wales. The limitation was preserved by the Administration of Justice Act 1920, s. 75, and now, by the Supreme Court (Consolidation) Act 1925, s. 22 (1) (a.) (xii.), is confined to cases where no owner or part-owner is domiciled in England. This action would not have been within the original jurisdiction of the High Court of Admiralty, nor would it have been within the jurisdiction of the Probate, Divorce, and Admiralty Division after the Judicature Act 1873 was passed. The president was wrong in holding that, under sect. 58, sub-sect. 2, of the Supreme Court of Judicature (Consolidation) Act 1925, he had a discretion to retain the action in the Probate, Divorce, and Admiralty Division. There was no jurisdiction to entertain the action in the first instance, and there is, therefore, no jurisdiction to retain it now. [Reference was also made to R. S. C. Order 49.]

Alfred Bucknill for the respondents.—The president had jurisdiction as a judge of the High Court to try the action: (*The Cheapside*,

9 Asp. Mar. Law Cas. 595; 91 L. T. Rep. 83; (1904) P. 339). This case does not, therefore, raise a question of jurisdiction, because the court has jurisdiction, but raises a question of discretion only: (*Ocean Steam Shipping Company v. Anderson*, 33 W. R. 536). The original jurisdiction *in rem* which was possessed by the Admiralty was extended to include jurisdiction *in personam*. Sect. 11 (2) of the Judicature Act deals with actions which the judge has jurisdiction to try, but in respect of which there may not in the first place have been power to assign to the division in which he sits. A judge may retain such actions notwithstanding that they could not have been assigned to his division. This power is retained in sect. 58 (2) of the Supreme Court of Judicature (Consolidation) Act 1925. The learned president, therefore, had jurisdiction to retain the action, should he see fit so to do, in the Admiralty Division, and it is submitted that the sole question is whether he exercised his jurisdiction rightly in so doing.

BANKES, L.J.—This appeal undoubtedly raises an important question and one in which it is said that the learned President exercised his discretion in such a way that we ought not to interfere. Now, if the matter was one in which the judge had exercised what in our opinion was a discretion vested in him—a judicial discretion—we should hesitate long before interfering with it. But in the view I take of the statute it does not seem to me that the judge had a discretion vested in him to retain this action in the Admiralty Division.

The writ in the action was issued on the 10th Dec. 1925; and the only claim was the plaintiffs' claim for damages for breach of contract and (or) duty in or about the carriage of goods by sea; and there is no indication anywhere that the claim is other than an ordinary claim by a consignee against a shipowner for damages for breach of contract to carry goods; and it is not in dispute that the defendants are the owners or part-owners of the ship on which the goods were carried, and that they, the defendant company, are domiciled in England. Under these circumstances the defendants object to the jurisdiction of the Admiralty Court and issued a summons that the action might be set aside and all proceedings stayed, or that any other order might be made as seemed just. I think counsel is right in saying that he might have a difficulty in setting the action aside. Whether there is any difficulty in staying the proceedings on the ground that they were brought in a division in which there was no jurisdiction to deal with it is another matter; but what he really asked for was that the action might be transferred to the King's Bench Division; and what the president did was, after consideration, to say that he had the discretion either to transfer or to retain the action; and under these circumstances he exercised the discretion in favour of retaining it. The question is whether the judge in so deciding, decided correctly.

At the time the action was brought the material statutes were the Admiralty Court Act 1861, s. 6, the Judicature Act 1875, and the Administration of Justice Act 1920; but at the time the matter came before the court the Supreme Court of Judicature (Consolidation) Act 1925 (15 & 16 Geo. 5, c. 49) had been passed and all the material sections in the other three statutes to which I have referred have been embodied in that statute. It is more convenient, therefore, to deal with the matter in reference to the provisions of the Act of 1925.

It seems to me that in this matter it is of importance to bear in mind the distinction between the provisions of that statute in reference to jurisdiction and the provisions in reference to procedure. In reference to jurisdiction the material sections seem to me to be these. First of all there is sect. 4, which provides that for the more convenient dispatch of business there shall be in the High Court three divisions—Chancery, King's Bench, and Probate, Divorce, and Admiralty; and that is, as it seems to me, a section dealing with procedure. Then we come to the sections dealing with jurisdiction; and they commence at sect. 18. Sects. 18, 19, 20, 21, and 22 are all sections dealing with jurisdiction, and when you come to sect. 22 you find a material section dealing with the jurisdiction of the Admiralty Division. The section is in these terms: "The High Court shall, in relation to Admiralty matters, have the following jurisdiction, that is to say. . . ." And then under heading (a) are a number of matters set out which are included in that jurisdiction. The material passage to consider is under special heading (xii.), which includes in the jurisdiction any claim arising out of an agreement relating to the use or hire of a ship, or relating to the carriage of goods in a ship, or any tort in respect of goods carried in a ship.

One or other of these matters must come within the present claim.

Then there is this qualification imposed upon the jurisdiction in respect of these matters in these words: "Unless it is shown to the court that at the time of the institution of the proceedings any owner or part-owner of the ship was domiciled in England." If there were nothing else in the section it seems quite clear that that particular case, the case where the owner or part owner was domiciled in England, is expressly excluded from the jurisdiction which is defined in the section as Admiralty jurisdiction, which is conferred by statute upon the High Court. It is quite true that this particular sub-sect. (xii.) is followed by general heading (b): "Any other jurisdiction formerly vested in the High Court of Admiralty." But the particular jurisdiction in this matter would not have been vested in the High Court of Admiralty by reason of the Act of 1861; and, therefore, so far as jurisdiction is concerned, it seems to me that the statute excludes from the jurisdiction of the High Court of Admiralty this particular class of case.

Then there comes an important body of sections which deals, as it seems to me, not with jurisdiction but with procedure; and those are sections introduced for the purpose of dealing with cases which had been assigned to some division other than the one to which the statute directs it shall be assigned. But, of course, the section assigning business to a particular division only deals with business which that division has jurisdiction to deal with. Sect. 56 is the section which deals with the assignment of business; and it assigns certain classes of business to the Chancery Division and certain classes to the King's Bench; and then when it comes to the Probate, Divorce, and Admiralty it assigns to that division all causes and matters which, if the Act of 1873 had not been passed, would have been within the exclusive jurisdiction of the Court of Probate or of the High Court of Admiralty. Of course that is a comprehensive description of all the matters which by statute the division has been given jurisdiction over.

Then to facilitate the conduct of business and as a matter of procedure there are sections directing transfers, where the person has assigned the case to some division other than the one to which the statute directs it shall be assigned; and then jurisdiction is given to the court either to transfer the matter to the proper division or to retain it. So far as the power of transfer is concerned, it seems to me that that power would include not only matters over which the court had jurisdiction, although as a matter of procedure they were assigned to some other division, but it would include the transfer of cases over which the particular division had no jurisdiction, because to facilitate business that might be reasonable. I think it is provided that the court shall have that jurisdiction, but when the statute provides for retaining a case, it seems to me that it cannot give the court discretion to retain a matter which the statute expressly says that division shall have no jurisdiction to deal with; and on that ground, with great respect, I am unable to agree with the view that the President had any jurisdiction to retain a case which a litigant in defiance of the statute had assigned to his division, but which the statute says that he, the President, so long as he is acting as a judge of that division, has no jurisdiction to deal with.

For these reasons I think the appeal must be allowed and the order asked for must be made, with the consequence that the appellants get the costs here and below.

WARRINGTON, L.J.—I am of the same opinion. On the 10th Dec. 1925 the plaintiffs issued in the Probate, Divorce, and Admiralty Division a writ claiming damages for breach of contract or duty in and about the carriage of goods by sea. The defendants happened to be a company domiciled in England; and accordingly they applied to the learned president of the division by summons asking that the proceedings might be set aside. But they did not

proceed with their summons in that form, but asked that the action might be transferred to the King's Bench Division. The ground of the application was that the Admiralty Division had no jurisdiction to entertain the action; and further that that being so the plaintiffs were expressly prohibited by statute from commencing the action in that division.

Now the statutory provisions actually in force at the date the writ was issued were sect. 11 (3) of the Act of 1875 and the Administration of Justice Act 1920, s. 5, which reproduces in substance the provisions of the Admiralty Court Act 1861, s. 6. But, inasmuch as all those provisions are embodied in the consolidation Act passed last year, it is convenient to refer to those provisions and not to the provisions to which I have alluded.

It seems to me of the utmost importance in these cases to remember that the objection taken by the defendants is one to the jurisdiction of the Admiralty Division and not merely an objection founded on matters of procedure. The jurisdiction of the Admiralty Division is defined by sect. 22 of the Consolidation Act of 1925; and it is defined in these terms: "The High Court shall in relation to Admiralty matters have the following jurisdiction, that is to say (a) jurisdiction to hear and determine any of the following questions or claims." And then there are eleven matters specified with which we are not concerned; and then comes (xii): "Any claim (1) arising out of an agreement relating to the use or hire of a ship; or (2) relating to the carriage of goods in a ship; or (3) in tort in respect of goods carried in a ship." It would seem that such a claim as that in this case is included in Admiralty jurisdiction; but there is this provision following: "Unless it is shown to the court that at the time of the institution of the proceedings any owner or part owner of the ship was domiciled in England." In this case it is shown that the owner of the ship was domiciled in England; and therefore the Admiralty jurisdiction did not extend to the claim endorsed upon this writ.

After dealing with the matters of jurisdiction in the earlier section, we come, in the Consolidation Act, to provisions relating to procedure and to the assignment of matters to the several divisions. But the most important is sect. 58, which deals with the commencement of actions and the selection by the plaintiff of the division in which he will commence his action. Sect. 58 begins thus: "Subject to rules of court and to the provisions of this Act, every person by whom any cause or matter is commenced in the High Court shall assign the cause or matter to such division as he thinks fit by marking the document by which the cause or matter is commenced with the name of that division and giving notice thereof to the proper officer." Now, passing over the sub-clause, there is this provision, sub-sect. (4): "Subject to rules of court a person commencing any cause or matter shall not assign it to the Probate Division unless he would have formerly been entitled to

commence that cause or matter in the Court of Probate . . . or unless the cause or matter is within the Admiralty jurisdiction of the High Court."

I have shown, I think, that the claim in this case was not within the Admiralty jurisdiction; and therefore the plaintiff was prohibited by sub-sect. (4), which is the proviso to the general provisions of the section, from commencing this case in the Admiralty Division, because it had no jurisdiction.

I go back to the other provisos to the general power which the plaintiff has of assigning his case to such a division as he thinks proper. The material proviso is (2): "If any plaintiff . . . assigns his cause or matter to any division to which, according to rules of court or the provisions of this Act, it ought not to be assigned, the court or any judge of that division, on being informed thereof, may, on a summary application at any stage . . . direct the cause or matter to be transferred to the division to which, according to those rules . . . it ought to have been assigned, or may retain it in the division in which it was commenced." It is said that that gives to the judge the power to retain in the Admiralty Division this case which, according to the provisions of the Act, the Admiralty Division has no jurisdiction to entertain. In my opinion that cannot be the true construction of that sub-section; and it must be borne in mind that this second proviso extends to a great many different matters. The expression "the division to which it ought not to be assigned" would extend to a case of assigning an action for breach of promise of marriage to the Chancery Division or an action for specific performance to the King's Bench Division, and other cases of that kind. In those cases the judge to whom the application for transfer comes might think proper to retain the action in the division in which it was commenced; but in my judgment it could hardly be said that this sub-section was intended to give the judge power to retain in the division in which it was commenced an action in regard to which another part of the Act expressly provided that that division should have no jurisdiction. And perhaps it is a matter for observation as confirming that view that the prohibition to which I have referred comes in a section after the general power of transfer. It looks as if it was intended as a further modification and a much more stringent and prohibitive restriction than the mere discretionary power of transfer. Whether I am right in that view or not on the construction of the section, and even assuming that the judge had such a discretion as is contended for in this case, the fact that the action was commenced in a division which, according to the provisions of the Act, had no jurisdiction to deal with it, ought surely to be a predominating consideration in the mind of the judge exercising his discretion, and ought to prevent him exercising it in any other way than by transferring the case to the division which had jurisdiction.

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Therefore I think the order of the President was wrong; and the appeal ought to be allowed.

ATKIN, L.J.—I agree. This case is in respect of a claim for damages for breach of contract for the carriage of goods by sea; and it appears to me to come precisely within the definition of the jurisdiction given to the Court of Admiralty in the Act of 1861: "Jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England and for loss or damage to goods by the negligence or misconduct of owners or masters," and so on. That definition of the jurisdiction has been re-stated, and only re-stated, in the Administration of Justice Act 1920, s. 5, which provides that Admiralty Jurisdiction shall extend to the carriage of any goods in a ship.

But it seems to me material that until the Act of 1861 the Admiralty Court had not in fact jurisdiction over a claim of this kind. I think that appears from the nature of the section itself; and if authority is required it is to be found in Dr. Lushington's Admiralty Reports in the case of *The Ironsides* (Lush. 458), which was the first case decided after the Act, and arose in respect of damage to goods by fire, the fire having happened before the passing of the Act. The question was as to whether or not the goods having been transferred to a different ship from that in which the fire took place and carried in the substituted ship to England, the proceedings *in rem* could be taken against the original ship. Dr. Lushington held that they could not because it was not the ship which brought the goods; and at p. 466 he says this: "Antecedently to the passing of the statute this court could not have exercised any jurisdiction at all of this kind. . . ." That remedy was wholly unavailable. It appears to me that that is ample authority for the proposition that there would be no jurisdiction in the Court of Admiralty for a case of this kind.

The position seems to me to be this. There is a practical prohibition against the plaintiff commencing such an action as this in the Admiralty Division where the defendant is domiciled in England; and this action therefore was brought in violation of this express prohibition. It appears to me that if you are dealing with the jurisdiction of the division it is quite plain that the statute has laid it down in terms that such actions are not to be tried in the Admiralty Division because the defendant is domiciled in this country and has got the right to have his liabilities determined by the ordinary tribunals, that is to say, by a common law action for breach of contract or for tort. Under these circumstances it appears to me that the procedure section must be read in in one of the two ways that have been suggested in the judgments already delivered. Either there is no discretion at all to retain such an action in the Admiralty Division, or if the terms of the section are wide enough to give

the discretion it is a discretion which could only be exercised by making the transfer, because it would not be a judicial exercise of discretion to retain in a division a case which the Act says ought not to be tried in that division.

There are no special circumstances in this case. It is an ordinary case of damages for non-delivery of a cargo, such as is tried every day in the commercial court, where there are precisely the same facilities as are suggested by the President as giving a balance of convenience to the Admiralty Court.

Therefore I think the appeal should be allowed and the order should be given for the transfer, subject of course to the consent of the President of the King's Bench Division, which is a matter of form.

I should like to say one other thing. I notice a note in the White Book to the effect that, when the Court of Appeal is called upon to make a transfer, the consent must be obtained, not only of the President of the division to which the case is transferred, but also of the President of the division from which it is to be transferred. That is not in accordance with the rule. I can hardly believe that the Court of Appeal can have laid down such a rule of law; and it does not seem to me to be applicable in a case of this kind in which we say the discretion should be exercised in one particular way.

Appeal allowed.

Solicitors for the appellants, *Downing, Middleton, and Lewis*, agents for *Downing and Hancock*, Cardiff.

Solicitors for the respondents, *Waltons*.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Wednesday, Jan. 27, 1926.

(Before ROCHE, J.)

WERNER v. DET BERGENSKE DAMPSKIBSSKLSCHAFT. (a)

Carriage of goods—Contract cargo damaged by contact with other cargo—Whether bad stowage or unseaworthiness of vessel—Relative order of shipment of cargoes—Effect of.

Held, that in determining the question whether damage complained of is due to bad stowage or to unseaworthiness the order of shipment and stowage of the cargoes is not the basis for decision.

Elder, Dempster, and Co. v. Paterson, Zochonis, and Co.; Griffith Lewis Steam Navigation Company v. Same (16 *Asp. Mar. Law Cas.* 351; 131 *L. T. Rep.* 449; (1924) *A. C.* 522) *considered and followed.*

(a) Reported by R. A. YULE, Esq., Barrister-at-Law.

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WERNER v. DET BERGENSKE DAMPSKIBSELSKABT.

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ACTION tried before Roche, J. without a jury.

The defendant company were the owners of the steamship *Columba*. The three plaintiffs were the holders of bills of lading for parcels of eggs loaded and carried on board the *Columba* from Danzig to London in May 1924 by the terms of which the shipowners were protected against the consequences of (amongst other matters) bad stowage, even when due to the negligence or want of judgment of their servants. The ship also carried a cargo of potatoes which were not dry, sound potatoes. The parcels of eggs were stowed on top of the potatoes. The potatoes, as they became more rotten, gave off heat and by reason of the heat so generated, a considerable proportion of the eggs was spoilt.

Clement Davies for the plaintiffs.—The ship was unseaworthy at the time of lading, by reason of the rotting potatoes, for the carriage of eggs, which are affected by heat, and as the vessel was unfit for the reception of the cargo of eggs the damage was due not to bad stowage, but to the unseaworthiness of the vessel. See

Macfadden v. Blue Star Line, 93 L. T. Rep. 52; (1905) 1 K. B. 697;

Ciampa v. British India Steam Navigation Company, (1915) 2 K. B. 774;

Elder, Dempster, and Co. v. Paterson, Zochonis, and Co., 16 Asp. Mar. Law Cas. 351; 131 L. T. Rep. 449; (1924) A. C. 522;

Upperton v. Union Castle Mail Steamship Company, 9 Asp. Mar. Law Cas. 475; 9 Com. Cases 50, C. A.;

Tatterstall v. National Steamship Company, 1884, 3 Asp. Mar. Law Cas. 206; 50 L. T. Rep. 299; 12 Q. B. Div. 297.

Sir Robert Aske for the defendant company.—The damage complained of was due to the inherent defects of the eggs at the time of loading. If, however, deterioration took place on the voyage, this was due to bad stowage only, and the defendant company were protected by the conditions in the bills of lading.

ROCHE, J.—In this case three plaintiffs claim damages from the defendant company, who are the owners of the steamship *Columba*. The three plaintiffs were holders of three bills of lading for three separate parcels of eggs which were loaded and carried on board the *Columba* from Danzig to London in the month of May 1924. The plaintiffs allege that the eggs in question were not delivered from the ship in the same order and condition as that in which they were received, and they allege that the cause of the bad condition or worsening of the condition of the eggs in the process of the voyage was due to the fact that the ship was unseaworthy in the circumstances that prevailed for the carriage of the eggs.

The first matter to determine in this case is what was the condition of the eggs when shipped, and whether in fact and to what

extent the eggs deteriorated on the voyage. The next question to determine is what was the cause of the deterioration, if any. That last question is a question of fact which is decisive of this case, because, as I have indicated, the plaintiffs rely upon unseaworthiness of the ship as the cause of deterioration. The defendants, on the other hand, contend that if there was deterioration of the eggs on the voyage and if it occurred through any reason for which they otherwise could be responsible, yet they were covered by one or more of the exceptions in the bill of lading. In substance the defendants contend that the cause of the deterioration, if any, on the voyage was bad stowage; that the matter complained of was bad stowage, and under the terms of the bill of lading that was a matter for which they were not responsible. My first finding of fact is that the eggs were deteriorated upon the voyage. I agree with counsel for the defendants that the evidence regarding the condition of the eggs when shipped was not very strong, but I think there is sufficient evidence to show that the eggs were received in a worse condition than that in which they were shipped. I assess the damages at 575*l.* in all, but I do not award that sum to the plaintiffs because I am going to pronounce judgment in favour of the defendants, but it will be convenient in the event of the case going elsewhere that my findings of fact upon that and other matters should be before the court or courts by which this case may have to be considered.

The next point is what was the cause of the deterioration? The deterioration I find, was due to the fact that these eggs were loaded in one hold and above a considerable quantity of potatoes which were not sound potatoes. I do not mean by that that they were at the time of shipment all rotten or anything of that sort, but they were not dry, sound potatoes. That fact, so far as it is material ought to have been observed by those responsible for the stowage of this ship. The potatoes were brought in bulk to or near the ship, and were packed in view of the ship, and the condition of the potatoes was observable and ought to have been observed. The consequence of the bad stowage of the cargo in the above way was that the potatoes confined in the hold got worse than they were when they started. They set up heat, and that heat communicated itself to the eggs, and that deteriorated the eggs, all the more perhaps because the ventilators from which the hot air was issuing were above or near the eggs, so that the hot air as it rose would pass, as it were, through or past these parcels of eggs. I find that the ventilation on board this ship was ordinary and sufficient for an ordinary and proper cargo, but that it was not adequate having regard to the condition of the potatoes. No ordinary ventilation would, in my opinion, have been adequate: it would have required the hatches to be off to avoid evil consequences from the stowage which was arranged and carried out in this ship.

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Those being my findings of fact, I next turn to the bill of lading. Broadly speaking, clause 2, which is relevant in this case, amounts in my judgment to this: that the shipowners are protected by it from the consequences of a number of things, including bad stowage, even though that bad stowage is due to the negligence or want of judgment of their servants. They are also protected from damage arising from other goods and from the heat of the hold. The clause certainly provides that from some direct or indirect consequences of unseaworthiness the shipowners are protected, but I think it is really true that under the clause "from other consequences than unseaworthiness of the ship" the shipowners are not. I have dealt with that clause in that broad fashion because the actual clause in (I gather) identical language occurring in a charter-party, though not in a bill of lading, has been the subject of consideration and decision by the highest courts in this country, namely, the Court of Appeal and the House of Lords. That consideration and decision was in the case of *Elder, Dempster, and Co. Limited v. Paterson, Zochonis, and Co. Limited* (16 Asp. Mar. Law Cas. 351; 131 L. T. Rep. 449; (1924) A. C. 522). The summary that I have given of the effect of the clause is that which I gather from the speeches of the noble Lords who gave the decision of the House of Lords. I am not here referring to the dissenting opinion of Lord Finlay. The contention of counsel for the plaintiffs, which has been pressed with vigour and absolute clearness, may be best put, in my opinion, by contrasting the facts in *Elder, Dempster, and Co. v. Paterson, Zochonis, and Co.* with the facts in this case. In the *Elder, Dempster* case certain barrels of palm-oil had been stowed in the lower part of the hold; certain palm-kernels, which in bulk were weighty, were stowed above and over the barrels of palm-oil, and the weight of the palm-kernels crushed the barrels in which the palm-oil was contained so that the palm-oil leaked out. The cargo-owners who were concerned with the palm-oil complained and alleged that the ship was unseaworthy by reason of the arrangement of matters, and in particular by reason of the arrangement as to the palm-kernels. It was held by the majority of the House, differing from the majority in the Court of Appeal, that that arrangement was not unseaworthiness, but bad stowage, and that the shipowners were not liable. Scrutton, L.J. had given a dissenting judgment in the Court of Appeal, and it was that opinion expressed in his dissenting judgment which prevailed with the majority in the House of Lords. In the present case the potatoes were stowed under the eggs, and the eggs were stowed over the potatoes. It is the owners of the upper portion of the cargo, namely, the eggs, which were stowed later above the potatoes, who are complaining in this case. Accordingly the position on the facts is exactly the reverse of the position in the *Elder, Dempster* case.

The contention put forward by Mr. Clement Davies on behalf of the plaintiffs (the cargo-owners) is that you must look at the circumstances at the time when the eggs are loaded, and at that time by the presence in the ship of potatoes containing within themselves all the potentialities, for the reasons I have found, of doing mischief to the eggs, the ship was unseaworthy. That is a nice and refined point, and it is perfectly clear. In my judgment it is not a good point: it is too fine, and is not, in my judgment, warranted by the proper construction of the clause or by the authorities. It is quite true that in the course of the judgments in the *Elder, Dempster* case, and in the course of the judgments in an earlier authority which has some bearing on the case, namely, *The Thorsa* (13 Asp. Mar. Law Cas. 592; 116 L. T. Rep. 300; (1916) P. 257), allusion is made to, and some weight is placed upon, the fact that the cargo which was under consideration there was stowed first. The same facts as in the *Elder, Dempster* case as to priority of the palm-oil in the ship applied in *The Thorsa* case to the chocolate which was there damaged through taint from cheese. Although that fact is alluded to and in some judgments relied upon, yet in my judgment it is not the basis of these decisions. I found my judgment upon the like principles as relied upon by Swinfen Eady, L.J. in the case of *The Thorsa*, where he says this: "The contention put forward really amounts to this, that if two parcels of cargo are so stowed that one can injure the other during the course of the voyage, the ship is unseaworthy. I am not prepared to accept that. It would be an extension of the meaning of 'unseaworthiness' going far beyond any reported case."

Scrutton, L.J., in *Elder, Dempster, and Co. v. Paterson, Zochonis, and Co.*, says this: "The ship must be fit at loading to carry the cargo the subject of the particular contract. If she is so fit, and the cargo when loaded does not make her unseaworthy, as in the case of iron plates which might go through the ship's side, the fact that other cargo is so stowed as to endanger the contract cargo, is bad stowage on a seaworthy ship, not stowage of the contract cargo on an unseaworthy ship." In my opinion, that general principle there stated is not dependent upon the relative priority in which the cargo is stowed. Though some potatoes and eggs can be stowed together in a hold, yet eggs are known to be susceptible to injury from heat and particularly from moist heat. Therefore it is important for the proper stowage of those cargoes near one another, that potatoes which are a potential source of heat should be examined and that care should be taken that unsound potatoes and eggs are not stowed near one another. The root of the trouble is that the necessary care was not taken, and these defective potatoes and these eggs were stowed near one another in the same hold. That, in my judgment, never ought to have been done. It is bad stowage

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and is not unseaworthiness on the part of the ship.

It is almost unnecessary to discuss the numerous cases to which I have been referred in the course of the argument, because they are really all discussed in the case of *Elder, Dempster, and Co. v. Paterson, Zochonis, and Co.*, and the effect of those decisions is there fully dealt with. I may, however, make reference to one of them, *Upperton v. Union Castle Mail Steamship Company* (reported in 9 Asp. Mar. Law Cas. 475; 8 Com. Cas., p. 96, and in 9 Com. Cas., p. 50), which, on the face of it, is perhaps the nearest to this case, and which has actually been strongly relied upon by Mr. Clement Davies. The second report is a report of the case in the Court of Appeal, and upon examination I think it will be found that all the Court of Appeal decided was that there were ample facts on which Mr. Justice Bingham, in the court below, trying the case without a jury, could arrive at the conclusion that the ship was in fact unseaworthy. Nor is the other case, *Tatterstall v. The National Steamship Company* (1884, 5 Asp. Mar. Law Cas. 206; 50 L. T. Rep. 299; 12 Q. B. Div. 297), which has also been strongly relied upon, a warrant, in my judgment, for the plaintiff's contention that the order of stowage which here occurred, and the nature of the potato cargo which was stowed before the eggs, constituted this ship unseaworthy for the voyage and gave the plaintiffs a cause of action, or precluded the defendants from relying on the exception clause.

The decision on this point decides the case, and it is not necessary for me to give a decision on the other points raised.

Action dismissed.

Solicitors for the plaintiffs, *Neve, Beck, Son, and Co.*

Solicitors for the defendants, *Botterell and Roche.*

March 8 and 9, 1926.

(Before ROCHE, J.)

RIO TINTO COMPANY LIMITED v. SEED SHIPPING COMPANY. (a)

Charter-party — Bill of lading — Liability of owners for loss of cargo — Unseaworthiness — Competence of master — Deviation.

On Christmas Day 1924 the steamship *M. S.* sailed at 11.30 a.m. from Glasgow and proceeded down the Clyde bound for Spain with a full cargo of coke, the property of the plaintiffs. At 5.30 p.m. the ship struck a rock off Troon, Ayrshire, and both vessel and cargo became a total loss. The master was a man of fifty-six years of age and was of ordinary health except that he suffered from indigestion. He had never navigated the Clyde before and when the

pilot left the ship the master misunderstood the directions and set a course S.S.E. instead of S.S.W. Shortly after the accident the master fell heavily to the deck and suffered from complete loss of memory of what had occurred.

Held, that there was a warranty that the master should be competent, but though warranty was an absolute contract it did not go to the extent that the master and ship should be absolutely perfect. The warranty only went so far that both should be reasonably fit.

Held, further, that deviation was a radical change of course in breach of contract.

ACTION tried before Roche, J. without a jury.

The facts and arguments sufficiently appear from the headnote and judgment.

Raeburn, K.C. and Mitchison for the plaintiffs.

Millar, K.C. and Sir Robert Aske for the defendants.

ROCHE, J.—The action is ordinary and in the usual form. The facts are unusual. On the 25th Dec. 1924 the steamship *Marjory Seed* sailed at 11.30 a.m. from Glasgow and proceeded down the Clyde for Spain with a cargo of coke the property of the plaintiffs. At 5.30 p.m. the steamer struck a rock off Troon, Ayr. The cargo became a total loss and the plaintiffs sue for 2781*l.* 9*s.* 9*d.* the agreed value of the cargo on ground of failure to deliver in breach of charter-party dated the 15th Dec. 1924. The defence was that the loss was due to a peril of the sea. In their replication the plaintiffs alleged the vessel was unseaworthy and that there had been deviation which placed the defendants outside any defence. Unusual circumstances arise out of the doings of the master on the day of the accident and subsequent days. The master was fifty-six years of age and generally speaking was a competent man. He was no doubt guilty of a lapse on the night in question with serious consequences to himself and the ship. The question is whether the lapse was an error of judgment or negligence or incompetence so as to render the owner liable. There is also the question whether the ship's position amounted to deviation. Some two hours after the accident the master fell heavily to the deck and was rendered incapable of communication and lost all recollection of the whole affair. The medical witnesses agree that loss of memory might well occur after the fall. I find he did in fact lose all memory of the accident. The mates know more but do not know why the course in question was taken by the master, that is S.S.E. instead of S.S.W. The question is why he took that course. Why the master fell is not material to my decision. The point for me to decide is his condition when he took the wrong course. On the evidence I find he was of ordinary health except for indigestion and had been unemployed for a year before this voyage. He had never navigated the Clyde before. He had been on board while the ship was loading and the

(a) Reported by R. A. YULE, Esq., Barrister-at-Law.

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THE BORS.

[ADM.]

pilot said he looked tired when the ship left. He, the master, had had attacks of giddiness. He had been on deck since dinner time. He was drowsy and it was suggested he went to sleep in the charthouse. The pilot before leaving told him to keep S.S.W. I find master did not trouble to look at chart and made the mistake of supposing pilot had said S.S.E. It is not supposed for a moment that anyone was under the influence of drink but the master was clearly not himself. When told of lights he thought they were ship's lights, instead of lights on coast. The question now is whether employing such a master was a breach of duty or unseaworthiness. There is such a warranty (*Tait v. Levi*, 1811, 14 East 481; *Standard Oil Company v. Clan Line Steamers*, 16 Asp. Mar. Law Cas. 273; 130 L. T. Rep. 481; (1924) A. C. 100). I am satisfied that had the master been in better health and wakefulness he would have been competent. I hold he was a competent master at time of sailing. The next question is whether in his then state of health he was justified in commanding. It does not matter whether he knew or thought he was. Warranty is an absolute contract. But there is no contract that ship or master be perfect. All it amounts to is that ship and master are reasonably fit. One of the medical witnesses said he would have only prescribed some medicine and told him to continue at work. I do not attach much importance to ill-health. It was an unfortunate combination of circumstances. As to the fall on deck after the accident, I find giddiness was not the cause of the accident but was probably induced partly by distress. Unconsciousness was due to the concussion of the fall. This deals with unseaworthiness. The onus was on the plaintiffs to prove it and they have failed.

I now pass to deviation. My judgment does not differ from that of Mansfield, C.J. in 1779: (*Lavabre v. Wilson*, 1 Douglas 284). Deviation is a radical change of course in breach of contract. It is not necessary to discuss *Tait v. Levi* as to deviation, *i.e.*, how far involuntary deviation can be breach. In my judgment it does not arise here. I find that the master did not in this case mean to deviate. If I may use an analogy: he did not take another road, he got into a ditch on the road he was in. I find there was no deviation so it is unnecessary to go into question of intention. There is no question of justification. The defendants' plea avails and judgment will be entered for them.

Solicitors: *Parker, Garrett, and Co.*; *Botterell, Roche, and Temperley*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 4 and 5, 1925.

(Before BATESON, J.)

THE BORS. (a)

Collision — River Thames — Vessel crossing from one side of the river towards the other side—Obligation of crossing vessel towards other vessels going up or down the river—Port of London River Bye-laws, 1914, art. 34.

Art. 34 of the Port of London River Bye-laws 1914 requires any steam vessel crossing from one side of the river towards the other side to do so at a proper time, having regard to vessels navigating up and down the river, and to be so navigated as not to cause obstruction, injury, or damage to any other vessel.

Held, that the effect of this rule, whilst not making the crossing vessel the "give way" ship, is to put the obligation of care as to time of, and navigation in, crossing specially upon the crossing vessel, which is not to behave as if she had the right of way. The obligation upon the crossing vessel, if she means to cross the bows of a vessel going up or down, is to give ample warning as to her movements or to take timely action to allow such vessel to pass up or down if there was not time and room to cross. If she cannot give ample warning, it behoves her to be very careful.

DAMAGE ACTION.

The plaintiffs, owners of the Danish steamship *P. N. Damm*, brought their action against the defendants, the owners of the Norwegian steamship *Bors*, to recover damages sustained by the *P. N. Damm* in a collision with the *Bors* which took place in the River Thames in the vicinity of the Surrey Docks, on the 31st Dec. 1924. The following statement of facts is taken from the judgment of the learned judge:

"In this case I find the *P. N. Damm* alone to blame. The collision happened on the evening of the 31st Dec. 1924, near the entrance to the Surrey Commercial Docks. The *P. N. Damm* was waiting to enter the docks. She was lying about 1700ft. above the entrance, and 150ft. or 200ft. out from the north shore, and at the collision she was angled about four points off the up and down river course. The tide was flood, with the force of about one knot, and there was a strong westerly gale. The *P. N. Damm* lay at anchor while other vessels were going into the Surrey Docks, and when the way was clear he proceeded to get up anchor. This was at about 5 p.m., and the collision happened at 5.10 p.m. Having got up her anchor she had to take manœuvres which would throw her stern towards the north shore and her bow into the stream. In that position she had to wait until two tugs had passed, one to the north and the other to the

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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southward. It was not until these tugs had got clear away that the *P. N. Damm* was able to make for the Surrey entrance. Evidence has been given that she went at a speed of about two knots. The speed cannot have been great because the distance that had to be crossed was only about 520ft. of water. In these circumstances the *P. N. Damm* was crossing the river when the *Bors* was seen about three cables' length away. I am satisfied that the two vessels saw each other at much the same time and distance. The red light of the *Bors* coming down the river showed her to be right over in her own proper water. The *P. N. Damm* did not wait and let the *Bors* go by, but continued with her manœuvres. Just before the collision those on board the *P. N. Damm* saw the green light of the *Bors*, showing that they had just crossed her bows. The collision happened very shortly afterwards.

"The following signals were exchanged. One short blast was sounded by the *Bors*, and the *P. N. Damm*, for a reason which is not very apparent, replied with two short blasts. The *Bors* kept on going down on her proper side at no great speed—about four knots—with the white stern light of the *P. N. Damm* open on the port bow. The *Bors* did not realise that anything was wrong until the *P. N. Damm* opened her two masthead lights and her green light. Immediately on seeing those lights the *Bors* stopped and reversed her engines, sounded three short blasts, hard-a-starboarded her helm and dropped both anchors. A collision, however, took place, the stem of the *Bors* striking the starboard quarter of the *P. N. Damm*, doing very little damage. The *P. N. Damm* then struck the dolphin near the upper pierhead of the entrance, and this did further damage. It is important to bear in mind that the damage was slight because it shows that the *Bors* had taken practically four knots way off by the time of the collision."

The Port of London River Bye-laws 1914, art. 34, provide as follows :

Every steam vessel crossing from one side of the river towards the other shall do so at a proper time, having regard to vessels navigating up and down the river, and shall be navigated so as not to cause obstruction injury or damage to any other vessel.

Dunlop, K.C. and Balloch for the plaintiffs.

Langton, K.C. and Digby for the defendants.

BATESON, J. stated the facts as set out above, and continued : What is the result ? By art. 48 of the old Thames bye-laws " steam vessels . . . crossing from one side of the river towards the other side " had to " keep out of the way of vessels navigating up and down the river." This rule, which made the crossing ship the give-way vessel, was altered in 1914, and by the new rule, art. 34 of the Port of London River Bye-laws 1914, " Every steam vessel crossing from one side of the river towards the other side shall do so at a proper time, having regard to vessels navigating up and down the river, and shall be navigated so

as not to cause obstruction, injury, or damage to any other vessel." This, I think, means that the obligation of care as to time of and navigation in crossing is especially put on the crossing vessel. It certainly does not allow the crossing vessel to behave as if she had the right of way. I think, therefore, that the action required of these two vessels was a give and take by each, with the obligation, however, on the crossing vessel, as she was executing the less ordinary manœuvre, to take care to give ample warning as to her movements if she meant to cross the bows of a vessel going up or down, or to take timely action to allow such vessel to pass up or down if there was not time and room to cross. If she cannot give ample warning it behoves her to be very careful. The *P. N. Damm* always presented a stern light to the down-coming ship. That stern light, in the manœuvres taken, would be moving to the north for some time, and with a vessel in the position of the *P. N. Damm* it was essential that those on board should do everything possible to warn the down-coming vessel in time or let her pass down. The *P. N. Damm* did nothing to warn the *Bors* or to show what she was doing, or let her pass. There was no warning other than the two-blast signal. That signal would have been most misleading if the pilot of the *Bors* had thought it had anything to do with him. If the signal was intended for the *Bors* it meant that the *P. N. Damm* was going to the northward out of her way. A long warning blast would have been better, or still better, a short blast, which would have indicated that the *P. N. Damm* was coming across under port helm and that the *Bors* must look out for her crossing over. Possibly the pilot of the *P. N. Damm* thought he had the right of way, and was entitled to blow two blasts that he was not accepting the whistle signal of the *Bors*. However that may be—and I do not think it was what the pilot intended to convey, as, to invite a ship coming down the river in her own proper water to starboard to a white light on her port bow would be very dangerous—the *P. N. Damm* could easily, by a slight delay in her manœuvres, have let the *Bors* pass down. It is said that the *Bors* ought to have seen the stern light coming slowly towards her. Even if I thought that the *Bors* could have seen that and had delayed a little before taking action I could not find her negligent in this case. I have consulted the Elder Brethren on the point, and we all think that the time and space available for the *P. N. Damm* to get across made it most difficult for the *Bors* to realise what the manœuvre was. I give judgment for the defendants.

Solicitors for the plaintiffs, *Thomas Cooper and Co.*

Solicitors for the defendants, *Ince, Colt, Ince, and Roscoe.*

ADM.]

THE LORD STRATHCONA (No. 2).

[ADM.]

Nov. 16 and 27, 1925.

(Before HILL, J.)

THE LORD STRATHCONA (No. 2). (a)

Practice—Mortgage action—Intervener ordered to give security—Judgment—Order for security in a further sum.

In a mortgage action a plaintiff obtained judgment in default of appearance, and an order for sale of the vessel. Subsequently leave was given to interveners (foreigners) to set up a counterclaim raising an issue between the plaintiffs and themselves, pending the determination of which the sale was ordered to stand over upon terms that the interveners gave security in a sum satisfactory to the registrar for loss of interest, expenses of the marshal, and any loss occasioned to the plaintiff by a fall in shipping values in the period during which the sale stood over. The interveners having given such security, and the issue having been determined against them,

Held, on the plaintiff's application, that the interveners, as they were disputing the plaintiff's claims at the reference, might be ordered to give security in a further sum.

SUMMONS adjourned into court.

The plaintiffs, the Old Colony Trust Company, as mortgagees of the defendants' steamship *Lord Strathcona*, had obtained, on the 26th Jan. 1925, judgment in default of appearance pronouncing in favour of their mortgage and an order for appraisal and sale. On the 11th Feb. 1925 an appearance was entered by the Dominion Coal Company as interveners, and on the 3rd March 1925 leave was given to them to counterclaim, and the order for sale was ordered to stand over pending the trial of an issue between the plaintiffs and the interveners, namely, whether the plaintiffs were bound to perform a charter-party made between the defendants as owners of the *Lord Strathcona* and the interveners as charterers, and the interveners were ordered to give security in an amount satisfactory to the registrar for loss in respect of interest arising from May and any loss on sale by reason of a general fall in shipping values. Such security was given by the interveners in the sums of 8000*l.* in respect of possible loss by fall in shipping values, 800*l.* for interest, and 200*l.* for marshal's expenses.

On the 15th July 1925 Hill, J. gave judgment in favour of the plaintiffs, dismissing the claim of the interveners, and awarding to the plaintiffs their costs of and occasioned by the intervention: (*The Lord Strathcona*, 16 Asp. Mar. Law Cas. 536; 133 L. T. Rep. 765; (1925) P. 143). On the 30th July Hill, J. dismissed an application for further security.

On the 14th Oct. the *Lord Strathcona* was sold for 33,000*l.* The plaintiffs claimed that under the registrars' report there was due to them the sum of 45,000*l.* and interest, and further that the value of the ship, had it been

sold in the early part of 1925, would have been 53,000*l.* By the present summons they asked for confirmation of the registrar's report, payment out of proceeds less the marshal's expenses, an order that the interveners should pay the difference between the values of the *Lord Strathcona* in the early part of 1925 and on the 14th Oct. respectively, and that the interveners should give further security.

Langton, K.C. and Alfred Bucknill for the plaintiffs.

Balloch for the interveners.

[Reference was made to *Brown v. Haig* (93 L. T. Rep. 99; (1905) 2 Ch. 379).]

Cur. adv. vult.

Nov. 27, 1925.—HILL, J.—The plaintiffs, who have succeeded in this action, ask for directions. About some matters there is no dispute as between the plaintiffs and the interveners. As to these matters: (1) I confirm the registrar's report. (2) Apart from the plaintiffs' claims, there are no claims in the registry against the proceeds. The marshal of course is entitled to retain his own charges and expenses. To the balance the plaintiffs are entitled. The marshal tells me that 27,000*l.* may be at once released to the plaintiffs, and I order accordingly. The balance will remain for the marshal's costs and charges.

I now come to questions as between the plaintiffs and the interveners, who became defendants and counter-claimants. The interveners lost and the plaintiffs were given as against the interveners their costs of and occasioned by the intervention: (*The Lord Strathcona*, 16 Asp. Mar. Law Cas. 536; 133 L. T. Rep. 765; (1925) P. 143). As the intervention was permitted after the plaintiffs had, in default of appearance of the owners, obtained judgment against the ship, and had also obtained an order for appraisal and sale, "costs of and occasioned by the intervention" means all plaintiffs' costs subsequent to the intervention except such as the plaintiffs would have incurred if there had been no intervention; such as such actual costs of sale as would have been incurred in any event and the costs of proving in the registry the amount of the plaintiffs' claim against the *res* and of obtaining confirmation of the report. As the plaintiffs have recovered against the interveners their costs, as above stated, they recover, *inter alia*, the marshal's charges and expenses subsequent to the date of intervention less only so much of them as would have been incurred if there had been no intervention. For the marshal's charges and expenses are part of the plaintiffs' costs. It is the plaintiffs who ask for the release to them of the proceeds, which will only be released to them after deduction of the marshal's charges and expenses. And, in ordinary course, when the plaintiffs lodged the *præcipe* for appraisal and sale, they had undertaken to pay all the marshal's charges and expenses. It makes no difference whether the marshal pays himself

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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by deduction from the proceeds or is paid direct by the plaintiffs. The charges and expenses are equally part of the plaintiffs' costs. I do not think that any further order is necessary as to the marshal's charges and expenses, as asked for in par. 7 of the plaintiffs' summons. But, if it is, I direct that the plaintiffs are entitled to recover against the interveners the amount of the marshal's charges and expenses except such as would have been incurred if there had been no intervention. Of course any moneys found by the plaintiffs for the marshal at his request, as, for example, for insurance or the wages of the master and chief engineer as caretakers are part of the marshal's expenses. As to the method of ascertaining the marshal's charges and expenses, as mentioned in par. 8 of the summons, no order is necessary. The rules of the Supreme Court provide for that: (Order LI., rr. 15 and 16). That has dealt with the summons including the marshal's charges and expenses.

I now come to the question of the damages sustained by the plaintiffs by reason of the postponement of the sale. This partly turns on the interpretation of an order made on the 3rd March 1925, but also upon a large question. The plaintiffs contend that they are entitled to recover whatever damages they have suffered by the postponement of the sale. The interveners contend that the plaintiffs are only entitled to damages in respect of the heads of loss mentioned in the order and to the extent of the security which has been ordered in respect of those heads of loss. The position on the 3rd March was that the plaintiffs had obtained a judgment against the ship and an order for appraisal and sale and the sale had been advertised by the marshal. The order postponed the sale until further order and under it the interveners were permitted to deliver a defence and counterclaim, and (a) to contend that the plaintiffs' mortgage was invalid and generally to contest the plaintiffs' right to a judgment at all; and (b) to contend that the plaintiffs' rights ought to be exercised only subject to the interveners' charter-party. The order contained the following, among other, directions: "Upon the Dominion Coal Company Limited giving security in an amount and form satisfactory to the registrar for loss in respect of interest arising from delay and any loss on sale by reason of general fall in shipping values . . . the hearing of the motion do stand over until further order. Liberty to apply and all questions of costs reserved." I am clearly of opinion that the contention that the liability is limited to the amount of security ordered is wrong. The promise to give security involves a promise to pay the debt which is to be secured.

I have no doubt at all that the plaintiffs are entitled to the whole loss in respect of interest arising from the postponement of the sale, and the whole loss on sale by reason of a general fall in shipping values. [The learned judge considered other possible items of

damage, and continued:] Whatever they are I think the interveners ought to pay them, and that, under the liberty to apply in the order of the 3rd March 1925, I ought to make an order to that effect. I refer all questions of the amount of damages to the registrar. He will have, no doubt, some difficult matters to deal with. He will have to find the period of delay caused by the postponement, and in so doing he may have to consider whether the ship would have been sold on the day originally fixed (the 25th Feb. 1925), or only at some later date, and also whether the ship ought, as interveners contend, to have been sold at auction on the 11th Aug. 1925. These matters were mentioned in argument. But I am not seeking to fetter the registrar. He will determine the period of delay. Having done that he will then have to decide the damages suffered thereby, including the loss by reason of the fall in shipping values and the loss of interest. As to interest I shall only add, as it was mentioned during the argument, (a) that the interest which the plaintiffs lost by the postponement of the sale was not necessarily interest at the mortgage rates. On the other hand, it was not necessarily interest at the rate which the court is in the habit of allowing upon judgments. It is such a rate as the registrar finds to be fair, having regard (*inter alia*) to the fact that the plaintiffs are bankers, and would have had the proceeds in hand so many months earlier. I will now deal with the paragraph in the plaintiffs' summons in which they ask for further security. The amount of the security is for the registrar. The question for me is whether any further security can or should be ordered. At the end of July, upon the materials then before me, I reversed an order which had been made for further security for loss of interest and marshal's expenses. I may have given good or bad reasons for so doing, but it was done upon the interveners' representation that judgment had gone against them and they were not going to appeal, and were, therefore, no longer interested in the case; and, as they were foreigners, it seemed idle to order security to be given by persons who had no interest to obey the order. Now, however, the interveners are taking a very active interest in the case, and attend by counsel to contest the present summons and show that they will vigorously dispute the plaintiffs' claims against them. I think the matter is now open. As they are still active parties, an order for further security for the plaintiffs' costs, including the marshal's expenses, can be made against them, and, if they still wish to be active parties they must comply with the order of the 3rd March 1925, and give such security as the registrar directs on the two heads which are mentioned in that order and referred to in his determination. The plaintiffs will have the costs of this summons against the interveners.

Solicitors: Messrs. Ince, Colt, and Ince, and Roscoe; Messrs. William A. Crump and Son.

ADM.]

THE VIPER.

[ADM.]

Monday, Jan. 11, 1926.

(Before Lord MERRIVALE, P. and HILL, J.,
assisted by Elder Brethren.)

THE VIPER. (a)

Ship — Collision — Barge dredging up River Thames brought up to an anchor—Collision with barge under way—Duty of barge at anchor to take action.

The defendants' barge V., dredging up the River Thames, engaged her anchor with the river bottom and was brought up. Subsequently the plaintiff's barge T. L., also bound up river, collided with the V.

Held, reversing the decision of the judge of the Mayor's and City of London Court, that the V. was not to blame for failing to sheer or pay out chain before the collision, as her master was entitled to assume, until a point of time when it was too late for him to take effective action, that the T. L. would keep clear.

Per Hill, J.: A ship at anchor is not entirely free from duties towards a ship under way, but her duty is not to alter her position or heading at any time short of the time when the situation is such that the ship under way cannot by her own unaided action avoid a collision.

APPEAL by the defendants, the owners of the sailing barge *Viper*, from a decision of the judge of the Mayor's and City of London Court, holding the *Viper* and the plaintiff's barge *True Love* to blame in equal degrees for a collision which took place in St. Clement's Reach, River Thames, on the 14th Oct. 1924.

The facts and arguments of counsel fully appear from the judgments.

E. Aylmer Digby for the appellants (defendants).

R. F. Hayward for the respondents (plaintiffs).

Jan. 11, 1926.—Lord MERRIVALE, P.—This appeal raises a question of some little nicety on the facts. The parties economised in the court below by omitting to secure the presence of nautical assessors. The case in fact, turns upon a question of nautical skill and practical knowledge of the handling of craft.

Plaintiff's barge was the smaller of the two barges and was coming up the Thames, light. The defendants' barge, the heavier barge, laden, had set out earlier in the day from quarries at Grays to come to the Surrey Commercial Docks with a cargo of chalk. She had started at about 8 a.m. in company with other barges similarly laden, but at about 9 a.m., while she was dredging up the Thames, taking advantage of the action of the tide to carry her up the river with her anchor down, the anchor fouled the bed of the river and held her, and she found herself securely anchored. She remained there anchored for something like three hours. When she had been held by her

anchor for about two hours the collision in question occurred.

The *True Love* was coming up the river, taking advantage of the tide, which by that time was a three-knot tide, and was preceded by another barge, the *Arrow*. The *True Love*, coming up river in that way, did not keep a sufficient observation on the state of the river ahead. The master of the *True Love* had seen the *Viper*, and the other barges with which she had set out, making their course up the river, and, taking things for granted, had not taken any particular note of what was happening to the *Viper*, or the mishap which occurred to her, until very shortly before the collision. She was, in fact, not more than two or three lengths off when she became aware that the *Viper* was held by her anchor. The master of the *True Love* says that if he had known earlier he would have come to anchor, or taken some other action. Learning of the position of the *Viper* at the time he did, he could not take any action. He said that the *Viper* failed to keep a good look-out, and that if she had either given warning of her situation while the *True Love* was approaching her or had sheered and paid out her cable to give the *True Love* a fair berth in passing, the collision would not have occurred.

The judge came to the view that the *True Love* was to blame for having no sufficient look-out coming up the reach, and that if she had apprised herself of the position of the *Viper* at a reasonable period before the danger of collision was imminent no collision need have occurred. Against that finding there is no appeal. But the judge considered that the *Viper* ought to have done something, when she was threatened with the collision, to avoid the impending risk. He said in his judgment: "I am not satisfied that there was a sufficient look-out on the other vessel (the *Viper*). If there had been a better look-out she could have sheered."

The difficulty which arises is that there is not before us any distinct evidence of the burden of the obligation which the judge puts upon the master of the *Viper*. She was at anchor and could have been seen to be at anchor by an approaching vessel which kept a good look out, and *prima facie* was to be avoided by vessels which are under way. Consequently, she was entitled to expect, as long as it was reasonable to expect it, that she would be avoided by the *True Love*. But there is an obligation upon the anchored vessel to keep a look-out, and if conditions arise in which action is required, to take the action which persons of reasonable competence would take in the circumstances. The difficulty is in realising what is the action which the judge thinks the *Viper* ought to have taken. He regretted that as the case shaped itself he had not the assistance of assessors. We have been able to consult the Elder Brethren on the subject, and they tell us that the master of the *Viper*, with the weather and tide described, might reasonably have assumed that

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the *True Love* was in control of her own course at a distance of 300 feet and probably at an even greater distance. The master of the *True Love* himself appreciated the danger from the *Viper* at a distance of no more than two or three lengths. There was a three-knot tide and he was making his course up the reach at about four knots over the ground with the light wind there was at the time. That 300 feet took less than a minute in which the master of the *Viper* was warned that some action should be taken.

It was pointed out by Mr. Hayward that a slight change of heading would at any rate have minimised the force of the collision, and that is manifestly true. But the master of the *Viper* was in this position. Ahead of the *True Love* was the *Arrow* which passed clear, and the *True Love* was discovered behind her. What could the master of the *Viper* have done? We are advised that he could not have safely put out chain until he had sheered and had got a heading, and that that would have taken him about half a minute; and to have paid out chain sufficiently to be shifted substantially would have taken more than another minute. But the problems which arise in a situation of that kind cannot be answered by arithmetical calculations, the human factor enters into the case. Here was the master of a barge which had been in difficulties for upwards of two hours and had the protection afforded to a barge at anchor. In that situation a barge under way approaches and comes within a distance which necessitates action—if action is to be taken—on his part, within less than a minute. The burden of proof is on the *True Love*, and having availed ourselves of the assistance of the Elder Brethren, for my part I came to the conclusion that the *Viper* ought not to be held to blame and that the *True Love* is alone to blame. The appeal accordingly will be allowed with costs.

HILL, J.—I agree. The *True Love* was a ship under way and the *Viper* was a ship at anchor. A ship at anchor is not entirely free from duties towards a ship under way, but in my view it would be very dangerous, and only lead to collisions, if it were thought that the duty of a ship at anchor was to alter her position or heading at any time short of the time when the situation is such that the ship under way cannot by her own unaided action avoid a collision. If the ship under way is powerless to act, as it is said here the *True Love* was, the ship at anchor is not to suppose that state of things to exist without warning that the ship is powerless to act; and, up to the time when it becomes apparent to her that the ship is powerless to act, the ship at anchor is entitled to assume that the ship under way will act, and will avoid the collision.

It is clear that up to the time the barges were very near each other the *True Love* could have avoided the *Viper*. The master of the *Viper* must have some little time to consider what he shall do, and on the advice we have received I am clearly of opinion that it

cannot be said that there is anything that the *Viper* ought to have done, and could effectively have done. As to sheering, it is possible that it could have been done within a limited time, but the question still remains as to the direction of the sheering, and having regard to the presence of the *Arrow* it is impossible to say that the master of the *Viper* was negligent in not making the particular sheer which it is now alleged he ought to have made. As to putting out chain, clearly on the advice we have received there was no time to do that. I agree, therefore, that a case of blame against the *Viper* has not been made out.

Appeal allowed.

Solicitors, Keene, Marsland, Bryden, and Besant; R. S. Jackson and Bowles.

Thursday, Jan. 28, 1926.

(Before Lord MERRIVALE, P.)

THE CITY OF BARODA. (a)

Practice—Discovery—Reports of ship's officers regarding loss of cargo—Privilege—Affidavit.

The plaintiffs claimed for short delivery of certain parcels of bristles, in respect of which they were holders of bills of lading, loaded at Shanghai upon the defendants' steamship. The defendants denied liability alleging that the loss was due to pilferage by an organised band of thieves. The defendants had called for reports from the first, second, third, and fourth officers of the steamer, in order to investigate the question of the management of the vessel and the conduct of their officers in the prevention of theft, which reports were in due course obtained through the defendants' agents in China. The defendants claimed that these reports were privileged from discovery.

Held, that the reports were not privileged.

Observations by Lord Merrivale, P. upon the form and contents of an affidavit claiming privilege from discovery for deponent's documents.

The Hopper No. 13 (16 *Asp. Mar. Law Cas.* 473; 132 *L. T. Rep.* 736; (1925) *P.* 52) and Birmingham and Midland Motor Omnibus Company Limited v. London and North-Western Railway Company (109 *L. T. Rep.* 64; (1913) 3 *K. B.* 850) distinguished.

Anderson v. Bank of British Columbia (35 *L. T. Rep.* 76; 2 *Ch. Div.* 644) applied.

APPEAL from the assistant Admiralty Registrar, holding that certain documents disclosed in the defendants' affidavit were privileged from discovery.

The plaintiffs were the holders of bills of lading for certain parcels of bristles loaded upon the defendant's steamship *City of Baroda* at Shanghai in respect of which they claimed

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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damages for short delivery. The defendants, owners of the *City of Baroda*, pleaded by their defence that the loss was due to pilfering by organised gangs of thieves in China.

It appeared that before telling the plaintiffs of the loss the defendants called for a report upon the matter from the captain of the *City of Baroda*, which report was duly made, dated the 20th April. On the following day the defendants, before the plaintiffs made a claim, instructed their agents to obtain reports from the ship's officers, and reports, dated the 24th April, were duly obtained from the first, second, third, and fourth officers of the *City of Baroda*. These reports were disclosed by the defendants in their affidavit of documents, and privilege was claimed upon the grounds that the defendants' London agents, having ascertained that the goods were stolen, and knowing that they were worth 1000*l.*, anticipated that litigation would arise; that the defendants always consulted solicitors in such a case, that it was usual for them to procure materials upon which professional advice could be obtained, and that therefore the reports were prepared in view of anticipated proceedings for the purpose and with the intention of being laid before solicitors. The Assistant-Registrar held that the report of the captain dated the 20th April, being made before the request for a report from the defendants, was not privileged, but that privilege attached to the reports made on the 24th April. The plaintiffs appealed.

Clement Davies for the appellants.—The reports are not privileged. In *The Hopper* No. 13 (16 Asp. Mar. Law Cas. 473; 132 L. T. Rep. 736; (1925) P. 52) specific questions were asked and answered. The case is distinguishable. Notwithstanding that the affidavit claims that litigation was anticipated, it is submitted that the real reason why the reports were asked for, as appears from the correspondence, was that the defendants were making an inquiry into the conduct of their officers, and were not contemplating proceedings being taken against them.

Sir *R. Aske* for the defendants.—There are two classes of privilege, viz.: (1) where specific information is asked; (2) where general instructions are given that certain classes of information shall be furnished. This is a case where a report has been specifically called for, and it is therefore within the principle of the *Birmingham and Midland Omnibus Company Limited v. London and North-Western Railway Company* (109 L. T. Rep. 64; (1913) 3 K. B. 850). It is to be noted that privilege was there held to be shown by an affidavit alleging that the report was made solely for the use of the defendants' solicitors. It is not stated that there was any request. [Lord MERRIVALE, P.: Request is not a governing factor.] The document need not in fact be laid before the solicitor. It is sufficient if it is brought into existence with the object of obtaining his advice: (*The Southwark and Vauxhall Water Company v. Quick*, 1878,

38 L. T. Rep. 28; 3 Q. B. Div. 315). A person is thus protected if he obtains the document for the purpose of taking the advice of his solicitor if he should fail to obtain a settlement of the claim.

Clement Davies replied.

Reference was also made to:

The Theodor Kornor, 1878, 4 Asp. Mar. Law Cas. 17; 38 L. T. Rep. 818; 3 Prob. Div. 162;

Bustros v. White, 1876, 34 L. T. Rep. 835; 1 Q. B. Div. 423;

Anderson v. Bank of British Columbia, 1876, 35 L. T. Rep. 76; 2 Ch. Div. 644.

Jan. 28, 1926.—Lord MERRIVALE, P.—Matters of difficulty necessarily arise in respect of the extent of and the limitations upon the right of discovery in cases like the present where, in the course of commercial transactions and the carriage of goods by sea, a loss has been suffered, and, when the loss has been discovered, questions come into view almost inevitably as to the quarter in which the burden of the loss will fall. The cases which have to be dealt with present very commonly complicated facts. The set of principles which have to be applied to the facts are not at all complicated. It is by keeping in view the principles which have to be applied that something like a working rule can be ascertained and maintained. The question is whether, within the working rules with regard to discovery, the defendants in this case ought to produce a series of reports with regard to the subject-matter of the claim which, in the course of the history of the loss, they have obtained from servants of theirs. The obligation which rests upon the litigant is, perhaps, as well illustrated as in any other way by referring to the terms of the defendants' own affidavit of documents in par. 1. What the defendants were required by the practice to do, and what they proceed to do, is to disclose upon oath what documents are in their possession or power relating to the matters in question in the suit.

Their *prima facie* obligation is to disclose those documents with such particularity that an order for production and inspection can be made. But the *prima facie* obligation which exists is limited by a principle of law which does not need to be expounded to-day, which is summed up in the judgment of Cotton, L.J. in the case of the *Southwark and Vauxhall Water Company v. Quick* (1878, 3 Q. B. Div., at p. 322) in these words: "That, I think, is the true principle, that if a document comes into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice, or of enabling him either to prosecute or defend an action, then it is privileged." That is the broad principle upon which exemption from a *prima facie* right is allowed in the case of communications with solicitors. The matter has been expounded often at great length.

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The principle laid down in that statement by Cotton, L.J. was somewhat elaborated and applied in the case of the *Birmingham and Midland Motor Omnibus Company Limited v. London and North-Western Railway Company* (109 L. T. Rep. 64; (1913) 3 K. B. 850). Questions arose there as to a particular state of facts and as to whether the documents obtained for use by the solicitor of the litigant for the purpose of helping the litigant in his professional capacity were or were not subject to be produced. Buckley, L.J. expounded the rule which I find in the *Southwark Water Company's* case by this statement: "It is not necessary, I think, that the affidavit should state that the information was obtained solely or merely or primarily for the solicitor, if it was obtained for the solicitor, in the sense of being procured as materials upon which professional advice should be taken in proceedings pending, or threatened, or anticipated. If it was obtained for the solicitor, as above stated, it is none the less protected because the party who has obtained it intended if he could to settle the matter without resort to a solicitor at all."

These are plain statements which govern the decision of this case. What was done in the case of *The Hopper No. 13* (16 Asp. Mar. Law Cas. 473; 132 L. T. Rep. 736; (1925) P. 52), out of which, I think, this controversy has more immediately arisen, was done with the intent of applying the principle as to discovery laid down in the earlier cases and exemplified in the case of the *Birmingham and Midland Motor Omnibus Company Limited v. London and North-Western Railway Company* (*sup.*); it did not in any way modify, and certainly was not intended to modify, any of the principles applicable to this matter.

The foundation of privilege from discovery is a sufficient affidavit or the proof by consent of sufficient facts, if there is any consent that the facts shall be established otherwise than by affidavit. It was a peculiarity of the case of *The Hopper No. 13* (*sup.*) that the material which was before the court had been produced in the course of an interlocutory proceeding, and that the privilege which was claimed was not claimed in the fullest and most direct way in the affidavit which had been used; and by consent of the parties the facts were ascertained not with a view of creating a precedent for inquiry in court as to questions of privilege, but really to avoid in a case where despatch was of more consequence, and expense was also a consequence—to avoid delay and expense in the formulating of the controversy which had arisen, and which was well understood, by means of a further affidavit.

In a general way, it is the affidavit of the party claiming privilege which must be referred to, and the party claiming privilege has this great advantage, that, if his affidavit is in explicit terms which bring him within the grounds of privilege, he may not be cross-examined upon it, and unless *aliunde* facts appear before the court which displace the

affidavit, he will be protected by the terms of the affidavit.

The affidavit here is of an unusual character. Sir Robert Aske conceded to me that it proceeds rather upon the lines of an argument founded upon the case of *The Hopper No. 13* (*sup.*) than upon those grounds of sober and restrained statements of fact whereby privilege from discovery is obtained. The deponent relates circumstances under which the loss had become known to his firm, and he says that certain memoranda were considered, and then he assumes a fact and he says "in view of the fact that the defendants could not see their way to accept responsibility for the loss"—there being no evidence of any such fact; and, so far as I know, it not being the fact—"it was anticipated that proceedings would arise." I make a benevolent guess as to where it was anticipated. Then the deponent enters upon generalities. He says the defendant company always consults solicitors in such a case, and for such purpose it is usual to procure materials upon which professional advice could be taken with reference to anticipated litigation. It sounds rather like an extract from a popular lecture upon business methods where there is possible litigation. At the close the argument is thus summed up: "The documents referred to were therefore prepared for the defendants by Captain Hufton in view of anticipated proceedings for the purpose, and with the intention of the same being laid before their solicitors confidentially and in their professional capacity as materials upon which professional advice should be taken."

I am not going to comment further upon the terms of that affidavit; but the affidavit which will inevitably protect the party from discovery will not be an argument, and it will contain the grounds of the alleged privilege so framed that the party who has stated them upon his oath will expose himself to the proper penalties if those grounds are untruly stated—if the claim is not honestly made. I have no doubt that the claim here is honestly made, but it is made with the intention of ascertaining whether protection can be got in this case. The affidavit being of that character, with an argumentative conclusion of what might be the necessary contents of an affidavit of fact, I have been referred by counsel to the correspondence between the parties—the correspondence between the plaintiffs and the defendants—and a previous correspondence between the defendants and their agents and other persons.

If I could come to the conclusion that the affidavit here was a mere routine mode of stating the conclusions upon which privilege is properly founded, and if the correspondence provided support for a conclusion to that effect, I might see my way to sustain the decision of the learned deputy registrar. But I have read the correspondence which has been produced. The documents in question, naturally enough, have properly not been produced, but the correspondence which has been produced seems to me to show that the documents

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in question are not within the privilege when it is properly understood. There are no documents which came into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice or enabling him either to prosecute or defend an action, and they do not come within the description of documents obtained for the solicitor.

The true position was that a serious question had arisen as to the conduct of those in charge of one of the defendant company's vessels, and the management properly found it necessary to insist upon immediate reports which would explain a very grave occurrence on board the defendants' vessel. Whether they might or might not refer the matter ultimately to solicitors was entirely an open question; but the immediate question was that of the management of the vessel and the conduct of their officers in the prevention of theft on board their ship; and the case does not fall within the principle laid down in the *Southwark Water Company* case, and illustrated by the *Birmingham* case, and in the case of *Hopper No. 13*; but it does come within that class of cases to which James, L.J. referred in the case of *Anderson v. Bank of British Columbia* (35 L. T. Rep. 76; 2 Ch. Div. 644), where he said that the privilege which exists for communication with solicitors and the rule governing that privilege seem to have no application to a communication between a principal and his agent in the matter of the agency giving information on facts and circumstances of a transaction which becomes the subject-matter of litigation.

It is not necessary to examine all the authorities which have been cited. Counsel have been so good as to supply me with all the material which appeared to bear on the case. But I am satisfied in this case, from the nature of the affidavit and from the nature of the correspondence, that the documents in question did not come into existence for the purpose of being communicated to the defendants' solicitors and were not obtained for the solicitors. For those reasons this appeal must be allowed.

Solicitors for the appellants, *Waltons and Co.*

Solicitors for the respondents, *Ince, Colt, Ince, and Roscoe.*

Dec. 21, 1925, Jan. 15, and Feb. 9, 1926.

(Before HILL, J.)

THE MODICA. (a)

Collision — Both to blame — Division of loss — Costs — Discretion — Maritime Conventions Act 1911 (1 & 2 Geo. 5, c. 57), s. 1 (1).

When two vessels are found to blame for a collision, and the consequent loss is ordered to be divided between them, there is no longer any rule in the Admiralty Court that "if both vessels are to blame, neither shall gain by any litigation in the matter," in pursuance of which rule no order

for costs was formerly made in such cases. The Maritime Conventions Act 1911 having put an end to such rule as regards damages, and having substituted for it liability in each vessel to make good the damage and loss in proportion to the degree in which she was at fault, has also put an end to the rule as regards costs. Subject to the rules in force in the High Court, costs are therefore in the discretion of the judge.

The Rosalia (12 Asp. Mar. Law Cas. 166; 106 L. T. Rep. 351; (1912) P. 109); and *The Bravo* (12 Asp. Mar. Law Cas. 311; 108 L. T. Rep. 430) considered.

Observations per Hill, J. as to the manner in which the discretion of a judge as to costs in such cases might be exercised.

ACTION for damage by collision.

The plaintiffs, owners of the steamship *George M. Embiricos*, claimed damages for injuries sustained in a collision between their vessel and the defendants' steamship *Modica*. Hill, J. held both vessels to blame, and apportioned the blame two-thirds to the *George M. Embiricos* and one-third to the *Modica*. On a question of costs,

Dunlop, K.C. and Digby for the defendants, owners of the *Modica*.—There is no rule that no order for costs should be made in such a case as this. The costs are in the discretion of the judge and it is submitted that in the present case it would be a proper exercise of discretion to order costs to be paid by the respective vessels in the same proportion as the damages.

Langton, K.C. and Noad for the plaintiffs, the owners of the *George M. Embiricos*.—It is admitted that costs are in the discretion of the judge, but it is submitted that in the present case there should be no order for costs.

Cur. adv. vult.

Feb. 9, 1926.—HILL, J.—The question I have to decide is whether any order should be made as to costs. At the trial I pronounced a decree of liability as follows: the *George M. Embiricos* two-thirds and the *Modica* one-third to blame. The owners of the *Modica* ask me to make an order as to the costs in their favour—so as to give them a proportion of the costs.

Since the Maritime Conventions Act 1911 it has been the practice in cases of both to blame, in whatever degree the blame was apportioned, to make no order as to costs. As to the practice before that Act, there was a time when the costs were added to the damages and divided; at a later time it became the rule that each side should bear its own costs. That prevailed for many years, both before the Judicature Act of 1873 had made the Admiralty Court a division of the High Court of Justice, and thenceforward to 1912. After the Maritime Conventions Act of 1911 had come into operation, the question of costs was raised in two cases where the blame was apportioned unequally, and in both each side was left to bear its own costs. In *The Rosalia* (12 Asp. Mar. Law Cas.

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166; 106 L. T. Rep. 351; (1912) P. 109) Bargrave Deane, J. said he made the order "as best meeting the justice of the case." In *The Bravo* (12 Asp. Mar. Law Cas. 311; 108 L. T. Rep. 430) Sir Samuel Evans was careful to say that he was not laying down any strict rule. But, after those cases, the practice seems to have become settled, and as a matter of routine, upon every judgment of both to blame, after a contest where there was no admission of blame, the judgment was drawn up without costs to either side. In my time—now covering a period of nine years—I cannot recall any case in which the question was raised; certainly there has been none in which it was argued until the present case. In *The Bravo* (*sup.*), Sir Samuel Evans came very near giving himself a general direction. He said: "I think on the whole the practice which has prevailed of each vessel paying her own costs where both are to blame ought to be applied to the new cases under the Maritime Conventions Act. . . . The preparation of the case does not alter in character by reason of the degree of fault, and I think in practice it will be generally found that the best course is for me to say, apart from any special circumstances, that each delinquent vessel if she comes into court, either to make an attack or to repel an attack, will have to bear her own costs." I presume that it was because of these words that the question was not again raised.

On the argument in the present case it was admitted by Mr. Langton that there was no binding rule. But I should hesitate to depart from an established practice even to the extent of considering the question of apportioning the costs without examining its origin and basis. It will, I think, be useful to consider how the practice before 1911 came into existence, and the reason of it, and to consider whether it applies in its full force to the case where since 1911 blame is apportioned unequally, and also to consider whether what Sir Samuel Evans said about the preparation of the case applies to all cases. On this last point there are, in my experience, cases of both to blame in which a very small part of the preparation of the case is concerned with the matter for which one ship is found to blame and nearly the whole of it is concerned with the matter for which the other ship is found to blame. To take an illustration, that is probably true in all cases where it is found that ship *A.* was under a duty to keep course and speed, and that she did so, but she is held in fault in that she did not reverse her engines when the time arrived that ship *B.*, neglecting a duty to give way, could not by her own action alone avoid collision. In such a case it may appear upon the pleadings that ship *A.* did nothing, and the whole controversy is whether the duty to give way was upon ship *A.* or ship *B.* It is true that the preparation of the case does not alter; ship *A.* attacks ship *B.* to show that it was the duty of ship *B.* to give way and defends herself by showing that it was not her own duty to give way, but on all this part of the case ship *A.*

succeeds both in attack and defence, and the fault in her is in a matter which appears on her pleading, and which calls for very little preparation and very little evidence. This applies with almost equal force if she pleads that she did reverse but it is held that she did not; for still only a small part of the evidence is directed to her engine action at the last. But apart from this reason which influenced Sir Samuel Evans, is there anything in the rule before 1911 which ought to be a guide to the court after 1911 to the extent of saying that in general no costs should be given when both ships are to blame in unequal degrees? The history of the rule appears to be as follows: (*Hay v. Le Neve*, 1824, 2 Shaw's Scotch Appeal Cases, 395) is generally regarded as finally settling the Admiralty rule to be that if there is blame causing the accident on both sides they are to divide the loss equally: (see Lord Blackburn in *Cayzer v. Carron Company*, 1884, 5 Asp. Mar. Law Cas. 371; 52 L. T. Rep. 361; 9 App. Cas. 881).

This conclusion was based on dicta of Lord Stowell in two cases, and upon a decision of Sir James Marriott in 1789, and was arrived at after consultation with Lord Stowell. Sir James Marriott had decreed that the whole damage and the costs of suit on both sides be equally borne by the parties in the suit. In *Hay v. Le Neve* (*sup.*) Lord Gifford in the House of Lords, after dealing with the damage, said: "Then I should propose to your Lordships to find that the appellants are not to pay interest. I do not think, in such a case as this, they ought to be called upon to pay interest upon this sum; and that the respondents and appellants ought to bear respectively their own expenses in the suit. As respects Sir James Marriott's case, expenses were brought together and divided; it would, perhaps, be more equitable to say that they should each pay their own expenses." I have failed to discover the order as drawn up. Lord Gifford said he would submit it on the following morning (the 16th June 1824). However, in *The Washington* (1841, 5 Jurist, at p. 1067), Dr. Lushington said: "The law is, if neither is to blame, each pay their own costs; if both are to blame, the cost fall on both. . . .

I decree the damages, costs, and expenses of both parties to be thrown together and to be equally divided, according to the precedent of *Hay v. Le Neve* (*sup.*) in the House of Lords." At some time or other, the practice which Lord Gifford thought the more equitable was followed instead of the practice of adding the costs together and dividing them, and in all cases both to blame each side was left to pay its own costs. In *The City of Manchester* (1880, 4 Asp. Mar. Law Cas. 261; 42 L. T. Rep. 521; 5 Prob. Div. 221), James, L.J. said that it was done to avoid the expense of apportionment. It certainly saved two taxations. As to the general rule, Brett, L.J., in *The Hector* (1883, 5 Asp. Mar. Law Cas. 101; 48 L. T. Rep. 490; 8 Prob. Div. 218, at p. 220), said: "My own view is that the Admiralty Court which had

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always exercised very wide discretion with regard to the discipline of the seas, laid down the rule if both vessels are to blame neither of them shall gain by any litigation in the matter." The practice was settled, and settled with reference to a state of law in which, when both ships were to blame they were equally liable for the damages.

Before *The City of Manchester* (sup.) and *The Hector* (sup.) the Admiralty Court had under the Judicature Act 1873 become a branch of the High Court of Justice, and it had been laid down that the same principles as to costs applied as in other divisions of the High Court, as, for instance, the rule that, in the absence of special circumstances, costs follow the event. *The Conдор* (1879, 4 Asp. Mar. Law Cas. 115; 40 L. T. Rep. 442; 4 Prob. Div. 115); see also *The Monkseaton* (1889, 6 Asp. Mar. Law Cas. 383; 60 L. T. Rep. 660; 14 Prob. Div. 51). And it may perhaps be said that, as the law did not inquire into degrees of fault, a judgment of both to blame was in every case a judgment that they were equally to blame, and that the event was that each succeeded and failed in equal degree. At any rate, the rule that the loss was divided equally remained, and was indeed enjoined by the Judicature Act 1873, and the practice as to costs remained with it. But a rule as to costs which grew out of a particular rule as to liability in damages is not necessarily applicable in relation to a different rule as to liability. The Maritime Conventions Act 1911, which gave effect to an international agreement, put an end to the rule that "if both vessels are to blame, neither shall gain by any litigation in the matter," and substituted the rule that if both are to blame "the liability to make good the damage and loss shall be in proportion to the degree in which each vessel was in fault." It seems to me that the old rule as to costs ought not to be treated as governing the changed conditions.

Then we are left with the general principle that costs are in the discretion of the judge, subject to such general rules as are in force in the High Court of Justice, including the rule that, in the absence of special circumstances, costs follow the event. But what is the event in cross-actions for damage by collision, in which each ship puts the whole blame on the other and both are found to blame and liable to make good the damage, but in unequal degrees? Clearly, in a consolidated action you cannot give the plaintiff the costs of the claim, and the defendant the costs of the counterclaim, for it is a mere accident that one is made plaintiff and the other defendant. In one sense, each side succeeds and each loses. But as in the illustration I have given, there are cases—I incline to think many cases—in which to ignore the proportions in which they respectively succeed and lose is to shut one's eyes to the real facts of the particular case and to produce a result which is inequitable.

In another and a truer sense the event is that one side succeeds to the extent of, say, two-

thirds, and the other to the extent of one-third. But, again, there may be cases in which to divide costs in the same proportions will produce results which are inequitable. For instance, in a fog collision case, each sets out to prove that the speed was moderate, the whistle being duly sounded and the engines duly stopped, but on the story of one as pleaded there is an admission that the course was altered after the other was heard and before she was seen. The finding is excessive speed in each, and alteration of course in the one. That one will almost certainly be held the more to blame. But her peculiar fault will have appeared upon the pleadings and the evidence on both sides will have been directed almost entirely to the question on which is held alike to blame. Mr. Dunlop suggested in argument that perhaps the proper way was to distribute the costs according to the issues upon which the ships respectively succeed and fail. He recognised the difficulty of such a proceeding, for he did not ask me to attempt it in the present case. You cannot do it unless you can really break up the case into several issues, and unless there is some reasonable chance of allocating the costs to respective issues. And in cases in which each ship sets out to prove that all the fault was in the other, you cannot in general break up the issues more minutely than these: Was ship *A.* in fault? Was that fault a cause of the collision? Was ship *B.* in fault? Was that fault a cause of the collision? The question "Did ship *A.* neglect a duty to keep out of the way of ship *B.*?" is not an issue by itself: it is necessarily wrapped up with the question "Did ship *B.* keep her course and speed?" The issue depends on the answer to both questions, coupled with the further question "Did the action or neglect of both or one of them contribute to the collision?" I need not multiply instances. The conclusion I have arrived at on the whole matter is, in cases where each sets out to prove that the whole blame is in the other and both are held to blame in unequal degrees, that the court must be guided by the circumstances in each case. I may add that, for myself, I should not be disposed to add the costs together and divide then in certain proportions. Not only would that entail two taxations, but where one side had incurred much greater costs than the other, such a division might produce most inequitable results. I shall in proper cases feel myself at liberty to give to the side which is held to blame in the similar degree such and such a proportion of that side's cost, being guided in each case by the facts and circumstances of the particular case.

In the present case, the fair thing, in my opinion, is to leave each side to bear its own costs. I come to that conclusion upon the special facts of the case. It was a peculiar case in which the two ships were running more or less side by side and in close proximity for over half an hour, and finally fell together. Each said the other was the overtaking ship; I found in the *Modica's* favour that though

at an earlier time she had overtaken the *Embiricos*, yet at the crucial time the *Embiricos* was overtaking her, or rather, still under the duty of an overtaking ship. I found also that the *Embiricos* was keeping too close to the *Modica* laterally. But on the *Modica*'s own case, the *Modica* made several changes of speed and had the *Embiricos* in close proximity while she did so. This had to be justified or excused if possible, or it had to be shown that it did not contribute to the collision. Even if the *Embiricos* had admitted on the pleadings that she was overtaking and was too close laterally, that would not have proved that the *Embiricos* thereby caused the collision, unless the *Modica* could show that her changes were justified or did not cause the collision. Even if the *Embiricos* had so admitted the *Modica* would have had to give substantially the same evidence as she gave; she could not have omitted any of her witnesses and they could not have omitted much of their evidence. On the particular facts of this case I think that there should be no order as to costs. I think Mr. Langton, who has succeeded, ought to have the costs of this further argument.

Solicitors: *William A. Crump and Son; Thomas Cooper and Co.*

[NOTE.—In the case of *The Robert Koeppen*, tried 3rd, 4th, and 5th March 1926, Hill, J. held the *Robert Koeppen* three-fourths and the plaintiffs' vessel *Egyptian* one-fourth to blame, and ordered the defendants to pay one-half of the plaintiffs' costs.]

Tuesday, Feb. 9, 1926.

(Before Lord MERRIVALE, P.)

THE CARLSTON AND THE BALCOMBE. (a)

Practice—Collision—Preliminary act—Two defendants—Collision between defendants' vessels—No action between defendants—No obligation between defendants to file preliminary act at the instance of another defendant—R. S. C. Order XIX., r. 28.

Where there are two defendants to a damage action who have been in collision with each other before the collision in respect of which the plaintiff claims, one defendant is not liable to file a preliminary act at the instance of the other.

APPEAL from an order of the assistant-registrar.

The plaintiffs, owners of the steamship *Coaster* brought an action against the owners of the steamship *Carlston*, claiming damage sustained by the *Coaster* in collision with the *Carlston*. Preliminary acts were duly filed. Subsequently the plaintiffs joined the owners of the steamship *Balcombe*. No preliminary act was filed by the owners of the *Balcombe*.

It appeared that a collision had taken place between the *Carlston* and the *Balcombe* shortly before the collision between the *Coaster* and the

Carlston. Upon the application of the owners of the *Carlston* an order was made by the Admiralty Assistant Registrar that a preliminary act should be filed by the owners of the *Balcombe* in relation to the collision with the *Carlston*. The owners of the *Balcombe* appealed.

Order XIX., r. 28, by the rules of the Supreme Court, provides :

In an action in any division for damage by collision between vessels, unless the court or judge shall otherwise order, the solicitor for the plaintiff shall, within seven days after commencement of the action, and the solicitor for the defendant shall within seven days after appearance, and before any pleading is delivered, file with the Registrar, Master, or other proper officer, as the case may be, a document to be called the Preliminary Act. . . .

E. Aylmer Digby for the appellants.—A collision certainly took place between the *Carlston* and the *Balcombe* some time before the collision between the *Coaster* and the *Carlston*. No doubt it is alleged by the *Carlston* in her defence that this collision was the cause of her collision with the *Coaster*, and that it was brought about by the fault of the *Balcombe*. No claim has been made by the owners of the *Carlston* against the owners of the *Balcombe*, and they are not, therefore, in the relation of plaintiff and defendant, and no preliminary act can be ordered against the owners of the *Balcombe* at the instance of the owners of the *Carlston*. The order made by the assistant registrar was therefore wrong. The result of the order would be that there would be in existence preliminary acts in an action which had never been brought. The issue in this action is the liability of the owners of the *Balcombe* to pay any liability which the owners of the *Carlston* may have to the plaintiffs. The liability of the *Balcombe* to the *Carlston* in respect of the collision between them may be a step, but is no more than a step, in the chain of liability between the owners of the *Carlston* and the plaintiffs. There is no authority to support the order which the assistant registrar has made. The point discussed in *The El Oso* (16 Asp. Mar. Law Cas. 530 ; 133 L. T. Rep. 269) is quite different. There were two actions in *The El Oso* ; one action was between the two defendants in the other action ; but it is worth noticing that in the action in which there were two defendants, the defendant who was also defendant in the other action does not appear to have filed a preliminary act in the first-mentioned action in relation to the collision between himself and the other defendant.

Hayward for the respondents.—The rule is not limited to cases where the parties stand in relation of plaintiff and defendant. It is sufficient that the appellants are defendants. The respondents are quite willing to file a preliminary act in relation to the collision with the *Balcombe* if the owners of the *Balcombe* are ordered to do so. The principle of mutuality, upon which the decision in *The El Oso* (*sup.*) was based, is not satisfied unless all parties file preliminary acts. Moreover, preliminary acts

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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have apparently been filed in similar cases without objection. It is true that there is no reported case, but reference to the pleadings in the three following unreported cases seems to show that preliminary acts were filed: *The Disperser* and *The Swift*; *The Dundee* and *The Dolly Vardon*; *The Matsen*. Reference was also made to *The Secretary of State for India v. Hewitt and Co. Limited* (6 Asp. Mar. Law Cas. 384; 60 L. T. Rep. 834), *The John Boyne* (3 Asp. Mar. Law Cas. 341; 36 L. T. Rep. 29; 25 W. R. 756). Further, if the owners of the *Carlston* commence an action against the owners of the *Balcombe*, the latter will have to file a preliminary act in relation to that collision. The rule should not be construed so as to cast upon the owners of the *Carlston* the expense of commencing proceedings in order to be placed upon what, it is submitted, is an equal footing with the other parties in this action. The preliminary act cannot therefore be withheld from the owners of the *Carlston*, and, that being so, the order made should be upheld.

LORD MERRIVALE, P.—I adjourned this summons into court because it deals with a matter in the conduct of actions in the Admiralty jurisdiction which has from time to time recently caused trouble in the matter of procedure and which in preceding investigations of it I have found not free from technical and practical difficulties. I am happy to say that the discussion I have had the advantage of listening to has put me in a position to define somewhat further the operations of the rule in question, Order XIX., r. 28, in cases where third parties are being sued in respect of collisions between vessels.

The collision here was between the vessel *Carlston*, a vessel of the first defendants, which was in collision with a vessel of the second defendants, whereby the *Carlston* was in collision with the *Coaster*. The plaintiffs in the action are the owners of the *Coaster*; and they brought a damage action with respect to the *Carlston*. In respect of that action all the proper steps with regard to preliminary acts were taken which are now regulated by Order XIX., r. 28. The first defendants, the owners of the *Carlston*, in their defence alleged, as I understand it, that the collision between their vessel and the *Coaster* was not due to the negligence of those in charge of their vessel, but of those in charge of the *Balcombe*, the vessel of the second defendants. Thereupon the plaintiffs amended their writ and included the second defendants in one action and allege that they have a claim for compensation for damage against both the defendants by reason of the collision of the vessel of the first defendants with the vessel of the plaintiffs. They said: "You, the defendants, jointly brought about the collision with your vessels, and both of you must pay the damage."

Thereupon this situation arose. There was the plaintiff's claim for damages for collision between vessels and there were two defendants;

and *prima facie* there was a case against them within the ambit of the operative words of rule 28 as to damage by collision between vessels. With respect to that collision the plaintiff had a defendant and joint defendant, or however they might be classified. On the other side the plaintiff had an obligation in respect of the two defendants. Whether he has fulfilled this with respect to No. 2 I do not know. Perhaps he thinks he has—I do not know—and defendant No. 2 is saying nothing.

In these circumstances defendant No. 1 has applied for and obtained an order that defendant No. 2 shall file preliminary acts; and it is the regularity of that order that is in question here. Mr. Digby contends on the part of defendant No. 2 that defendant No. 1 is not within the meaning of the operative words of rule 28 in making a claim for preliminary acts; and he says defendant No. 1 is making no claim against defendant No. 2. Mr. Hayward says it is a technicality that can be cured by certain procedure which he indicated. It is not a technicality in my view. Assume defendant No. 2 files preliminary acts, defendant No. 1 will have the advantage of seeing it at the time indicated in the rule and at that time will have incurred no liability as against defendant No. 2. That will depend upon what happens at the trial of the action. Not only so, but he may go to trial as against the plaintiffs and he will not be bound as against the second defendant by any *res judicata*. He will be at large so far as *res judicata* is concerned. It is true that he will have had valuable guidance in forming a sound judgment whether he can venture to bring proceedings against defendant No. 2; and he will have this further advantage, that, while defendant No. 1 is not necessarily bound, defendant No. 2 will become bound, or prejudiced if he is not bound, by stating the situation with respect to the controversy in the terms of a document from which it is difficult to depart. Therefore, in my view, it is not a mere technical matter; otherwise I should use any ingenuity I might derive from suggestions of the Bar and should endeavour to defeat it.

The question is whether under rule 28 the first defendant is entitled to assert his rights as plaintiff against the second defendant. In my judgment he is not. The party who is entitled to preliminary acts against defendant No. 2 is the plaintiff; and the first defendant would be entitled only when he undertook that obligation and treated himself as a plaintiff alleging collision against the second defendant.

As to the first defendant, he is in this position. He can issue his writ forthwith against the second defendant. Mr. Hayward said it is an unnecessary expense. Well, if he is proved not to have cause for an action against the second defendant it will be troublesome, but if he has a cause of action against the second defendant he can issue his writ, and thereupon—and, as I understand, Mr. Digby does not deny that—a second writ being issued, he must deliver the

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best preliminary acts and reply he possibly can, just as the first defendant is bound to deliver preliminary acts. The first defendant will then become a plaintiff under rule 28 and the second defendant who has a plaintiff opposed to him other than the plaintiff in the action will also be subject to the obligations of a defendant.

That to my mind is the effect of the rule ; and therefore this application ought to succeed and there ought to be no order, as matters now stand, for preliminary acts by the second defendant at the instance of the first defendant. In my judgment if it were a question of discretion the principle which I adopted after some consideration in the case of *The El Oso* (16 Asp. Mar. Law Cas. 530 ; 133 L. T. Rep. 269) that the guiding principle with respect to these preliminary acts, that of mutuality, would be infringed by the order made in this case where one of the parties (defendant No. 2) would be bound by the preliminary acts he had delivered, whereas the first defendant at whose instance he had delivered them would not be bound in my judgment as against that second defendant.

For this reason this order must be revoked ; and if there is any change in the relative positions of the parties in view of the opinions I have expressed, there will be no necessary difficulty in the conditions brought about by that change.

Solicitors for the appellants, *Thomas Cooper and Co.*

Solicitors for the respondents, *Pritchard and Sons.*

Wednesday, March 10, 1926.

(Before BATESON, J.)

THE GOLAA. (a)

Practice—Arrest of vessel—Bail—Bail previously given in an action pending in the courts of a foreign country—Lis alibi pendens—Motion to set aside proceedings in England—English proceedings oppressive and unfair.

On the 16th Jan. 1923 the defendants' vessel was arrested in proceedings in America commenced by the plaintiff in respect of damage done by the vessel to the plaintiffs' oil pipe lines in Mexico. Bail was given, the defendants' vessel was duly released, and the proceedings continued.

On the 27th Feb. 1926, whilst the proceedings were still pending in America, and the defendants' bail still in existence, the plaintiffs commenced proceedings in England in respect of the same cause of action, and the defendants' vessel, being within the jurisdiction, was arrested and bail given. Thereupon the plaintiffs discontinued the proceedings in America.

Held, on motion by the defendants to set aside the writ and subsequent proceedings, that the issue of a writ, and bail given in this country whilst the proceedings and bail in America were in existence, were oppressive and unfair, and that the writ and subsequent proceedings ought to be set aside.

The Christiansborg (1885, 5 Asp. Mar. Law Cas. 491 ; 53 L. T. Rep. 612 ; 10 Prob. Div. 141) followed.

MOTION to set aside writ and subsequent proceedings.

The plaintiffs, the *Compania Mexicana Hollandsea La Corona S.A.*, on the 27th Feb. 1926 issued a writ claiming damages in respect of injury to their pipe lines at Tampico, Mexico, alleged to have been caused by the negligence of the defendants or their servants in charge of their steamship *Golaa*. Bail was given. At the time of the issue of the writ there were pending in the courts of the United States proceedings which had been commenced by the plaintiffs in respect of the same cause of action, and in which bail in the sum of \$28,000 had been given by the defendants. On the day after the arrest of the *Golaa* in this country the plaintiffs discontinued the proceedings in America.

Digby for the defendants.—The proceedings in England whilst proceedings are pending in America in respect of the same cause of action are vexatious and ought therefore to be set aside. This case is stronger than *The Christiansborg* (1885, 5 Asp. Mar. Law Cas. 491 ; 53 L. T. Rep. 612 ; 10 Prob. Div. 141). It does not matter that the American proceedings are now discontinued. The court must consider the position as it was on the 27th Feb. when this writ was issued. The defendants ought not to be required to give bail twice in respect of the same cause of action. [Reference was also made to *The Hagan* (11 Asp. Mar. Law Cas. 66 ; 98 L. T. Rep. 891 ; (1908) P. 189)].

Langton, K.C. and Darby for the plaintiffs.—The principle underlying *The Christiansborg* (sup.) and *The Mannheim* (8 Asp. Mar. Law Cas. 210 ; 75 L. T. Rep. 424 ; (1897) P. 13) and the doctrine of *lis alibi pendens* is that the proceedings sought to be set aside are vexatious or oppressive. There is nothing vexatious or oppressive in this action because the plaintiffs have discontinued in America and are willing to pay all costs reasonably incurred by the defendants in those proceedings and are willing that your Lordship should tax them as an arbitrator, but this offer has been refused. In setting aside proceedings on the ground that they are oppressive the court must see clearly that no injustice is done : (see *Peruvian Guano Company v. Bockholdt*, 1882, 48 L. T. Rep. 7 ; 23 Ch. Div. 225). It makes no difference that bail has been given in the American proceedings. It never appears to have been suggested previously that bail made any difference. Any expressions of opinion to the contrary in *The Christiansborg* (sup.) or

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law

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The Mannheim are merely *obiter*. The matter is one for the discretion of the court, and the discretion will be exercised upon the facts.

Digby was not called upon to reply.

BATESON, J.—The facts of this case seem to be as follows. Some time in Oct. 1923 the *Golaa* did some damage to pipe lines belonging to the plaintiffs. On the 28th Dec. 1923, it is stated, though it is not proved by affidavit, that the owners knew of this claim being made against the ship. There were some interviews apparently between Messrs. Cooper, the solicitors for the defendants, Messrs. Webster, the underwriters' agents, I expect—a well-known firm who act for foreign underwriters—and the plaintiffs' representatives in this country, and before any arrest of the ship in America Messrs. Webster had offered to the plaintiffs, through Messrs. Cooper, their undertaking, which I should have thought would almost in every case be accepted. The offer was made to Mr. Elmslie, who represented the plaintiffs, and, he having no authority to accept an undertaking only, the ship was in fact arrested on the 16th Jan. 1924, in America, and bail to the extent of 28,000 dollars was provided by the defendants to meet that claim. On the 17th Jan. Messrs. Webster wrote to the plaintiffs' agents in this country, the Anglo-Saxon Petroleum Company, saying: "We have now received telegraphic advice from our friends in Norway that bail will be arranged here." In answer to that Mr. Elmslie wrote on the 21st Jan. as follows: "No doubt Messrs. Cooper will have informed you as to the result of our interview on the 19th. The case will now be dealt with in New York." And the action has gone on. To what extent it has gone on I do not know, because all that I have seen is the actual libel in the New York proceedings. But it has gone on since that date. The ship has been in this country, I am told, several times since; and on the 27th Feb. 1926, the writ in this action was taken out, and the ship was arrested in London. A motion is then made by the defendants to set aside this writ, on the ground that they have already given bail in America to satisfy the claim, which is exactly the same claim here as the one in America.

The question is whether I ought to set aside that writ in accordance with the decisions to which Mr. Digby has called my attention, namely, *The Christiansborg* (1885, 5 Asp. Mar. Law Cas. 491; 53 L. T. Rep. 612; 10 Prob. Div. 141). I think it is clear that this is a breach of faith in the sense that, having got bail in one country, thereby releasing the ship from any claim for this particular damage—the bail being substituted for the ship—it is contrary to good faith to pursue the ship in another country, and to re-arrest her for no reason that has been put before me at all. No suggestion has been made that the case cannot just as well be tried in America as it can here, except the fact that the Norwegian

owners are nearer to this country than they are to America.

This action has been going on in America for two years. The vessel has been trading, and her arrest in the Thames of course interferes with her trading. I do not know, but it may be most inconvenient to ask the defendants to put up a second amount of bail, 28,000 dollars being something over 5000*l.*, while their bail guaranteed in America is still standing. I think that that is most oppressive and most vexatious. Mr. Langton says that no case like this has ever been reported, and I think there may be very good reason for that. Nobody has ever attempted to try to do what the plaintiffs are attempting in this case, getting bail in one country, keeping it and re-arresting the ship, and asking for the same bail again. The plainer the case the less authority you are likely to find. Mr. Langton relies upon *Peruvian Guano Company v. Bockholdt* (1882, 48 L. T. Rep. 7; 23 Ch. Div. 225), and the fact that this case is not like that of *The Christiansborg* (*sup.*), or *The Mannheim* (8 Asp. Mar. Law Cas. 210; 75 L. T. Rep. 424; (1897) P. 13), because he says that the expressions in the judgments there were really *obiter*. He also relies on the dissenting judgment of Lord Esher in *The Christiansborg*.

The *Peruvian Guano* case was not a case of arrest at all. It was a question of whether two actions should go on at the same time, one in a foreign country and one in this country, regarding different ships, and the Court of Appeal held that there was no reason why the two actions should not go on at the same time because different remedies were available. This is a case of bail, not a question of two actions. It is a question of double bail which I think makes a very considerable difference. *The Christiansborg* (*sup.*) is more nearly like this case because the court in effect held that the guarantee in that case was the equivalent of bail. Sir J. Hannen says this: "By that release it was plainly meant that the vessel was to continue on her voyage and be useful in any port of the world to her owners, and not merely that she was at liberty to navigate Dutch waters. But the plaintiffs, by commencing an action here, and arresting this vessel here, have set at naught this theory, though they have in Holland a security according to the law of that country and satisfactory to the plaintiffs' agents in that country. The plaintiffs seem to think that they may arrest this ship wherever they find her, and so defeat the object of giving bail in Holland. It appears to me, therefore, that justice requires that both suits instituted in this country should be stayed, and that the vessel should be released." I think that is the reason for Sir J. Hannen's decision. It commends itself to me, and I think it is followed out in all the judgments in the Court of Appeal. Lord Esher says: "I think it would be vexatious; in fact, to call upon the owner of the ship in respect of the same cause of action to give bail

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in the two courts at the same time." Further down he says: "But the present case is stronger, for either the proceedings in Holland are shown to be different from those in the English Admiralty Court, and the plaintiffs will have no chance or possibility of obtaining judgment with effect in Holland; or, on the other hand, the proceedings in Holland are the same as those here. Then it is clear that after the release of the ship upon the guarantee between the parties an English court of Admiralty would not try the case." So there is a question in his mind as to whether there was some possibility of getting some judgment in Holland. He seems to say quite clearly that, if the proceedings in Holland are the same as here, the English Court of Admiralty would not try the case. As far as I know this case can be just as well tried in the courts in America as it can here. Baggallay, L.J. seems to me to be dead against Mr. Langton's contention, and Fry, L.J.'s judgment seems to be equally fatal to Mr. Langton's arguments.

I need not set out in detail the passages already referred to. In *The Mannheim (sup.)*, Gorell Barnes, J. puts it shortly as follows: "It is therefore said that if bail is put in in the suit, you have, by doing that, procured and purchased the release of your ship, so that she cannot be arrested again." Now in this case, after the motion to set aside the writ was made, it appears that on 27th Feb. 1926, about 11.30 a.m., according to Mr. Brown's affidavit, his solicitors informed him that the vessel had been arrested, and advised him to dispatch a cable to discontinue the American proceedings. He then reported to his office and gave instructions for the dispatch of a cable to discontinue proceedings in America. That was sent off on 27th Feb. at 1.25 p.m., that is to say, after the writ had been issued. The first intimation of the discontinuance was when this affidavit was handed to the defendants on 8th March, but I do not think it matters. There was no discontinuance when the writ was issued, and I do not think it cures the unfairness or want of good faith in issuing the writ here, whether it happened a day or an hour afterwards. The fact remains that bail is demanded in both countries. It is suggested that on paying the costs here there is nothing vexatious or oppressive in such proceedings, but when one looks at the affidavit that has been put in, as to what has happened in America about discontinuance, it appears that the total amount of the taxed costs is some 335 dollars. That is only the taxable court costs. What the actual costs are that have been incurred by the defendants out in America I do not know. The thing has been going on for two years, and I suspect that they are very considerably more than that, and one does not know how far evidence has been collected out there in a case which has been in existence for some two years. If the case is now started here for the first time, and has to be begun two years after the event, no one

knows where the witnesses have gone to, or what position defendants may be in in having to meet a case in this country after a long lapse of time. I think it would be most improper to allow the writ to stand; and I set it aside with costs.

Solicitors for the defendants, *Thomas Cooper and Co.*

Solicitors for the plaintiffs, *Waltons and Co.*

House of Lords.

March 8, 9, and 26, 1926.

(Before Lords DUNEDIN, ATKINSON, SHAW, SUMNER, and CARSON.)

KIMBER COAL COMPANY LIMITED v. STONE AND ROLFE LIMITED. (a)

APPEAL FROM THE FIRST DIVISION OF THE COURT OF SESSION.

Charter-party—Demurrage—Signature by agent "for" named charterers—Effect of signature—Added clause that demurrage is to be paid by named agent—Personal liability of agent.

A steamer was chartered by a Danish firm to carry a cargo of coal to a Danish port. The charter-party, which was on a printed form, was expressed to be made between "G. T. G. and Co., owner's agents, and A. B. Co., Copenhagen, charterers." Throughout, obligations were assumed by and rights were stipulated for the "charterers." The word "charterers" was used throughout the charter-party without further naming the A. B. Co.

At the end a written clause was added, "Freight and demurrage (if any in loading) to be paid in Glasgow by the K. Coal Company Limited," and the signature was in the following form: "For the A. B. Company, Copenhagen, J. B. J. of the K. Coal Company Limited. For and by telegraphic authority of owners, for G. T. G. and Co., J. M. as agents only."

Held, (1) that signing "for the A. B. Company, Copenhagen" was the same thing as signing as their agents; (2) that the words of the manuscript clause, "Freight . . . to be paid in Glasgow by the K. Coal Company Limited," did not in themselves import a promise to pay by any other party than the charterers. They bound the charterers to make payments in Glasgow by the hands of agents whom the charter-party named in advance, and to be answerable for seeing that this was done.

Decision of the First Division of the Court of Session (1925 S. C. 277) reversed.

APPEAL from an interlocutor of the First Division of the Court of Session in Scotland reported (1925) S. S. 277.

A charter-party which was dated the 10th June 1920, consisted of a printed form headed "The Baltic and White Sea Conference Coal

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

Charter," and was expressed to be made between "G. T. Gillie and Co., owners' agents of the good screw steamer called the *Allie*, now trading and expected ready to load on or about the 21st to 25th June 1920, and Atlantic Baltic Company, Copenhagen, charterers," for the carriage of a cargo of coal from Grangemouth to a Danish port.

The charter-party contained the following clauses :

1. That the said steamer being tight, staunch and strong, and in every way fitted for the voyage, shall with all possible despatch proceed to Grangemouth, and there load in the customary manner from the charterers a full and complete cargo of duff coal . . . and being so loaded shall therewith proceed with all possible despatch to good Danish port. . . .

2. Freight to be paid at the rate of 45 kroners per ton of 20cwt. in taken weight, provided the steamer arrives without having broken bulk. The freight to be paid on unloading and right delivery of cargo in cash at port of discharge at current rate of exchange for approved sight bills on London. The consignees to pay freight on account during delivery, if required by the captain.

4. Charterers to pay all customary dues and duties on the cargo at port of loading, also to bear cost of separation and levelling should the cargo be composed of different parcels. In like manner, the receivers to pay all dues and duties on the cargo at port of discharge. The owners to pay trimming, port dues, pilotage, towage, and other charges appertaining to the steamer.

5. (c) The cargo to be loaded in 100 running hours (2 p.m. Saturday to 6 a.m. Monday, colliery and dock holidays excepted, unless used). Time to count when written notice of readiness in dock to receive the entire cargo is given to the charterers' agent or handed into his office between the hours of 9 a.m. to 5 p.m., or 9 a.m. to 2 p.m. on Saturdays.

6. . . . If the steamer be detained beyond her loading time, the charterers to pay demurrage at the rate of 1s. 6d. p.g.t. per running day.

8. The captain, owner, or agent is hereby bound to sign bills of lading as per form on the back hereof, "weight and quality unknown," at the office of charterers or their agents, within twenty-four hours after the cargo is on board.

15. The charterers' liability shall cease as soon as the cargo is shipped, and the advance of freight, dead freight, and demurrage in loading (if any) are paid, or a banker's guarantee given that the charterers will pay to the owners such sum as shall be proved to be legally due by agreement, arbitration, or legal process, and (unless owners and charterers are domiciled in the same country other than Great Britain) will, if requested, submit to the jurisdiction of a court in the country of the loading port; the owners having a lien on the cargo for freight, demurrage and average.

19. Five per cent. brokerage is due by the vessel to G. T. Gillie and Co., one-third of which to exporters on signing this charter. Ship lost or not lost, and the ship is to be cleared at the Customs at port of loading by owners' agent.

The following words were added to the printed form: "Loading hours to count from time cargo is released by Coal Controller. This charter-party is subject to approval of Coal and Shipping Controller." And a written clause was also added: "Freight and demurrage (if any in loading) to be paid in Glasgow by the Kimber Coal Company."

The signature was in the following form: "For the Atlantic Baltic Company, Copenhagen, J. B. Jamieson of the Kimber Coal Company, Limited. For and by telegraphic authority of owners, for G. T. Gillie and Co., J. Mathieson as agents only." Mr. Jamieson was the manager of the Kimber Coal Company Limited and Mr. Mathieson was the manager of Messrs. G. T. Gillie and Co.

One bill of lading was issued for the entire cargo, running thus: "Shipped by the Kimber Coal Company Limited of Glasgow . . . which are to be delivered to the Atlantic Baltic Company or their assigns."

The *Allie* arrived at Grangemouth on the 23rd June, and loading began on the 28th June, when the coal was released by the Coal Controller, but it was not completed within the stipulated time and demurrage was admittedly incurred. The owners accordingly sued the appellants in the Sheriff Court at Glasgow for the demurrage thus incurred. The Court of Session held, affirming the decision of the Sheriff, that upon the construction of the charter-party, and in view of the correspondence and actings of parties subsequent to its signature the owners were entitled to recover the damages sued for.

The Kimber Coal Company appealed.

Craigie Aitchison, K.C. and *J. G. Thom* (both of the Scottish Bar) and *G. Russell Vick* for the appellants.

Condie Sandeman, D.F. and *Albert Russell* (both of the Scottish Bar) and *B. Sandeman* for the respondents.

The House took time for consideration.

LORD SUMNER (whose judgment was the judgment of the House).—In this case the respondents, who are shipowners, sued the defenders for demurrage incurred at Grangemouth, the port of loading. The charter, made in 1920, was in the form of the Baltic and White Sea Coal Charter from east coast of England to Baltic ports. It began: "It is this day mutually agreed between Messrs. G. T. Gillie and Co., owners' agents . . . and Atlantic Baltic Company, Copenhagen, charterers." Throughout, obligations were assumed by and rights were stipulated for the "charterers" without further naming the Atlantic Baltic Company. Clause 19, the last in the print, ran: "five per cent. brokerage is due by the vessel to G. T. Gillie and Co., one-third of which to exporters on signing the charter." One bill of lading was issued for the entire cargo, running thus: "Shipped by the Kimber Coal Company Limited of Glasgow . . . which are to be delivered unto the Atlantic Baltic Company or their assigns." The bill of lading was a clean bill of lading and bore no endorsement of any claim for demurrage at the port of loading.

At the end of this printed charter-party there was an addition in manuscript, of which the material part ran: "Freight and demurrage (if any in loading) to be paid in Glasgow by the Kimber Coal Company." The charter was then

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signed in the following manner:—"For the Atlantic Baltic Company, Copenhagen, J. B. Jamieson of the Kimber Coal Company Limited. For and by telegraphic authority of owners, for G. T. Gillie and Co., J. Mathieson, as agents only."

There was no question that the defenders had authority to bind the Atlantic Baltic Company or that the latter were duly made parties to the contract.

To any claim against the Kimber Coal Company Limited, upon the charter, as contracting parties on the face of it, there would have been a sufficient answer *in limine*, viz., that Mr. Jamieson's signature did not purport to be the signature of the Kimber Coal Company Limited, or to be attached to the charter on their behalf. The reference to the company was only by way of description of the person of Mr. Jamieson himself. The Kimber Coal Company, however, expressly disclaimed any right to raise this defence and accepted liability notwithstanding, if on any other ground it could be established. No doubt, if the point had been taken, a new action would have been raised against Mr. Jamieson.

The first issue, therefore, was the familiar one whether, by reason of the form of the signature, the Kimber Coal Company Limited had been made liable upon the charter. The issue arises in a very simple form, which makes immaterial many of the authorities commonly cited in such cases. The Kimber Coal Company are nowhere named in the body of the charter as charterers, while the Atlantic Baltic Company are so named throughout. Every obligation, of which the shipowners could claim performance by the named charterers, was capable of being performed by them directly or by their agents and except for the second issue arising on the manuscript clause, every obligation was so performable. The form of the signature was simple. No words of limitation were added after the name, which was taken to be the company's, but there were prefixed to it the words "for the Atlantic Baltic Company, Copenhagen." The defenders argued that to say "we sign for the company, who are the named 'charterers,' is the same as to say: 'we sign as their agents. He who signs 'for' another does so as his agent to sign."

In itself I think this contention is correct, nor was this point very stoutly contested. The authorities support it on the whole: (*Redpath v. Wigg and O'Beirne* (14 L. T. Rep. 764; L. Rep. 1 Ex., at p. 340, per Willes, J.); *Alexander and others v. Sizer* (20 L. T. Rep. 38; L. R. Rep. 4 Ex. 102). Lord Ellenborough, C.J., in *Leadbitter v. Farrow* (5 M. & S., at p. 349), asks: "Is it not an universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion?" On the other hand, in *Wake v. Harrop* (6 H. & N. 768), where the charter was expressed in the body to be between Wilkinson, owner, and

Harrop, charterer, and was signed "for A. Davidson, and Co., Messina, T. W. and J. C. Harrop and Co., agents." Bramwell, B. thought with doubt that the signature did not make Harrop personally liable, while Wilde, B., following *Lennard v. Robinson* (5 E. & B. 125), since overruled, held that it did. The case was actually decided on another ground. In *Ariadne Steamship Company v. James McKelvie and Co.* (15 Asp. Mar. Law Cas. 450; 126 L. T. Rep. 484, at p. 438; (1922) 1 K. B. 518), Atkin, L.J. says, at p. 535: "C. on behalf of B. is . . . an assent of C. to the contract not so as to bind himself but to bind B." In *Gadd v. Houghton and Co.* (35 L. T. Rep. 222; L. Rep. 1 Ex. Div. 357) the words "on account of James Morand and Co." were inserted in the body of the sold note but were not attached to the signature. This position has been regarded in some of the cases as one less effectual to negative the personal liability of the signatory, but, in spite of it, the words sufficed. "How can the words 'on account of James Morand and Co.,' asks Mellish, L.J., at p. 360, 'be inserted merely as a description?' The words mean that Morand and Co. are the people who have sold. It follows that the people who have signed are merely the brokers and are not liable."

The decision in *Parker v. Winlow* (7 E. & B. 942) rests on the fact that the signature itself was unqualified and that the words "agent for E. Winlow and Son" occurred in the body of the document, where at any rate they could be read as mere words of personal description. Similarly in *Oglesby v. Yglesias* (1 E. B. & E. 930) the words "as agent for the freighter," used in describing one of the parties, were held not to be sufficient to qualify an unrestricted signature at the end. *Yglesias*, "as agent for the freighter," might well be assisting him by giving his own personal liability to the transaction. *Weidner v. Hoggett* (35 L. T. Rep. 368; 1 C. P. Div. 533) is a case in which the document began: "I undertake to load with Bebside coals . . ." and was signed "W. S. Hoggett." The words "on account of Bebside Colliery" occurred in print over Hoggett's name, but it was shown that those words were the name of a pit, not of any person or company, who could be Hoggett's principals, and they were taken as representing the source, from which the cargo was to come, the promise being that of Hoggett himself. Reference should be made to 35 L. T. Rep., p. 369, for the full terms of the document.

The second point taken on the charter, I think, may be put thus: The words in manuscript, "to be paid by the Kimber Coal Company," in themselves import a personal promise by the named payors, sufficient to rebut any inference to the contrary from the form of the signature. Still more is this clear, when it is borne in mind, that the named charterers were abroad. It is not as if the qualification of the signature of the Kimber Coal Company had been worded like that of the signature of the shipowners. To sign "for" the Atlantic Baltic

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Company is consistent with signing for the Kimber Coal Company Limited themselves as well. There is no addition of "as agents only."

I do not think it necessary to go into the question how far evidence might have been called to add a party, namely, the Kimber Coal Company Limited as chargeable on the contract, for the manuscript words do not in themselves import a promise by any other party than the charterers. They bind the charterers to make payment in Glasgow by the hands of agents, whom the charter names in advance, and to be answerable for seeing that this is done, but they no more import the personal promise of those agents than would a stipulation that the charterer's agents should send a sailing telegram or make an advance to the captain for ship's expenses.

The interlocutor of the sheriff substitute, dated the 19th Nov. 1923, finds as a fact that the charter-party was, as regards the manuscript clause, signed by the defenders' manager as and for the defenders' firm and not as agents for the Atlantic Baltic Company, but as representing themselves and accepting liability for the condition referred to and embodied in the said charter-party, and that the defenders, subsequent to the 6th Aug. 1920, wrote a letter to the pursuers' agents, stating that they would personally be responsible for payment in Glasgow of the demurrage. The first finding appears to me to be a matter of law, as to which the learned sheriff substitute interpreted the effect of the form of the signature contrary to the decided cases, and as to the second, an examination of the documents, in which the evidence was supposed to be found, showed that there was no such evidence whatever, but that their tenor had been misunderstood. The latter part of this interlocutor was, in fact, formally recalled by the learned sheriff on the 3rd Jan. 1924.

In the court of session these interlocutors were discharged and the interlocutor now appealed against was pronounced of new. In effect, at the trial an attempt was made to prove that the Kimber Coal Company Limited came under personal liability, because they had induced the captain to forego his intention of endorsing the demurrage on the bill of lading on the faith that they would themselves pay demurrage in Glasgow in virtue of this clause. There was also an attempt to prove a promise by them to pay independently of the clause and of any estoppel. All, however, that the evidence came to was, that the defenders, as charterers' agents, agreed the date of the commencement of the demurrage days with the captain, but no promise by them nor any change of position by him in reliance upon their conduct could be made out at all. It was also put to your Lordships that on the evidence the Kimber Coal Company Limited should be held to have been parties to the charter throughout on the authority of *Young v. Schuler* (49 L. T. Rep. 546; 11 Q. B. Div. 651). The signature there was "P. P. A. John Abrahams and Co.

J. Otto Schuler," the contract being expressed to be between Young and Abrahams and Co. As Cotton, L.J. observes: "*Prima facie* he would be taken to have signed only for Abrahams and Co.," but, there being evidence that he meant to sign in both capacities, for Abrahams and Co. as principal debtors and for himself as surety, he was held liable.

There was no sufficient evidence to that effect in the present case. Accordingly it is not necessary to discuss *Young v. Schuler* (sup.). I think that, in any case, great difficulties would have faced the respondents, if such evidence had been forthcoming, for then it would have been necessary to elect whether the Kimber Coal Company Limited were to be charged as parties to the manuscript clause only or to the whole of the contract of charter-party. In this latter case, with great deference to the judgment in the court below, I doubt if the words of the manuscript clause could be construed as words of promise by them. In any case they can only be reconciled with clause 6, which says that the charterers will pay demurrage, by reading the reference to the Kimber Coal Company Limited as the charterers' nomination of the Glasgow agents by whose hands they will pay. In the former case, if they were bound by the entire charter, I do not see why they were named in that clause at all.

I think that for these reasons the appeal should be allowed.

Appeal allowed.

Solicitors for the appellants, *Rollit, Sons, and Haydon*, agents for *J. George Reid, S.S.C.*, Edinburgh.

Solicitors for the respondents, *Holman, Fenwick, and Willan*, agents for *MacLay, Murray, and Spens*, writers, Glasgow, and *J. and J. Ross, W.S.*, Edinburgh.

Feb. 9, 11, 12, and May 7, 1926.

(Before Lords CAVE, L.C., HALDANE, ATKINSON, SHAW, and SUMNER.)

UNITED STATES SHIPPING BOARD v. FRANK C. STRICK AND CO. LIMITED. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—Demurrage—Lay days—Cargo to be loaded in regular turn—Time commencing when notice given of readiness to load—Congestion of shipping in port—Delay in loading.

By a charter-party it was provided: "The cargo to be loaded subject to port regulations in regular turn, as customary at the rate of 1000 tons per day, commencing when written notice is given of steamer being completely discharged and ready to load. . . . If detained longer charterers to pay demurrage." The ship arrived at the port and on the following day her

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

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master gave written notice of the ship being completely discharged and ready to load, but owing to the congestion of traffic at the port the ship did not get to her loading berth in her regular and customary turn until one month after her arrival at the port. Upon a claim by the shipowners for demurrage,

Held, per Lords Cave, L.C., Atkinson, and Shaw (Lords Haldane and Sumner dissenting), that the obligation to load in turn at the specified rate was to become binding when the notice of readiness was given, although that obligation could not become actually operative until the turn arrived.

Decision of the Court of Appeal affirmed.

APPEAL by the claimants in an arbitration from the order and judgment of the Court of Appeal (Sir Ernest Pollock, M.R., Warrington and Scrutton, L.JJ.), dated the 18th July 1924, upon an award of an umpire stated in the form of a special case. This appeal was concerned solely with the proper construction of a charter-party made between the appellants as shipowners and the respondents as charterers.

The main question involved in the appeal was whether upon the true construction of the charter-party the time for computing lay days and demurrage at the port of loading counted from the time when written notice was given of the steamer being completely discharged of inward cargo and ready to load, or counted from the time that the ship was at berth in turn to load.

The appellants, who were the owners of a steamship called the *Hinckley*, chartered her to the respondents by a charter-party dated the 30th July 1920, which provided by clause 1 that the steamer should proceed to Delagoa Bay and there load always afloat a cargo of coal not exceeding 5500 tons to be carried to Suez and there discharged. Clause 3 of the charter-party provided as follows :

The cargo to be loaded subject to port regulations, in regular turn as customary at the rate of 1000 tons per day . . . commencing when written notice is given of steamer being completely discharged of inward cargo and ballast in all her holds and ready to load. . . . If detained longer charterers to pay demurrage at the following rates : 300l. (three hundred pounds) per running day or *pro rata* for part thereof.

The following provision was also made by clause 3 of the charter-party :

Any time lost through riots, strikes, lockouts or any dispute between masters and men . . . obstructions in the docks ; or by reason of floods, frosts, fogs, storms or any cause beyond the control of the charterers, not to be computed as part of the loading time (unless any cargo be actually loaded during such time).

In the event of any stoppage or stoppages arising from any of the above causes continuing for the period of six running days from the time of the vessel being ready in turn to load . . . or, in the event of such stoppage or stoppages commencing after the vessel is ready to load in turn and con-

tinuing for six running days, this charter shall at the expiration of such period, provided that no cargo shall have been shipped on board the steamer previous to such stoppage or stoppages, become null and void.

The *Hinckley* arrived at Delagoa Bay and anchored within the commercial limits of that port on the 30th July 1920, and on the following day her master gave notice of the ship being completely discharged and ready to load. At Delagoa Bay there are no docks, and there was only one berth or tip for the loading of coal and this berth only accommodated one steamship at a time. Vessels arriving at Delagoa Bay to load a coal cargo if the berth was occupied had to anchor in the roadstead and take their turn at the berth in accordance with the port regulations. When the *Hinckley* arrived at Delagoa Bay on the 30th July a vessel was loading at the tip, and there were other vessels waiting their turn to load coal. The turn of the *Hinckley* came on the 26th Aug., and at 9.10 a.m. on that day she got alongside the loading-place, and the loading which was conducted with dispatch was completed at 2.10 p.m. on the 28th Aug. On the 5th Oct. 1920 the respondents rendered an account to the appellants showing the balance of freight due to the appellants. From the balance of freight the respondents deducted 462l. 10s. as dispatch money for the time saved in loading. In June 1922 the appellants wrote to the respondents claiming 6397l. 1s. 4d. for demurrage. The claim was disputed and arbitration ensued. The arbitrator decided in favour of the owners subject to a case which he stated for the opinion of the High Court. Rowlatt, J. affirmed the award, his view being that the time for loading began to run when the notice of readiness to load was given, although the ship could not then commence loading, but had to await her turn to be berthed. On the other hand, the Court of Appeal held, reversing the decision of Rowlatt, J., that the words in clause 3 "commencing when written notice is given of steamer being completely discharged of inward cargo and ballast in all her holds and ready to load" defined the period at which the obligation of the charterers to load in turn became binding," but that this obligation did not become actually operative until the time when the ship's turn to load arrived.

The owners appealed.

Dunlop, K.C., Raeburn, K.C., and Stenham for the appellants.

Sir John Simon, K.C., Jowitt, K.C., and J. V. Naisby for the respondents.

The House took time for consideration.

LORD CAVE, L.C.—This appeal is concerned with a claim for demurrage.

The appellants, the United States Shipping Board, were the owners of a steamship called the *Hinckley*, and chartered her to the respondents by a charter-party which provided that the ship should proceed to Delagoa Bay and there load a cargo of coal not exceeding 5500 tons

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to be carried to Suez and there discharged. Clause 3 of the charter-party provided as follows :—

The cargo to be loaded, subject to port regulations, in regular turn as customary at the rate of 1000 tons per day (excluding bunkering time, Sundays, custom-house, colliery and local holidays, Easter Monday and Tuesday, Whit Monday and Tuesday, and three days following Christmas Day, and from 1 p.m. on Saturday or the day previous to any such holiday to 7 a.m. on Monday or the day after any such holiday unless used), commencing when written notice is given of steamer being completely discharged of inward cargo and ballast in all her holds and ready to load, such notice to be given between business hours of 9 a.m. and 5 p.m., or 1 p.m. on Saturdays. If detained longer, charterers to pay demurrage at the following rates: 300*l.* (three hundred pounds) per running day or *pro rata* for part thereof.

The *Hinckley* arrived at Delagoa Bay and anchored within the commercial limits of that port on the 30th July 1920, and on the following day, the 31st July, her master gave notice of the ship being completely discharged and ready to load. At Delagoa Bay there are no docks, and there is only one berth or loading place at which one steamer at a time can lie and be loaded with coal; and the port regulations provide that all ships calling for coal shall load at this berth by means of the coaling appliance, and that ships shall be berthed at the coaling appliance in order of arrival. Accordingly, if when a ship arrives at the port, there are other vessels lying at the loading place or awaiting their turn to be berthed there, the ship has to lie out in the harbour (where she is still within the commercial limits of the port), until her turn for loading comes. When the *Hinckley* arrived at Delagoa Bay on the 30th July a vessel was loading at the coal appliance and there were other vessels waiting their turn to load coal; and accordingly the *Hinckley* had to lie out in the harbour and await her turn. Her turn came on the 26th Aug., and at 9.10 a.m. on that day she got alongside the loading place; and the loading, which was conducted with dispatch, was completed at 2.10 p.m. on the 28th Aug. Her cargo was 5267 tons of coal, and if this were loaded at the rate of 1000 tons a day it would take about five days and six hours to load; but, in fact, the loading was accomplished (as the above statement shows) in about two days and five hours, so that there was a considerable saving on the time allowed.

On the 5th Oct. 1920 the charterers rendered an account to the owners for the balance of freight, from which they deducted 462*l.* 10*s.* as dispatch money for the time saved in loading. The balance shown by the account was paid to the owners, and the charterers had no further communication with them at that time; but in June 1922 the owners wrote to the charterers to say that their attention had been drawn to a claim for demurrage on the *Hinckley* for 6397*l.* 1*s.* 4*d.* This claim was based upon the view that, the master's notice of readiness to load having been given at 11 a.m. on Saturday,

the 31st July 1920, the time for loading then began; and that, a Saturday afternoon and Sunday having intervened, the time for loading expired at 6.24 a.m. on the 7th Aug. and the vessel was therefore on demurrage from that time until 2.10 p.m. on the 28th Aug. The owners also claimed payment of the 462*l.* 10*s.* deducted from the freight as dispatch money; but as this claim stands or falls with the other it need not be further mentioned. The claim was disputed and was referred to an arbitrator, who decided in favour of the owners (the present appellants) subject to a case which he stated for the opinion of the High Court. On the argument of the case stated Rowlatt, J. confirmed the award; but on appeal to the Court of Appeal that court reversed the decision of Rowlatt, J. and decided in favour of the charterers. The owners have now appealed to this House.

The view taken by Rowlatt, J. was that the time for loading began to run when the notice of readiness to load was given, although the ship could not then commence loading but had to await her turn to be berthed. On the other hand the Court of Appeal held that the words in clause 3 "commencing when written notice is given of steamer being completely discharged of inward cargo and ballast in all her holds and ready to load" defined the period at which the obligation of the charterers to load in turn became binding, but that this obligation did not become actually operative until the time when the ship's turn to load arrived. The question which your Lordships have to determine is, which of these two views is correct?

The general rules which in the absence of express words to the contrary govern the construction of charter-parties are now well settled. Where, as in this case, the stipulated destination of a ship is a port without further limitation, the ship is an "arrived ship" so soon as she reaches the commercial limits of the port. Where, as here, the charter-party provides for a notice of readiness to load being given by the master, such a notice may be given so soon as the ship is an arrived ship and is in fact ready to load. And where, as here, lay days are fixed, either by a number of days or by a specified daily rate of loading, those days begin to run on the giving of the notice of readiness to load, and as from that time the risk of delay by reason of local impediments falls upon the charterer and not upon the owner of the vessel. All this is clearly established by a series of authorities which cannot now be shaken, including *Tupscott and others v. Balfour and others* (1 Asp. Mar. Law Cas. 501; 27 L. T. Rep. 710; L. Rep. 8 C. P. 46), *Tiis and others v. Byers* (3 Asp. Mar. Law Cas. 147; 34 L. T. Rep. 526; 1 Q. B. Div. 244), *Nelson v. Dahl* (3 Asp. Mar. Law Cas. 392; 41 L. T. Rep. 365; 12 Ch. Div. 568), *Re an arbitration between Pymar Brothers and Dreyfus Brothers* (6 Asp. Mar. Law Cas. 444; 61 L. T. Rep. 724; 24 Q. B. Div. 152), *Leonis Steamship Company Limited v. Rank Limited* (10 Asp. Mar. Law

Cas. 398; (1908) 1 K. B. 499), and *William Alexander and Sons v. Aktieselskabet Dampskibet Hansa* (14 Asp. Mar. Law Cas. 493; 122 L. T. Rep. 1; (1920) A. C. 88).

But these rules, like all other rules of construction, must yield to the express terms of the contract entered into between the parties; and if the contract contains terms which are inconsistent with the application of the general rules of construction, the contract and not the rules must prevail. Now, the contract in this case is that the cargo shall be loaded "subject to port regulations in regular turn as customary at the rate of 1000 tons per day"; and if there were nothing more I doubt whether anyone would say that the charterer had contracted to load out of his regular turn as fixed by the port regulations, or to pay demurrage or damages if he failed to do so. If the contract had been only to load "in the usual and customary manner," those words must have been held (as in *Tapscott and others v. Balfour and others, sup.*), to refer to the mode and not to the time of loading; but the contract is to load "in regular turn as customary," and the expression "in regular turn" has reference to succession, and therefore to the time and not only to the mode of loading. The contract is to load in regular turn at a daily rate of speed, that is to say, to commence loading when the turn arrives and then to continue at the stipulated speed; and if this were all, the charterer could hardly be held to be in default or liable to demurrage only because he had awaited his turn to be berthed before commencing to load.

The cases in which the expression "in turn" or other like expressions have been considered appear to me to be wholly consistent with this view. In *Robertson v. Jackson* (2 C. B., 412) the charterers had engaged that the vessel should carry a cargo of coal to Algiers and there be unloaded at the average rate of not less than 20 tons of coal per day (Sundays excepted), and if detained on their part during a longer period they engaged to pay for such detention at the rate of 5l. per day, "to reckon from the time of the vessel being ready to unload and in turn to deliver," and it was held that the words "in turn to deliver" put the owner on inquiry as to the regulations in force at the port of discharge, and must be interpreted with reference to those regulations. In *Leidemann v. Schultz* (14 C. B. 38) the charter-party provided that the ship was to proceed to Newcastle "and on arrival there be ready forthwith in regular turns of loading to take on board by spout or keel as directed" a cargo of coal and coke. The ship arrived in Newcastle and was able to load the coal at once, but had to wait more than a month for her turn to be loaded with coke. In an action against the charterers for the detention, it was held that the expression "in regular turns of loading" pointed to a course of dealing outside the instrument, and that evidence should have been admitted as to the practice of the port for ships to load coke in turn. In *Lawson v. Burness* (1 H. & C. 396) the charter-party provided

that the ship should proceed to a certain dock and there load a cargo of coke, "to be loaded in regular turn." It was held that the words "in regular turn" referred to the order of readiness to load and not to the order of entry in a book kept by the colliery company of which the owner had no knowledge, and demurrage was allowed; but it was assumed throughout that, if the vessel had been loaded in her order of readiness, though not immediately on her being ready, no demurrage would have been payable. In *Postlethwaite v. Freeland* (4 Asp. Mar. Law Cas. 302; 42 L. T. Rep. 845; 5 App. Cas. 599) the charter-party merely provided that the cargo was "to be discharged with all dispatch according to the custom of the port," and the discharge could only be effected by a warp and lighter which were under the control of a company, and which vessels were allowed to use in turn according to the order of their arrival. Owing to congestion in the port the vessel had to wait for thirty-one days before she could be discharged, and it was held that no demurrage was payable. In *The Cordelia* (11 Asp. Mar. Law Cas. 202; 100 L. T. Rep. 197; (1909) P. 27), where it was agreed by the charter-party that a vessel should proceed to the Nob and deliver the cargo "in regular turn with other sea-going vessels at an average rate of 30 tons per weather working day," and the vessel was kept waiting while another vessel also consigned to the charterers was being discharged, it was held that "in regular turn" meant one vessel at a time, and that no demurrage was payable. In this case Sir Gorell Barnes, P., in giving judgment, said: "It looks to me as if the plaintiff (the owner) expected that his vessel would find a string of barges when she got to the Nob. I am afraid the plaintiff could not reasonably expect more than that he should have his vessel discharged in regular turn with other sea-going vessels which were being discharged in turn and with the usual dispatch. The terms of the charter-party do not justify the plaintiff in expecting more than that."

There remain two cases which have many points of resemblance to the present case. In *Kokusai Kisen Kabushiki Kaisha v. Flack* (10 Lloyd's List, 33, 635) a vessel had been chartered to load coal at Delagoa Bay and carry it to another port. The charter-party (like the charter-party in the present case) was based upon the Chamber of Shipping Welsh Coal Charter, certain words only having been altered. The ship got to Delagoa Bay, and her master gave notice of readiness to load; but she had to wait her turn to be berthed at the coal appliance, and one question raised was whether the lay days began on the notice of readiness being given. The facts were therefore very like the facts in this case, but unfortunately the decision of the court did not cover the point now in dispute. The arbitrator to whom the claim had been referred was asked to deal first with certain preliminary questions, one of these questions being whether the ship when she

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lay at anchor in Delagoa Bay and purported to give a notice of readiness to load was an "arrived ship." This question was answered both by the arbitrator and by McCardie, J. in the affirmative, and their decision was affirmed by the Court of Appeal; but no question was submitted or argued as to the meaning of the words "in regular turn" or as to the effect of those words on the commencement of loading time, and these questions appear to me to have been left open in both courts (see per McCardie, J. at p. 85, and per Scrutton, L.J. at p. 638). But at last, in *Miguel de Larrinaga Company v. Flack* (20 Lloyd's List, 268), the very point came up for decision. In that case also the charter-party was based on the "Welsh Coal" form used in the present case, and contained the words which I have quoted above. The vessel arrived at her place of destination, the port of Philadelphia, on the 23rd June 1920, and on the 25th June her master gave notice of readiness to load; but owing to congestion in the port she had to await her turn for a berth, and on the 16th July the charterers declared the charter null and void. The owners claimed (among other things) demurrage from the 4th July (when the lay days if counted from the notice of readiness to load would have expired) until the 16th July, but the arbitrator disallowed the claim. When the matter came before Roche, J. on a case stated by the arbitrator, the owners declined to argue the point further; but Roche, J. expressed his concurrence with the decision of the arbitrator, which he described as follows: "In the ordinary case she would not be an arrived ship until she got into dock, but having regard to the particular provision of the charter-party the contention was open to the charterers, and was availed of by them and accepted by the umpire, that, though an arrival might have been fixed and stipulated by the provisions which I have read, the obligation to load at a certain specified rate per day did not arise until the vessel was 'in turn,' that is to say, was at the pier, and was there to load as customary. Accordingly, the umpire decided that, the vessel not having come on turn before the 16th July, the obligation on the charterers to load and to pay demurrage never had arisen."

At a later stage of his judgment the learned judge, when dealing with the paragraph avoiding the charter in certain events, said: "It would appear that there are strong grounds for saying that the time when readiness to load was to be regarded for the purpose of clause 3, and when written notice could be given which dated the time when the obligation to load began, did not arise or occur until the vessel was ready in turn as customary."

I have thought it desirable to refer to these authorities—the only reported cases in which (so far as I am aware) the expression "in turn" or "in regular turn" has been the subject of decision—in order to make it clear that our courts have uniformly given effect to those expressions as having a bearing on the question

of lay days. In most, if not all, of the cases the ship in question was an arrived ship and ready to load, but it was nevertheless held or assumed that the commencement of the loading or unloading days was by the terms of the contract postponed until the ship's "turn" arrived. Nor is the inference to be drawn from these authorities affected by the decisions in *Tapscott and others v. Balfour and others* (sup.) and *Leonis Steamship Company Limited v. Rank Limited* (sup.), the charter-parties in those cases not containing the words "in turn" or any similar expression.

It is only necessary to add on this point that the owners in the present case had full knowledge when the charter-party was signed of the regulations as to loading prevailing at Delagoa Bay. The words of the charter-party would in any event (as appears from *Robertson v. Jackson* (sup.) and other cases) have put them on inquiry; but any doubt is removed by the fact, inferred by the arbitrator from the correspondence between the parties, that "the owners expected the vessel to be delayed at their expense before getting a loading berth and fixed their freights accordingly." This inference, assuming it to be correct, cannot alter the meaning of the charter-party, but it is evidence to show that the parties contracted with knowledge of the local conditions.

But the appellants rely on the words which occur later in the clause, viz., "commencing when written notice is given of steamer being completely discharged of inward cargo and ballast in all her holds and ready to load," and no doubt these words require very careful consideration. For this purpose the words in brackets which exclude certain days from the calculation may for the moment be omitted, and the clause may be treated as if it ran as follows: "The cargo to be loaded subject to port regulations in regular turn as customary at the rate of 1000 tons per day . . . commencing when written notice is given of steamer being . . . ready to load." What, then, do the words "commencing," &c., mean? I do not think it would be right to read them as wholly nullifying the expression "in regular turn" occurring earlier in the clause, and an endeavour must be made to reconcile the two expressions. There is no noun to which the word "commencing" may properly be referred, and it might conceivably be read as meaning "loading commencing" or "time for loading commencing"; but neither reading would give full effect to all the words of the clause. The expression "commencing," &c., is harnessed to a clause, which includes an obligation, not simply to load within a fixed time, but to load in regular turn at a fixed rate; and I think that the true meaning of the clause is that the obligation to load in turn at the specified rate is to become binding when the notice of readiness is given although that obligation cannot become actually operative until the turn arrives. In other words, to the three conditions for the commencement of the lay days enumerated by Kennedy, L.J. in

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Leonis Steamship Company Limited v. Rank Limited (sup.), viz., arrival of the ship, readiness to load and notice of such readiness—there is added by the terms of this charter-party a fourth condition, namely, the arrival of the turn. If the loading berth had been empty when the ship arrived in port, the time would not have commenced to run until notice of readiness had been given; and if notice of readiness is given before the berth is empty and ready to receive the ship, then the time does not run until the regular turn for loading arrives. This is the construction which was put upon the clause by Scrutton, L.J. and the other members of the Court of Appeal, and it appears to me to be the only construction which gives effect to all the terms of the contract.

This conclusion, at which I have arrived on the first paragraph of clause 3 of the charter-party taken alone, is supported by two other paragraphs occurring later in that clause. These paragraphs are in the following terms: "In the event of any stoppage or stoppages arising from any of the above causes continuing for the period of six running days from the time of the vessel being ready in turn to load, this charter shall, provided however that no cargo shall have been shipped on board the steamer previous to such stoppage or stoppages, become null and void. In the event of such stoppage or stoppages commencing after the vessel is ready to load in turn and continuing for six running days, this charter shall on the expiration of such period, provided that no cargo shall have been shipped on board the steamer previous to such stoppage or stoppages, become null and void."

In each of these paragraphs the words "in turn" have been inserted in the print, and the effect is to make it clear that the charter is not to be avoided by reason of a stoppage occurring before the vessel is in turn to load. This express limitation of the power to avoid the charter appears to me to support the view that the time for loading does not run until the turn arrives.

It was suggested by counsel for the respondents that, assuming the time to have begun to run at the date when notice of readiness was given, they could rely upon another paragraph of clause 3, by which it was provided that any time lost through (among other things) obstructions in the docks "or any cause beyond the control of the charterers" should not be computed as part of the loading time; but this point was not fully argued, and I do not base my opinion upon it.

For the above reasons I am of opinion that the decision of the Court of Appeal was right, and accordingly that this appeal fails; and I move your Lordships that it be dismissed, with costs.

LORD ATKINSON.—It is well established that where a ship in which goods are to be carried is employed under a charter-party, the following conditions must, *primâ facie*, be fulfilled by

the shipowner before he becomes entitled to call upon the charterers to ship his goods. The ship must be at the place of loading contemplated by the charter-party, must be ready to receive the goods on board, and due notice of that fact must be given to the charterers.

In this connection the words "port of loading" must, *primâ facie*, be taken to mean not the geographical, fiscal or pilotage port, but the commercial port, that is, the area known and treated as the "port" by persons engaged in shipping merchandise whether as shippers, charterers or shipowners: (*Sailing Ship Garston Company v. Hickie and Co.*, 5 Asp. Mar. Law Cas. 499; 53 L. T. Rep. 795; 15 Q. B. Div. 580; *Leonis Steamship Company Limited v. Rank Limited (sup.)*).

As between charterer and shipowner, a ship is not to be considered as at a port, in a commercial sense, until she has reached the usual place in the port at which vessels intended to be loaded lie. In ordinary cases, where there is no demise of the ship and the time for the loading or the discharge of the cargo, as the case may be, is definitely fixed, or is so described as to be calculable beforehand, an absolute obligation rests upon the charterers to have the particular work completed within the time fixed, whatever, with the exception mentioned, may occur. He is answerable, though the completion of the work be rendered impossible from causes which have arisen without any fault or omission on his part. Thus the charterer must bear the risk of delay arising from the crowded condition of things at the place at which the ship is to load or discharge as the case may be: (*Potter and Co. v. Burrell and Co.*, 8 Asp. Mar. Law Cas. 200; 75 L. T. Rep. 491; (1897) 1 Q. B. 97), and he takes the risks, although the shipowner should be prevented from doing his part of the work within the agreed time, unless the latter is in fault in the matter.

The charterer's contract is in effect this—that if the ship is not able to load or discharge, as the case may be, the whole of her cargo within the number of days fixed for the particular purpose after she has come to the usual place for carrying out that purpose, he will pay for the delay, however caused, otherwise than by the default of the shipowner. But, of course, it is quite competent for the parties to a charter-party, by a provision, legal in character, inserted in it, to agree to modify as between themselves the rights and obligations which, according to the general law, would spring from the relation in which they stand to each other. The question for decision, or one of the questions for decision in this appeal, is whether they have done that in this case and, if so, to what extent have they done it, and with what consequences.

In my view the parties to the charter-party in this case have entered into an agreement of this character, and on the facts found by the arbitrator, the consequence flowing from it is that the right of the shipowners to recover the demurrage which they claim cannot be

supported. The arbitrator finds that the *Hinckley* arrived at Delagoa Bay and anchored within the commercial limits of the port at 9.50 a.m. on the 30th July 1920. What is the extent of the area of water within those limits is not mentioned, nor is it shown by map or otherwise what was the precise place of the ship's anchorage. On the ordinary maps Delagoa Bay would appear to be a large bay. By the third article of the charter-party it is expressly provided that the cargo is to be loaded "subject to the port regulations in regular turn as customary." Mr. Dunlop, on behalf of the appellants, argued that every vessel which goes to a port to load or discharge a cargo is bound by the ordinary regulations of the port whether those regulations are referred to or not in any charter-party or other contract dealing with the adventure. That may be, but the fact that by the express provisions of the charter-party those regulations are made applicable to the adventure entitles one to examine the regulations themselves in order to ascertain, if possible, what was the precise nature of the adventure, what were the conditions attaching to its performance, and what the rights and obligations respectively conferred and imposed upon the parties concerned in the conduct of it.

The most important of these obligations touching the matter in hand ran as follow :

Art. 2. Applications for a berth must be made to the wharfmaster by the owners, agents, or captain of a ship on the prescribed form (Form No. 1). The wharfmaster, on receipt of the application for a berth as well as the telegraphic notification of the maritime department regarding the ships entering the harbour, will assign berth for such ships at the wharf and advise the port captain and the Customs accordingly (Form No. 2).

Art. 3. Ships will be berthed, as a rule, in the order they enter the port, it being understood that the ship has entered the port when she has crossed westwards the line passing through the Ponta Vermelha buoy and the Catembe Lighthouse. In case of dispute as to the priority of entrance to the port the port captain's decision shall be final.

Art. 24. All ships calling for cargo coal shall load at the berth assigned for that purpose by means of the coaling appliance unless special reason is shown, through the wharfmaster, to the satisfaction of the director of the port.

Art. 25. Ships shall be berthed at the coaling appliance in order of arrival; this rule may be altered in cases of urgency or when the director of the port may think fit to vary the order of preference.

If these regulations are to be construed according to the ordinary meaning of their language, it does not appear to me that it is possible to hold that it was in the contemplation of the parties bound by them that ships frequenting the commercial port of Delagoa Bay were to be loaded or discharged in any part of that harbour other than at one of the berths indicated by the regulations.

The adventure in which both the appellants and the respondents were concerned was in effect, according to the first article of the charter-party, this—that this ship, the *Hinckley*,

being taut and strong and in every way fitted for the voyage, should with all possible dispatch sail and proceed to Delagoa Bay, and there, at one of the berths provided for her under the regulations of the port, always afloat, load in the customary manner for the shippers a full and complete cargo, &c., &c.

The third article of the charter-party provided that written notice was to be given of the steamer being completely discharged of inward cargo and ballast in all her holds and ready to load.

The arbitrator has found that a notice to this effect was given by the master at 11 a.m. on the 31st July 1920. That notice indicates clearly what the condition of the steamer was—namely, that she was empty and in a state fit to receive a cargo, but, having regard to the facts found and the provisions of the regulations, it is impossible, it would appear to me, to hold that she was ready to load her cargo in the place where she lay. The regulations by which she was bound forbade that, and the facts found by the arbitrator in pars. 2 and 4 of his award clearly show that to do so would be contrary to the regulations of the port even if it were physically possible, which would appear to be doubtful. He finds that there are no docks at Delagoa Bay, that there is only one berth or tip or loading place alongside which one vessel at a time can lie and be loaded with coal by some appliances; that if, when a vessel arrives at Delagoa Bay, another vessel should be lying at this loading place, the former has to lie out in the bay or harbour to await her turn; that if other vessels are already so awaiting their turn they have to take their turn to come to the loading place according to the regulations of the port.

In par. 4 he finds that when this steamer, the *Hinckley*, arrived at the port and anchored within its commercial limits, a number of vessels were already there waiting to load, and that the *Hinckley* lay with them in the harbour taking her turn according to the regulations.

There is nothing in the evidence in the case to show that this condition of things was exceptional. From the regulations one, I think, would be led to the conclusion that it was the usual or ordinary condition of things. It was to such or similar condition of things, it would appear to me from the language of the third paragraph of the charter-party, that that document was designed to apply and was framed to meet. The following words in the opening lines of the paragraph clearly show this. They run: "The cargo to be loaded subject to port regulations in regular turn as customary at the rate of 1000 tons per day." It would appear to me that it was in the carrying out of the operation described in these words that the rate of loading specified was to be observed, and not in the carrying out of some other operation under wholly different restrictions and forbidden by the regulations of the port.

This provision as to the 1000 tons a day, of course, does not mean that 1000 tons

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precisely were to be loaded every day till the entire cargo was loaded. It would be quite competent for the parties to load 1500 tons one day and 500 tons the next. The result aimed at was that the whole cargo should be loaded in five days or thereabouts.

Those operations were of the kind found by the arbitrator to be such as are described by him in the second and fourth paragraphs of his award. I cannot see upon what principle the rate of loading was to be measured or fixed by a process of loading which upon the facts found was either impossible or prohibited.

The arbitrator has found as a fact that the *Hinkley*, taking her turn according to the regulations, got alongside the loading place at 9.10 on the morning of the 26th Aug. 1920; that her loading was finished at 2.10 p.m. on the 28th Aug.; that her cargo was 5267 tons of coal; that, if this were loaded at the stipulated rate of 1000 tons per day, her loading of her cargo would have taken five days six hours, so that in fact she loaded within less than half of her lay days, if these were fixed by the stipulated rate, and that the shipowners would therefore on this assumption have no claim for demurrage, and, lastly, the arbitrator has found as facts, in par. 9 of his award, that the charterers could not load the vessel in the customary or any other manner until she got alongside the one loading place, and that under the regulations of the port the *Hinkley* was prevented from getting there till the 25th Aug. 1920; that this hindrance was caused by the presence of other ships waiting in port, waiting to load coal and having under the regulations prior turns.

Having regard to these facts so found, I think the principle upon which the case of *The Cordelia* (*sup.*) was decided, applies to this case, that the ship was loaded within the lay days fixed in the only way in which they could be fixed in accordance with the port regulations, and that the shipowners therefore had no sustainable claim for demurrage against the charterers.

The appeal, I think, should accordingly be dismissed with costs.

Mr. Dunlop endeavoured to get over the difficulty which the opening words of the third paragraph of the charter-party placed in his way by contending that the charter-party should be construed as if this vital clause was deleted from it. That was a very bold contention, but in my view as unsound as it was bold. There is in the case, in my view, no principle involved, no fact found which would justify such a mutilation of the governing agreement into which the parties have entered, and by which they are bound in its integrity.

LORD SHAW (read by Lord Carson).—I feel loth to add anything to the judgment of my noble and learned friend Lord Atkinson, which has just been read by him to the House, and in which I concur. I venture to add the following words to indicate that in my view the terms of the charter-party taken along with the port

regulations are conclusive of the issue between the charterers and the owners of this vessel and determine that issue in favour of the charterers.

There is reference in the charter-party to these port regulations at Delagoa Bay, and by the 24th and 25th of them it is provided that the regulations may be subject to exception. In the first case, an exception may be made from loading at the berth assigned for a special reason "through the wharfmaster to the satisfaction of the director of the port." In art. 25 the rule of berthing at the coaling appliance in order of arrival may be altered in case of urgency or when the director thinks fit. In neither of these cases was there any alteration or exception made, and the rules accordingly are to be read absolutely.

I now articulate the points of the charter-party and regulations leading up to the payment of demurrage.

Under art. 1 of the charter-party the ship is to proceed to Delagoa Bay and there load, always afloat, in the customary manner.

Under art. 3 the cargo is to be loaded (1) subject to port regulations, that is to say, at the berth assigned for that purpose, by means of the coaling appliance; (2) the ship is to be berthed at the coaling appliance in order of arrival, and the cargo is to be loaded "in regular turn as customary at the rate of one thousand tons per day"; (3) "commencing"—that, in my opinion, clearly means "the loading commencing," or "commencing loading" as per the contract stipulations, namely (a) in turn, (b) as customary, (c) at the berth assigned, and (d) by means of the coaling appliance; (4) the rate of loading to be not less than 1000 tons a day; (5) if detained longer, charterers are to pay demurrage at 300*l.* per day.

The argument for the owners is that the lay days began when notice was given that the vessel had arrived at Delagoa Bay. The notice, it is said, embraced the terms that the vessel was ready to load. In my opinion this was a notification that so far as the ship was concerned she was in a condition fit to receive cargo. But it is not denied that the vessel, after giving, according to contract, notice of her arrival in Delagoa Bay and readiness to take cargo, was nevertheless quite helpless so far as the last-mentioned operation, namely loading, was concerned, until her turn came and she was properly berthed at the coaling appliance. Had any attempt been made to force an earlier berthing or loading, or a berthing and loading in a different place or manner, the conduct of the charterers would have been in violation of their contract by the charter-party with the owners.

I cannot see my way to countenance a construction of this charter-party which would compel that result.

This is not a case in which it was stipulated that the loading was to be completed at a fixed date. The case depends entirely upon when loading was to commence. Once commenced it must take place at a fixed

rate. It would on a reckoning of the cargo to be handled last five and a half days. Those lay days concluded, demurrage would run. But the loading was so expeditious as to be well within the lay day period.

It would be a very remarkable result to hold that demurrage for days or weeks or months was running against the charterers before it was possible that loading in terms of, and not contrary to, the stipulations of the charter-party itself, could have begun.

I do not think it to be in accordance with law that demurrage should be accumulated against the charterers in such circumstances, and apart from a clear and definite stipulation in the charter-party to such an effect.

I think that the judgment of the Court of Appeal is right.

LORD SUMNER.—This appeal relates to the construction of a clause in a common form of voyage charter, of which every phrase and almost every word and collocation of words are familiar and have been the subject of repeated decisions for thirty years and more.

Rowlatt, J., affirming the learned umpire, read the clause as providing that laying time began to run when the ship, being then "arrived," duly gave her notice of readiness. He rejected the charterers' contention, which then was "that the time, which then began to run, was time not merely measured in hours but time measured by the port regulations, which limited the available time, and by the ship being in turn," and he held that he was not entitled to read into the notice of readiness clause, as this argument does, such expressions as "being then in berth" or "being then in turn" or both, for the two expressions are not identical. With this I agree. Every phrase is given its accepted meaning. No prior decisions are disturbed. The construction is without difficulty, apart from the purely linguistic one of saying to what noun substantive "commencing" attaches itself, and as for the effect in distributing the risk of delay to the ship, that is a mere affair of business for the parties themselves. It always is.

This judgment was reversed in the Court of Appeal, and the Lords Justices, though differing considerably in their reasoning, concur in one conclusion—namely, that what "commences" is the obligation to load, not the laying time, and that, until the ship is in regular turn to load, the obligation to load cannot commence. I think, further, that they considered the language of this charter to be distinguishable from other texts which have long received a settled construction in judicial decisions, because in this case the words as to the manner in which cargo is to be loaded run on in one sentence continuously with the words as to rate of loading and as to notice of readiness, and because, further, no substantive is expressed to which the participle "commencing" is referred.

Before passing from these judgments, I wish to draw attention to Warrington, L.J.'s view,

which appears to be that the ship's lay time would not have begun till her regular turn to load had arrived, if there had not been a special clause fixing its commencement (if it did so fix it) with reference to the ship's notice of readiness, and that accordingly the burden is on the ship to express in unambiguous words this special modification. On the contrary, if this clause in effect prevents lay days from running till the ship gets her regular turn and (I suppose) is in berth, it is evidently a stipulation in the charterers' favour. Such a clause must be construed *contra proferentem* and also, as Lord Macnaghten says in *Elderslie Steamship Company v. Borthwick* (10 Asp. M. C. 24; 92 L. T. Rep. 274; (1905) A. C. 93), in such cases an ambiguous clause is no protection. Now who can say that this clause is unambiguous, after considering how many transpositions of words, which are expressed, and how many implications of words, which are not, the construction claimed by the respondents in effect requires? The Lord Justice, I think, overlooks the effect of the rule as settled in *Leonis Steamship Company Limited v. Rank Limited* (*sup.*). The matter really depends on clause 1. If that clause names a destination which is reached before the ship gets to her berth or can get there, she is "arrived" nevertheless, because she has performed the part of the agreed voyage, which is preliminary to arrival, and therefore her laying time begins to run, unless in some other part of the charter this is unambiguously varied. If the sub-sentence which begins with "commencing" refers to lay days, such a variation is effected but quite unambiguously, for the *terminus a quo* is fixed by a notice that the ship is ready, that is, ready in herself. If it refers to loading, then the above rule as to laying time is unvaried, unless it can be shown that, by including the words as to rate of loading in the same sentence as those providing for the manner of loading, the charter has been taken out of the "fixed lay days" class, which I submit is contrary to all the weight of authority.

So much for the Court of Appeal, but, as the result of the argument at your Lordships' Bar, two further views have been arrived at, and clause 1 is now dealt with as well as clause 3.

The effect of the first view, in which two of your Lordships concur, is that the words in clause 1: "Shall proceed to Delagoa Bay and there load" are to be interpreted as if they read: "Shall proceed to Delagoa Bay, and there, at one of the berths provided for her under the regulations of the port, load." Such is the adventure, for the carrying out of which the subsequent clauses provide. No stress is laid upon the words "in regular turn," or on the condition which they express. I agree with Scrutton, L.J., that explicit mention of port regulations adds nothing. In performing the operation of loading compliance with them would in any case be implied, though it is a separate question which party has to pay for any delay they cause. It follows that, on this

view, a "port" charter is converted into a "berth" charter, wherever, at the named port of loading, port regulations in fact deal with the berths in the port, and this whether there are or are not any such express words as "at any berth as ordered by charterer," which are in common use. If this view be right I do not understand how any of the cases, which were settled by *Leonis Steamship Company Limited v. Rank Limited (sup.)*, were ever disputed at all, for if the whole adventure involves loading under port regulations at a berth, and if, therefore, lay days cannot begin till the ship is in berth in turn, the whole distinction between charters to a port and charters to a berth was all along illusory. This conclusion makes me regret the more the very sparing way in which the respondents' counsel assisted your Lordships by reference to the authorities. It was repeatedly and pointedly declared by the appellants that the respondents had, throughout, never questioned that the *Hinckley* was an "arrived" ship, and I never heard this challenged. *Leonis Steamship Company Limited v. Rank Limited (sup.)* and the very numerous cases which were summed up in or follow on that decision, were not discussed. Nevertheless, the above view overrules this extensive chapter of shipping law, for it is, in brief, a decision that the *Hinckley* was not an arrived ship at the material time. I admit at once that none of these cases bind your Lordships; they are decisions of inferior courts, and your Lordships are free to overrule them if you think fit, in spite of all that has been said about the importance of following well-established rules in commercial matters (*Nelson v. Dahl*, at p. 588 per Lord Esher, M.R.; *Dunlop and Sons v. Balfour, Williamson, and Co.* (7 Asp. Mar. Law Cas. 181; 66 L. T. Rep. 455; (1892) 1 Q. B. 507) per Lord Esher, M.R. and per Fry, L.J.; and *Castle-gate Steamship Company Limited v. Dempsey and Co.* (7 Asp. M. C. 186; 66 L. T. Rep. 742; (1892) 1 Q. B. 854), per Lord Esher, M.R. and per Fry, L.J.). Framers of charter-parties and their advisers must begin again, for nearly all loading ports have port regulations, and shipowners will not always submit to bear the risk of detention awaiting a berth at the port of the charterer's choice.

This view is further developed thus: "Under Article 3 the cargo is to be loaded 'in regular turn as customary at the rate of one thousand tons a day'; (3) 'commencing'—that in my opinion clearly means commencing loading—(a) in turn; (b) as customary; (c) at the berth assigned; and (d) by means of coaling appliance; (5) the rate of loading to be not less than 1000 tons a day."

This, I take it, means that the fixed rate is to be observed in carrying out, and therefore is subject to the hindrances involved in carrying out the described operation, and that, as observance of customs which apply during loading is as obligatory as submission to regular turn before beginning to load, "commencing," which refers to loading, must include "con-

tinuing" that loading during the whole of the process in accordance with custom. It was exactly to get rid of questions of delay to the ship by having to load under local and temporary conditions of loading that fixed days were introduced (*Tiss v. Byers (sup.)*, at p. 246, per Blackburn, and Lush, J.J.), questions which must otherwise always turn up, because compliance with local customs as to the manner of loading is implied even if not expressed (*Postlethwaite v. Freeland (sup.)*, per Lord Blackburn). The effect of the proposition above set out is to neutralise the benefit, for the sake of which lay days are fixed or made capable of being fixed.

I respectfully submit that the settled law, as to the distinction between charters with fixed laying time and without it, is to make words, which fix a rate of loading, dominant over words, which relate to the mode of loading, and (subject to the questions of "arrival" and of lay days "commencing") are also dominant over provisions, whether express or implied, relating to regular turn or ready berths. This must be so, because they are the parties' own express and exclusive provision as to time, and, as Lord Blackburn quotes from Abbott on Shipping, the charterer "has engaged that it shall be done": (*Postlethwaite v. Freeland, sup.*). Without such words the law deals with the matter. Provided that each party does his part in a time which is reasonable in the circumstances, he is not in breach. Days fixed by the parties oust this rule of law and a *fortiori* so, when, as here, they not only express a number of days but express the excepted days that are not to count, and so include all other time, whether occupied by compliance with regulations or customs or not. I think this consideration is binding *de jure* in the present case.

The general rule as to the effect of the words in clause 1: "Shall sail and proceed to Delagoa Bay and there load," has been settled for much over half a century. I quote *Tapscott and others v. Balfour and others (sup.)*; though not the origin of the rule, which is considerably older, this case has always been regarded as authoritative. It was held that, in a charter to proceed to a dock to be named, the shipowner had done all that he was required to do, when the ship had got into the dock, though the dock was then so crowded with shipping that she could not get to a loading berth. The loss fell on the charterer, and this although the charter contained the words "in the usual and customary manner," which were held to apply only to the mode of loading and not to the place to which the shipowner undertakes that the ship is to proceed.

A second view is now developed that, as the expression "in regular turn" refers to succession and therefore to the time and not only to the mode of loading, this charter, thus worded, adds to the three conditions of arrival specified by Kennedy, L.J. in *Leonis Steamship Company Limited v. Rank Limited (sup.)*, a fourth, viz., the arrival of the turn, and that

consequently, while the obligation to load in turn at the specified rate becomes binding when the notice of readiness is given, it only becomes operative when the turn arrives. I respectfully fail to understand why the words "in regular turn" should have any special effect in setting aside the general rule. No one has pointed out any distinction between binding local regulations and binding local customs, and regular turn is a local custom. The Master of the *Rolls* thinks that perhaps, because they are tautologous as expressive of an obligation to submit to a turn, these words ought to be read as a special provision, which converts them into a condition precedent to the attaching of the obligation involved in the fixed rate of loading. The rule of construction, no doubt, is to read a contract so as to give effect to every word, but it is new to utilise tautologies by applying them to an alien subject-matter and in a sense which they do not express.

I think, however, that the judgments in the Court of Appeal generally did not purport to qualify, still less to disapprove, *Leonis Steamship Company Limited v. Rank Limited (sup.)* in any way; they only found in the doubt as to the word to be supplied before "commencing" a ground for holding that in effect *Leonis Steamship Company Limited v. Rank Limited (sup.)* does not apply. I now gather that it is really these words "in regular turn," which are to constitute in this case the express terms of the contract that "are inconsistent with the application of general rules of construction, such as those" in *Tapscott and others v. Balfour and others (sup.)*, *Tiis v. Byers (sup.)*, and *Leonis Steamship Company Limited v. Rank Limited (sup.)*.

I think there has been some misapprehension as to the effect of the authorities on the words "in regular turn." Most of the cases on them simply raise the question whether evidence is admissible to explain what "in regular turn" means, and, if so, what the regular turn of the particular place is: (*Leidemann v. Schultz, sup.*; *Taylor v. Clay*, 9 Q. B. 713; *Lawson v. Burness*, 1 H. & C., 396; *King v. Hinde*, 12 L. Rep. 113). Only three are cases where the charter contains any provision for a fixed rate as well, and of these *Robertson v. Jackson (sup.)* expressly removes any difficulty by saying that, for the purpose of payment for detention beyond the time calculated at the fixed rate, the reckoning was to be from the time the vessel was ready to unload and in turn to deliver. We get no help from this.

Another is *The Cordelia (sup.)*, upon which alone the Court of Appeal placed definite reliance. The Master of the *Rolls* merely said that in *The Cordelia (sup.)* Sir Gorell Barnes (President) "gives a full and important meaning to the words 'in regular turn,'" which is true of that and of all other cases on their meaning, but both Warrington and Scrutton, L.J.J., regard it as a decision on the question, whether or not the *Cordelia* was an arrived ship, and apparently they thought that she was not. I am quite unable to see that the case

of *The Cordelia (sup.)* is a decision on "arrived ship" at all. Why does so careful and experienced a judge say nothing about the ship's arrival, but merely affirm the finding of the court below, as to what regular turn was at Topsham? He discusses what the ship-owner expected to find when his ship got to the Nob, which was the place to which she was ordered in accordance with the charter "on arrival at Topsham." He says that she could not reasonably expect more than to be discharged in regular turn, which, in fact, was "one at a time." These expressions are apt, if the ship's case was that, being arrived, she was ready to deliver at the stipulated rate, if only the charterer had been ready with barges, as he should have been under the words "in regular turn," but they were quite inept, if the issue was "arrived or not arrived," in which case the ship's expectations did not matter, the only point being in turn or out of it. I cannot believe that so important a question would have been decided without reference to a single case out of the many then in the books upon the subject, or doubt that, if that had ever been the point, the President would have reserved judgment, for this simple reason that *Leonis Steamship Company Limited v. Rank Limited (sup.)* was then awaiting judgment in the Court of Appeal. In fact, judgment was delivered just three days afterwards—viz., on the 21st Nov. 1908. The profession has always taken the case of *The Cordelia (sup.)* to be one of evidence upon the meaning of "regular turn." The Fifth Edition of Carver on Carriage by Sea did not even quote it, but the Sixth (p. 620), and the editors of the Twelfth Edition of Scrutton on Charter-parties (p. 358) so treat it, and in my opinion rightly.

The remaining case is *Kokusai Kisen Kaisha v. Flack (sup.)*. The charter was the Chamber of Shipping Welsh Coal Charter 1896, under which, as adapted by the parties, the steamer was "to proceed to Delagoa Bay and there load in regular turn always afloat in the customary manner from the charterers in such dock as may be ordered by them on or before arrival . . ." There being no dock in Delagoa Bay, it was the opinion of Scrutton and Atkin, L.J.J., agreeing with McCardie, J. in the court below, that the words "in such dock as may be ordered by them on or before arrival" should be rejected altogether. This at once made the decision in *Leonis Steamship Company Limited v. Rank Limited (sup.)* applicable, and, "from the time when the vessel was in the usual place where ships lie, and, being unloaded of her cargo and ballast, had given a valid notice," her lay time would run without regard to the fact that, owing to congestion in the port, a long time elapsed between her arrival in that place and the earliest possible time when she would get to a place where she could load cargo. The charter contained the clause now under discussion, and McCardie, J. stated its effects (p. 83) as making the days begin "when written notice is given of steamer

being completely discharged of inward cargo and ballast in all her holds and ready to load." Scrutton, L.J. said that her lay time ran from her arrival as above, and Atkin, L.J. says "she is an arrived ship when she arrives at that part of Delagoa Bay where ships usually do lie within the meaning of the case of *Leonis Steamship Company Limited v. Rank Limited* (sup.), and when she is, having arrived at that spot, entitled to give notice of readiness, though she may not in fact have given that notice." This really was a decision. The words "in regular turn" were before the court and, whether they were made the subject of special argument or not, the decision of the court covered them. Of course, it is open to your Lordships to hold that, if these words had been more fully considered, the result would have been different. The case is not binding here, but I do not think the Lords Justices overlooked any point proper for their consideration, and the weight of their opinion, on facts and words which are so closely like those before us, is most impressive to me.

On the other hand, I venture to think that *Miguel de Larrinaga Steamship Company v. Flack* (sup.) is not a case which raised the present point for decision at all, nor is it in any way conclusive now. The ship was chartered to load in a dock as ordered, but there were no docks. The contract had thus to be departed from *in limine*. Roche, J., with the parties' consent, held that the contract applicable was an obligation to go to a pier and there in turn load as customary. How this was got at I do not know. It was apparently by agreement. At any rate, it was not the point in the case. The learned judge then dealt with the wording of the cancelling option, which the charterers claimed to exercise, viz., that the option was exercisable, if she was not "ready in loading dock as ordered" upon a certain date. His conclusion was twofold. The ship was not an arrived ship, so as to be entitled to demurrage, because she did not get to the pier, there to load in turn, neither party having asked him to say otherwise, but he held that she was an arrived ship when in the port, so as to defeat the exercise of the option to cancel. His expression of opinion is that, if a ship is not arrived till she is at the pier in turn to load, stoppages dependent on her being ready to load there do not affect the right, in view of the fact that she never got to the pier at all. So far, I cannot see that the learned judge decided anything relevant on the present occasion. If he is correctly reported, he said that there were strong grounds for saying that the time for giving notice of readiness, so as to start the laying time, did not arise till the ship was ready in turn; but it was an observation quite indecisive and not material to any point dealt with by him. I have the highest regard for that learned judge's lightest opinion, but not knowing on what this opinion is based, I can make no use of it.

I do not appreciate the special efficacy supposed to belong to the actual words "in regular

turn." The use of the coaling appliance on the one hand, which art. 24 prescribes, and on the other the length of the working day, which custom fixes, also involve time and indirectly affect the rate of 1000 tons per day. Again, the same question would arise under the words "as customary," if, say, work was not done on saints' days, saints' days not being regarded as local holidays, or if the custom of the stevedores in the port was not to work on the union's business meeting days. On such a *dies non* lay days could not "commence" any more than on a day when the ship was not in berth in turn. Does the same reasoning apply? Again, if the local customs forbade the loading of coal during rain, owing to the risk of heating, the loading could not commence till the ship was in berth, in turn, and in fine weather. How far does this sort of inroad on *Leonis Steamship Company Limited v. Rank Limited* (sup.) go? I could put other similar examples, till the charter would be turned into a "reasonable time" charter instead of a "fixed days" charter to an alarming extent. As it appears to me, the argument involves that the words "subject to the regulations" stand on the same footing and have the same effect as "in regular turn," and for this reason. Clearly she cannot load except in berth, but that is got out of the regulations, not out of the words "in regular turn." The latter words would be satisfied, when she was lying in the bay next in turn to go to the berth, as soon as the ship, then loading in the berth, should complete her loading and haul off. It follows that she might be "in regular turn" and yet, at that moment and for some time to come, be unable to load. If ability to load is the test of the commencement of lay days or of the right to give an effective notice of readiness, then not only "in regular turn" but "subject to the regulations and as customary" all may (and do) "refer to the time and not only to the mode of loading."

It is one of the commonest incidents in a voyage charter, that the ship is chartered to go to a named dock, the property of undertakers, in which there are a number of berths fitted with coal tips, special cranes, or other loading machinery. A ship may be able to get admission to the dock, and then be obliged to lie moored at buoys for days, waiting her turn to get under the tip and load. How does this differ from a charter to a port, there to load, the regulations of the port requiring a tip to be used, for which regular turn is to be taken? It may be that the words "in regular turn" have not been used, but everybody with practical knowledge is aware, that in nine out of ten such cases there is a regular turn, which must be followed, though it is only implied, for the alternative of a scramble—"first come first served"—is impracticable. Such cases are *Davies v. McVeach* (4 Asp. Mar. Law Cas. 149; 41 L. T. Rep. 308; 4 Ex. Div. 265) as explained in *Nelson v. Dahl* (sup.) and in *Tharsis Sulphur and Copper Company v. Morel* (7 Asp. Mar. Law Cas. 106; 65 L. T. Rep. 659; (1891) 2 Q. B. 647) per

Bowen, L.J., and *Thorman v. Dowgate Steamship Company Limited* (11 Asp. Mar. Law Cas. 481; 102 L. T. Rep. 242; (1910) 1 K. B. 410).

I will refer to another authority in which, if the words in regular turn are not employed, a "custom as to turn" was the point in issue. In *Shamrock Steamship Company v. Storey and Co.* (4 Com. Cas., 80), where a charter stipulated that loading time was to be on the terms of a colliery guarantee, Bigham, J. referred to the further words of the charter, viz., that the vessel was to load "in the usual manner according to the custom of the place" and said: "The usual manner . . . is to take it from the coal tip . . . and this the vessel cannot do until she is under the tip. . . . The charter-party further says that the ship is to load her cargo from such colliery or collieries as the charterers may direct, which means that she shall load at the tips of such collieries. Then the time for loading is to be 'thirty-six running hours,' which is about the length of time which would be required for loading after the vessel is once under the tips. These provisions in the charter-party, and particularly the last provision as to the thirty-six hours, when read with reference to the manner of loading and to the custom as to turn, seem to me to show that the time for loading is not to begin until the vessel is under the tip."

I think this is in substance the same reasoning as that which has been used in the present case, to the effect that provisions as to the mode of loading and the allowance of lay days must be read together so as to allow the former to control the latter. In the Court of Appeal (81 L. T. Rep. 415; 5 Com. Cas., 21), however, when the judgment was affirmed on another ground, Lord Russell of Killowen, C.J. (A. L. Smith and Vaughan Williams, L.J.J. concurring), says this: "Bigham, J. . . . also stated that in his opinion, apart from the colliery guarantee altogether, he would have arrived at the same conclusion in favour of the defendants, if this colliery guarantee clause had not been in the charter-party. . . . I desire to guard myself to this extent, that if it were necessary to consider that view of the case, I should certainly require to have it further discussed before I should be prepared to accept the view of the learned judge."

Some years afterwards an opportunity for such further discussion presented itself in *Thorman v. Dowgate Steamship Company Limited* (sup.), when the above opinion of Bigham, J. was again advanced in a similar charter-party and was not followed. The words there were "proceed to Hull (Alexandra Dock) . . . and there take on board as tendered in the usual manner according to the custom of the place as per colliery guarantee a full and complete cargo . . . to be loaded in 120 hours on conditions of usual colliery guarantee." It was held at the trial that the laying hours began to run when the ship was in the Alexandra Dock, unballasted and ready, though she was not yet in a loading berth and could not get into one, because owing to the

congestion of the shipping she had to wait her turn, but the case was not taken to the Court of Appeal and, as far as I know, this mode of construing such words has not been urged again until the present case was heard, unless indeed *Love and Stewart Limited v. Rowtor Steamship Company Limited* (13 Asp. Mar. Law Cas. 500; 115 L. T. Rep. 415; (1916) 2 A. C. 527) is such a case, where at any rate it was not well received.

I would respectfully ask whether these decisions, after standing so long, are now to be considered as overruled by your Lordships in this case? No doubt it may be said that these cases were not wrongly decided, for the point was not taken as to the efficacy of the words "in regular turn" in fixing the time of loading. Now, however, that it has been taken, it seems to me that if the judgment of the Court of Appeal is right, these decisions can be followed no longer. Again, take such a case as *Re an arbitration between Pyman Brothers and Dreyfus Brothers* (sup.), where a ship in the outer harbour at Odessa was held to be an arrived ship, so that her laying time began to count then and there, notwithstanding that she had still to wait her regular turn before going to a loading quay, where alone she could take cargo. Can this be relied on in future? Mathew, J. says, in *Murphy v. Coffin* (12 Q. B. Div. 87), "the test of an arrived ship is what is her place of destination," but, if the decision of the Court of Appeal is to be affirmed, this will no longer do; it will have to be "where is her loading berth within that place of destination and what is her regular turn for it?" And how is *Leonis Steamship Company Limited v. Rank Limited* (sup.) itself affected? If the principle of construction is to prevail that, till this ship was in berth in turn, she was not arrived, but that from that point her lay days began to run and then ran continuously (subject to excepted days), I think that, logically, this negatives the correctness of *Leonis Steamship Company Limited v. Rank Limited* (sup.), though the respondents did not challenge it. Scrutton, L.J. states what that case decided, viz., "that in the case where the charter was to go to a berth, though the charterer had the implied right to select his berth, the time began, as far as the shipowner was concerned, when the ship was in a part of the port, where ships waiting for loading would lie, although she had not got to the berth where she could load." Why, then, do the days not run from the time when this ship gave notice, being in a part of the port, where ships waiting for loading (as the *Hinckley* was) would lie? Only because of the words "in regular turn" in this clause. It is true that the charter in *Leonis Steamship Company Limited v. Rank Limited* (sup.), which is fully set out in 13 Com. Cas., did not mention "customary manner" or "port regulations" or "regular turn," but what was it that caused the delay, for which the ship recovered demurrage? It was that she lay in the river off the wharf unable to get there because there were forty-six other vessels in

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turn before her. As regular turn existed in fact and was the cause of the difficulty, I find it hard to say that the point did not arise, or that to add a fourth condition to those enumerated by Kennedy, L.J., namely, "the arrival of the turn" is anything but a reversal of his decision. The whole point of it was that the ship was arrived and that her lay days began, the non-arrival of the turn notwithstanding.

The judgments delivered in the Court of Appeal show that, in arriving at the construction adopted, great importance was placed on the supposed connection between the commencement of the lay days and the commencement of the loading. The word to be implied before "commencing" was to be the word "loading." The supposed reconciliation between the notice of readiness to load and the provision for loading in regular turn was that the ship's right to be loaded was assumed to be coincident and simultaneous with her duty to play her part in the prescribed manner of loading. Scrutton, L.J., for example, says, "to make a provision that a ship shall load at the rate of 1000 tons a day before she can possibly load at that rate looks as if there was something wrong somewhere."

It seems to me that such reasoning loses sight of the real nature of lay days, and also of the obligations of the respective parties, the shipowner and the charterer. Lay days ascertained by a rate do not differ in their character from lay days fixed by a number (*Love and Stewart Limited v. Rowtor Steamship Company Limited (sup.)*). The rate affords a calculus for getting at a number, but the rate of loading is not measured or fixed by any process of loading; it is fixed by dividing one figure, viz., the fixed rate, into another, viz., the weight loaded, quite irrespective of the time, place or mode of such loading. Again, a contract to load in regular turn at the rate of 1000 tons a day is not a contract to commence loading when the turn arrives, and then to continue at the stipulated speed. A charterer does not break his contract by not beginning to load on the first lay day or by not continuing to load on each or any subsequent lay day. He is not in default, if he falls short of the rate, and so has to load during the demurrage days. If, knowing that the agreed rate is fixed favourably to himself and that with ten days to go he can load in three, he does nothing for seven, hoping to force the captain to pay him dispatch money, he has not broken his contract. Very often this is a by-way of making money out of the charter, and this is the reason why, as in this case, there is a clause providing for dispatch money for all time saved. Lay days and laying times are days allowed for loading without further payment than the freight, and, if there is an agreement for further days on demurrage at an agreed rate, those further days are allowed at that price. No question of damages arises till the ship is further "detained" and such detention is only a breach in the sense of founding a claim for proved

unliquidated damages. The ship has still to wait and load, until the delay either evidences repudiation by the charterer or commercial frustration of the contract. Till then, inaction by the charterer is not a breach of his contract to load, but only a breach of his undertaking that the ship shall be set at liberty after a certain time; and, at the price of paying damages for detention, the charterer can load or not as suits him best. Hence, if lay days commence before loading can commence, this merely means that the charterer has not the best of the bargain.

The obligation to load of course arises when the contract is signed, not when the ship gets her turn; that merely enables performance of the loading obligation to commence. The commencement of lay days is stipulated as part of a different obligation; it is the contractual adjustment of the incidence of risks of delay. The parties contract not that the ship must be loaded during those days and not otherwise, but, as Lord Dunedin says in *William Alexander and Sons v. Aktieselskabet Dampskibet Hansa and others (sup.)*, at p. 96: "The charterer guarantees discharge in so many days." This is an absolute obligation, subject to express exceptions. If this is not fulfilled, a money payment has to be made. Accordingly, the words beginning "The cargo to be loaded" and the words "at the rate of 1000 tons per day" are in their nature independent stipulations. The ship undertakes to submit to the usual rules and practices; the charterer backs himself to set her at liberty within so many free days and so many more to be paid for. Clearly these engagements would be independent if there were a full stop after "as customary" and then a new sentence began with the one word "Loading." Does it really make all the difference (or any) that the words are elliptical and the punctuation is only a comma? A deed would be engrossed in one long sentence without punctuation and this would not affect the intrinsic nature of its several provisions; may not a clause in a charter be so construed, even though it lacks the literary grace of short sentences, or the principle of one clause, one thing? As to the substance of this endeavour to connect readiness to load on one side with readiness on the other, I think that *Budget v. Binnington* (6 Asp. Mar. Law Cas. 592; 63 L. T. Rep. 493, 742; 25 Q. B. Div. 320; (1891) 1 Q. B. 35) is a good illustration of the independence of these stipulations. According to the customary mode of discharge, both ship and merchant had to employ stevedores, the former to deliver cargo into the merchant's craft, the latter to receive it and stow it therein. All the men on both sides struck. Although the operation was a joint operation and the charterer could do nothing, if the ship did not do her part, the consequent delay was held to be entirely at his risk, the lay days being fixed, and the reason given is that the ability of the ship to discharge had not been made a condition precedent to the merchant's undertaking,

that the whole discharge should be completed in the fixed time or payment made.

I turn now to the purely grammatical side of the matter. The subject of the sentence is the "cargo" to be loaded, and then follow three quite distinct sets of words expressing respectively (a) the manner, (b) the time, and (c) the beginning, as I venture to think, of that time. The words "commencing when" are obviously apt to express the beginning of a period of time. The next preceding words—"per day" with their dependent parenthesis—all refer to time, and to imply from the previous words either "days" or "time," before "commencing," so far from doing violence to sense or language seems to be the only way of making business sense and of presenting an ordinary example of business expressions. After all, one does not look for style in a charter.

On the other hand, the implication of the word "loading" before "commencing" has two difficulties; first, that there is no such word in the sentence, and next, that other words, which are in the sentence, have to be reinserted elsewhere—namely, the words "in regular turn," immediately after "ready to load." It would have been quite easy to add these words over again or to have inserted "in turn" after "ready." The parties did so twice over in the later paragraphs of this clause, once when dealing with cancellation of the obligation to accept cargo, but in the clause in question, when dealing with the supply of cargo, they deliberately forebore to do so. It is significant that this was not done, for "ready to load" has both in law and in plain English one clear and accustomed meaning only, that is ready in herself, ready as far as she is concerned, as a ship is ready for action, though not yet within range of her enemy. The authorities on this point are numerous, explicit, and uniform and give the phrase a meaning which it is difficult indeed to vary merely by argument from a context (see, for example, *Northfield Steamship Company Limited v. Compagnie l'Union des Gaz*, 12 Asp. Mar. Law Cas. 87; 105 L. T. Rep. 853; (1912) 1 K. B. 434, per Farwell, L.J.; *William Alexander and Sons v. Aktieselskabet Dampskibet Hansa, sup.*, per Lord Finlay, and per Lord Shaw). I think Lord Dunedin's language on pp. 95 and 96 (1920) A. C. 88) of this last case is specially apposite.

"It is, I think, impossible to draw a distinction between any of the various kinds of agencies which are not within the control of the ship, any one of which may delay the loading or unloading. If, therefore, the clause in question were given the most expanded meaning" (i.e., ready and with stevedores willing to work) "it would certainly reverse the ordinary legal result of the stipulation as to lay-days. . . . If that was meant, it would have to be effected by unambiguous words."

The whole reasoning of their Lordships' judgments in the case now cited shows that the earlier decisions were approved, e.g., that a ship may be "ready" for the purpose of giving

notice of readiness to receive cargo, though she has not yet lined her hold as customary for a wheat cargo about to be shipped (*Vaughan v. Campbell*, 2 Times L. Rep. 33; *Grampian Steamship Company v. Carver*, 9 Times L. Rep. 210; and see *Armement Adolf Deppe v. John Robinson and Co. Limited*, 14 Asp. Mar. Law Cas. 84; 116 L. T. Rep. 664; (1917) 2 K. B. 204, at p. 208, per Swinfen Eady, L.J.), or although she was not in a loading berth (*Hick v. Tweedy and Co.*, 6 Asp. Mar. Law Cas. 599; 63 L. T. Rep. 765). The ship's readiness is affected by her own disabilities (*White v. Steamship Winchester Company*, 23 Sc. L. R., 342, at p. 347), but these notices are meant to be given on arrival; they must refer to the facts then existing as to the ship, and cannot be qualified by uncertainties as to places, to which she is only to go when she has accomplished her voyage to her loading port, and as to the state of things then existing there, which should be known to the charterer, who has bidden her come there to load his cargo, but cannot readily be known by the captain newly arrived.

Now suppose the sub-clause is not so read, the sentence will then have to be re-arranged. "Loading commencing" when the ship is ready in turn, even if that is deemed to mean, what in itself it does not say, ready in berth in turn, will not be enough, for even with a ship ready in berth in turn, loading might not commence but might be further postponed, if any custom or regulation forbade it to commence forthwith. If the full loading obligation (lay days apart) is to be prefixed to the word "commencing" something like this would be required: "3. The loading of the cargo to commence when written notice is given, that the steamer being, &c., . . . is in berth in turn ready to load it, subject to the regulations and customs of the port, and there to continue loading, always in accordance therewith, at the rate of 1000 tons per day till completion."

This would be an heroic effect of conjectural emendation. It would be not construction but reconstruction.

Next, what about the syntax? "Commencing" is a present participle, which qualifies some missing substantive. The lacuna must be supplied from some antecedent substantive or, alternatively, this participle must be deemed to relate to some actual antecedent, normally the nearest. Throughout the previous five lines of print all the substantives relate to time, and that time is loading time. They are "day," "time," "holidays," and "days" of the week. If we pass over these to reach something farther back, the only available substantive remaining is "cargo," but commencing cargo will not do; cargo is not commenced. Once more new words have to be foisted upon the parties. It has to be "loading of cargo commencing." I know that this is not very difficult, since the words are cargo to be loaded, but neither is it difficult to say "lay time commencing" instead of "loading commencing," and I can see no reason for

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adopting the former, except to make the interpretation square with some presupposed principle of chartering business, that the obligation to go and load (which is not the real point—the real point is the commencement of lay days) must coincide with the obligation to put cargo on board. With regard to all implications of new terms, when the existing words are in themselves clear, I venture once more to invoke *The Moorcock* (6 Asp. Mar. Law Cas. 373; 60 L. T. Rep. 654; 14 Prob. Div. 64). It should only be done, if it is necessary to give effect to the clear intention of the parties. We are not, however, to presume that they intended lay days and loading to commence together. In scores of charters the matter is arranged otherwise. It is a question of money, and they have made their own bargain. I submit that to read the clause as “laying time commencing” gets rid of all need for reconstructions and additions; it makes any inroads on “berth” or “port” charters, “fixed lay days” or “reasonable time” quite needless. *Leonis Steamship Company Limited v. Rank Limited* (sup.) will stand over to be affirmed or overruled some other time and perhaps that time may never come.

I apologise for so tedious an exposition of cases, all no doubt already well known to and maturely considered by your Lordships, but the citation of authority at the Bar was parimonious, and I have felt it my duty to submit to your Lordships' better judgment these cases, with such observations on them as seemed to me to be material.

I should add that the opinion I have just read enjoys the agreement of my noble and learned friend, Lord Haldane.

Appeal dismissed.

Solicitors for the appellants, *Thomas Cooper and Co.*

Solicitors for the respondents, *William A. Crump and Son.*

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 26 and March 1, 1926.

(Before BANKES, WARRINGTON, and ATKIN, L.JJ.)

ETHEL RADCLIFFE STEAMSHIP COMPANY v. W. AND R. BARNETT LIMITED. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Order as to port of discharge to be given by consignees—Refusal by consignees to give orders—Breach of contract—Measure of damages—Commission.

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

By a charter-party dated the 26th June 1924 it was provided that the steamer should receive a full and complete cargo of grain at the River Plate and being so loaded should proceed with all convenient speed to St. Vincent for orders. By clause 22 orders as to port of discharge were to be given to the master within twenty-four hours after receipt by the consignees of the master's cable of his arrival at the port of call and for any detention waiting for orders after the twenty-four hours the charterers were to pay to the steamer 30s. per hour. It was further provided by clause 35 that 4 per cent. commission was due by the vessel “upon the gross amount of freight, dead freight, demurrage, &c., on shipment of cargo to charterers.” The charterers who were the consignees of the cargo, deliberately kept the steamer waiting for some thirteen days at St. Vincent for orders as it suited their business arrangements to keep her there although pressed constantly by the owners to give orders as to port of discharge. The shipowners having claimed damages at common law for the detention, the charterers admitted liability to pay for the detention of the steamer at 30s. per hour, but claimed to deduct commission from the sum due on the above basis. Upon a special case stated for the opinion of the court,

Held, (1) that the master having elected to wait at the port of call until orders to proceed were received, the damages to which the owners would be entitled were limited to the 30s. per hour specified in clause 22 of the charter-party, and (2) that commission could not be claimed by the charterers under clause 35 upon the damages which they had to pay.

Decision of Rowlatt, J. infra affirmed.

This was an appeal by the shipowners from the decision of Rowlatt, J. upon a special case stated by an umpire and there was a cross-appeal by the charterers.

The material parts of the special case were as follows:

By a charter-party dated the 26th June 1924 the Ethel Radcliffe Steamship Company Limited, as owners, chartered the steamship *Ethel Radcliffe* to W. and R. Barnett Limited as charterers, to bring a cargo of grain from the River Plate.

Clause 2 of the charter-party provided that the steamer should receive from the charterers a full and complete cargo of wheat and (or) maize and (or) rye at the ports or places mentioned.

Clause 3 provided that the steamer should load in the River Parana not higher than Rosario as much cargo as the master might consider safe and the balance of the cargo at Buenos Aires or La Plata.

Clause 4 provided that “being so loaded, the steamer shall with all reasonable speed therewith proceed to St. Vincent (Cape Verde) [or to certain other named ports of call] for orders (unless these be given by charterers on signing bill of lading) to discharge at a safe

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port in the United Kingdom or on the Continent between Bordeaux and Hamburg, both included. . . ."

Clause 5. Freight to be paid at varying rates "All per ton . . . gross weight delivered."

Clause 13 provided: "The steamer shall be loaded at the rate of 225 tons per running day up to the first 3000 tons, and at the rate of 400 tons per running day for any quantity above 3000 tons, Sundays and holidays excepted, otherwise demurrage shall be paid by the charterers at the rate of twopence sterling per gross register ton per running day for steamers of up to 4000 tons deadweight cargo capacity, and threepence sterling per gross register ton per running day for steamers of over 4000 tons deadweight cargo capacity. Time for loading shall commence to count twelve hours after written notice has been given by the master or agents . . . that the steamer is ready to receive cargo. . . ."

Clause 22 provided: "Orders as to port of discharge to be given to the master within twenty-four hours after receipt by the consignees of master's telegraphic report to consignees (whose name and cable address are to be given in writing by charterers to the master before sailing from last loading port) of his arrival at the port of call, and for any detention waiting for orders after the aforesaid twenty-four hours the charterers shall pay to the steamer thirty shillings per hour. The master shall give written notice to charterers before signing final bill of lading whether he will call at St. Vincent . . . for orders. Should cable communication with the port of call be interrupted steamer shall proceed to Lisbon, Queens-town or Falmouth at the master's option for orders, and the master shall advise charterers' agents of his arrival at such port of call."

Clause 35 provided: "Four per cent. commission is due by the steamer upon the gross amount of freight, dead freight and demurrage, &c., on shipment of cargo to charterers."

The charterers were the consignees of the cargo. The master before sailing gave written notice to the charterers of his intention to call at St. Vincent for orders.

The steamer arrived at St. Vincent at 6 a.m. on the 16th August 1924. The master dispatched a cable message to the charterers at 8.15 a.m. on that day informing them that he had arrived and was awaiting orders. The said message reached the charterers at 1 p.m. on the same day. Orders as to the port of discharge did not reach the master until 9.50 p.m. on the 29th Aug. 1924, and on receipt of orders he sailed at once. A period of thirteen days eight hours and fifty minutes (320 hours fifty minutes) elapsed between the receipt by the charterers of the master's cable reporting his arrival at the port of call and the giving of orders to the master as to port of discharge. The steamer was consequently detained for that period. There was no interruption of cable communication with St. Vincent.

During the period of detention the charterers were constantly pressed by the shipowners to give orders as to port of discharge. The charterers neglected and refused to give such orders until the 29th Aug. 1924, and did so deliberately as it suited their business arrangements to keep the steamer at St. Vincent. This was the sole cause of the steamer's detention.

The charterers admitted a liability to pay, and paid the owners, for the detention a sum of 427*l.* 8*s.* 10*d.*, which they arrived at under clause 22 of the charter-party by calculating 296 hours and 50 minutes (being the before-mentioned 320 hours and 50 minutes less the 24 hours mentioned in clause 22) at 30*s.* per hour. This amounted to 445*l.* 5*s.* and from that sum the charterers deducted 17*l.* 16*s.* 2*d.* under clause 35 of the charter-party.

The shipowners contended that clause 22 imposed on the charterers an absolute obligation to nominate a port of discharge within twenty-four hours, and that the provision as to detention waiting for orders dealt only with telegraphic delays and did not entitle the charterers to use the steamer as a warehouse, and that there was nothing in clause 22 or elsewhere in the charter-party to deprive the shipowners of their right to damages at common law. They further contended that clause 35 providing for 4 per cent. commission was not applicable in that it only applied to matters arising and sums due on shipment.

The charterers contended that on the natural and ordinary construction of clause 22 they were entitled to delay sending orders as to the port of discharge in the manner in which they did and to pay only the sum for detention mentioned in the clause. They also contended that no other meaning was necessarily to be implied, and that the shipowners had made a bad bargain and were bound by it. As to commission, they contended that it was not restricted to sums due on shipment, inasmuch as the freight itself was payable on gross weight delivered.

The umpire found as facts, or held in law: (a) That the charterers were not entitled under clause 22, or otherwise, to delay sending orders as to port of discharge, and that the provision in the clause as to payment in respect of detention waiting for orders did not apply; (b) that the shipowners were entitled to recover damages at common law from the charterers for the detention of the steamer at St. Vincent; and (c) that the charterers were not entitled to the 4 per cent. commission (provided for in clause 35) in respect of the sum so recovered.

The questions for the opinion of the court were:

(1) Whether on the facts found and on the true construction of the charter-party, and in particular of clause 22 thereof, the charterers were entitled deliberately to neglect and refuse to send orders to St. Vincent as to port of discharge for the said period of about thirteen days; (2) whether, alternatively, the shipowners were entitled at common law, or upon

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some other and what basis, to recover damages in respect of the detention of their steamer at St. Vincent; and (3) whether the charterers were entitled to deduct the 4 per cent. commission provided for by clause 35 from the amount (if any) payable under clause 22, or, alternatively, from the damages (if any) recoverable at common law or otherwise.

ROWLATT, J.—This case raises rather a curious point. The charter-party provided that the vessel was to go to a port of call for orders and that the charterers were then to give orders to the master as to port of discharge within twenty-four hours of receiving a cable from the master and for any detention beyond that the charterers were to pay to the steamer 30s. per hour. The facts were that the vessel was detained at St. Vincent, the port of call, for some thirteen days and the arbitrator has found that the delay was deliberate and in spite of pressure to nominate a port of discharge. The first question which the learned arbitrator puts to me is this, whether on the facts found and on the true construction of the charter-party the charterers were entitled deliberately to neglect and refuse to send orders to St. Vincent as to port of discharge for thirteen days, and, secondly, in the alternative, whether the shipowners were entitled at common law or on some other basis to recover damages in respect of the detention of their steamer. It was contended on behalf of the claimants that clause 22 did not contemplate the charterers giving the go-by altogether to their underlying obligation which was necessary in order that this adventure might be carried out to give orders to the ship as to her port of discharge and saying: "We are not going to consider that question at all." The clause is addressed to the case where, as a matter of business, the charterer being regarded as a man who would further the joint adventure as far as he reasonably could was not in a position to give the notice in time. It seems to me that upon the findings of the arbitrator I ought to answer the first question which he has put in the same sense as he has answered it himself. It seems to me that clause 22 does not contemplate permitting the charterer to do a thing of this kind. It seems to me that what was in the minds of the parties was that the charterers intended to nominate a port of discharge for the steamer within a reasonable time and that the vessel was not to be detained and kept as a sort of warehouse for the charterers for such time as they were considering what was to be the port of discharge for the vessel. I am rather surprised that authority, if not on the law of charter-parties, at any rate on some branch of the law of contract has not been cited. In my judgment the charterers were not entitled deliberately to neglect and refuse to send orders to St. Vincent as to the port of discharge.

So much for the first point, but then there is the second point arising out of the fact that the vessel was detained at the port of call for so

many days. Now the answer I have given to the first question would have this result. Assume the charterers had said in terms as soon as they heard that the vessel had arrived at the port of call, "We are not going to consider just yet what the port of discharge is to be; we will keep the vessel here as many days as you (the owners) will put up with while we attend to something else," or something of that sort; and not recognising their duty to nominate a port of discharge except at their own convenience, that would put on the shipowners the risk of saying: "How long have we to put up with this and take the risk of repudiation?" If they had done that, I think upon the basis of my answer to the first question, that the owners might have said to the charterers: "If you tell us that you are not going to address your mind to the question of the port of discharge we tell you now that you have broken your contract and we will treat you on that footing and repudiate it as far as the term of staying at the port of call under clause 22 is concerned, and will treat it as a breach now. We are not going to wait and see how long we are to be kept waiting." The charterers in fact kept the vessel waiting and the question that then arises is this, whether if by doing so they keep the contract alive, they do so upon the basis of general damages or on the basis of agreed damages. It is on that point that I differ from the arbitrator with some doubt. It seems to me that if the vessel stays on, he treats her as detained under clause 22. If so, I cannot see why the agreed rate payable in respect of the detention at the port of call should not apply. In other words, it seems to me that the reasoning of the arbitrator with which I agree in substance, that this detention was not such as was contemplated by the clause at all, only goes to give the vessel the right to repudiate at an earlier period than she would otherwise have had, or to treat the charterers as repudiating at an earlier time than they would otherwise have done, but not so as to set the amount of damages at large.

This brings me to the next question, whether the respondents are entitled to commission. I do not think they are entitled to commission. Looking at the matter generally, I cannot see that it was intended that commission should be paid on the 30s. for the extra detention which was expected to be only for an hour or two. I do not think, broadly speaking, they thought of receiving commission for the few hours' delay waiting for a cable, and I am fortified in my view by the terms of clause 35 which show that commission is to be paid on shipment of cargo; it is stated to be due by the steamer upon the gross amount of freight, deadweight and demurrage, &c., on shipment of cargo to charterers. It cannot really be paid on shipment, because you do not then know how much the freight is going to be until after payment. In the result I do not accept the contention of the charterers upon this point. The award must therefore be entered

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for the 30s. an hour for the relevant number of hours.

I am of opinion that the answer to the first question put by the arbitrator must be in the negative. As to the second question, in my view the claimants are entitled to damages upon the basis fixed by clause 22 of the charter-party. To the third question as to whether the respondents were entitled to the 4 per cent. commission, the answer is in the negative.

The owners appealed and the charterers cross-appealed.

C. R. Dunlop, K.C. and *Holman* for the shipowners.

A. T. Miller, K.C. and *James Dickinson* for the charterers.

BANKES, L.J.—This is an appeal from a judgment of the learned judge upon a special case stated by an umpire in reference to a dispute which arose between shipowners and charterers with regard to the time during which a vessel was kept waiting at the port of call for orders. The charter was a charter under which the vessel had to proceed to load in the River Parana at certain ports, and there was a provision in reference to the steamer calling at a port of call. In the events which happened the port at which she had to call was St. Vincent. The clause dealing with the giving of orders at the port of call is clause 22, which is in these terms: "Orders as to port of discharge to be given to the master within twenty-four hours after receipt by the consignees of master's telegraphic report to consignees . . . of his arrival at the port of call, and for any detention waiting for orders after the aforesaid twenty-four hours the charterers shall pay to the steamer 30s. per hour. . . ."

What happened was that the vessel arrived at St. Vincent on the 16th Aug., and the master duly sent the telegraphic report, which was received by the charterers on the same day. It did not suit the charterers' purpose to give the master orders within the twenty-four hours or for a long time afterwards; and in fact they did not give him any orders until thirteen days, or nearly fourteen days, had elapsed after the expiration of the twenty-four hours. The vessel remained at St. Vincent and the charterers were pressed to give orders, but they did not give them; and the dispute between the parties in reference to this matter was whether, under those circumstances, the shipowners were entitled to general damages for the detention of the vessel, or whether, as the charterers contended, the damages recoverable by the shipowners were limited to the 30s. per hour provided for in clause 22.

The umpire was of opinion that the charterers were exceeding their rights in delaying giving the orders for so long, and he decided that the charterers were not entitled to delay giving orders for that length of time, and that

under those circumstances clause 22 had no application to the case. He therefore held that the shipowners were entitled to general damages.

The learned judge took a different view. He agreed with the learned umpire that the charterers had no contractual right to delay giving orders for that time, but he held that, in spite of that, the amount recoverable by the shipowners was limited to the 30s. per hour.

In my opinion the learned judge in taking that view was putting the true construction upon this charter-party. It is necessary, I think, when dealing with clause 22, to consider what are the obligations of the charterers under that clause and what is the duty of the shipowners and the master representing the ship.

First of all, the only obligation undertaken by the charterers is, it seems to me, to give the master orders within twenty-four hours, and if the orders are not given within that time the charterers commit a breach of their obligation and a breach which gives the shipowners the right to claim damages. Whether the damages are at large or whether the damages are represented by the amount specified in clause 22 is the question which has to be decided.

Before dealing with that particular point I should like to refer to what seem to me to be the obligations and the rights of the shipowners under this clause. It is quite plain that the duty of the shipowners is to remain at the port of call for the stipulated twenty-four hours. That has been, I think, decided on more than one occasion, but it was clearly decided in the case of *Proctor, Garratt, Marston, Limited v. Oakwin Steamship Company Limited*, which was before this court a short time ago on appeal from Roche, J.: (see 16 Asp. Mar. Law Cas. 600; 134 L. T. Rep. 388; (1926) 1 K. B. 244).

Now the question has arisen as to what is the obligation or the right of the shipowner at the expiration of the twenty-four hours, and in that case it was held that it was the duty of the master to remain for a reasonable time after the expiration of the stipulated number of hours. But it was not, in that case, necessary to decide, nor do I think the court did decide, the ground upon which that duty rested. It seems to me reasonably plain that, when once the delay in the giving of orders by the charterers is such that it manifestly appears that the delay amounts to a repudiation of the contract by the charterers, the shipowners' right is not to remain for an unlimited time at the port of discharge, but to accept the repudiation and to do what, under the circumstances, is best in mitigation of the damages. That would naturally be to proceed to the port which in the opinion of the master would most likely be the one selected by the charterers. Roche, J., in giving judgment in the *Proctor* case (*sup.*), said that in his opinion it is the duty of the master to remain a reasonable time after the expiration of the number of hours named in the

charter-party, but he leaves it undecided as to whether he rests that duty upon an implied term of the contract or whether he rests it upon the necessity that the master shall remain a reasonable time before he is in a position to say that the conduct of the charterers in not giving orders amounts to a repudiation; and I do not think it is necessary that in this case we should express a decided opinion upon it. Scrutton, L.J. in his judgment in the Court of Appeal in that case said that he agreed with Roche, J. in holding that the port of call means —“ a place for the receipt of orders in regard to the port of discharge,” and that “ by necessary implication the charter obliges the shipowners to keep their ship at the port of call for twenty-four hours, and, at any rate, a reasonable time thereafter.”

He accepts Roche, J.'s view, but, as I have pointed out, Roche, J. left it open as to the ground upon which he rested that view, and I think Scrutton, L.J. did so also.

If that is the position of the master, that he is only obliged to remain at the port of call for a reasonable time after the expiration of the twenty-four hours, it seems to me that he has his remedy in his own hands if the charterers neglect to send the orders within a reasonable time after the expiration of the limited number of hours. He is entitled then to make his way to the port which he considers the one in the circumstances most likely to be the one selected by the charterers, and if he does that it is in the hope of mitigating the damages so far as possible; and from a business point of view one realises that since the advent of wireless, much less risk is run by a captain who does leave the port of call upon failure to receive orders within a reasonable time than would have been the case before it was possible to communicate with a vessel as easily as it is now. In those circumstances, those being the respective rights and obligations of the parties, it seems to me that if a master, instead of proceeding on his way through failure to receive orders within a reasonable time, elects to remain, he elects to remain because he is waiting for orders and he is remaining at the port of call until he does receive the orders, which particular event is specially, clearly and unequivocally provided for in the clause which says that “ for any detention waiting for orders, after the aforesaid twenty-four hours, the charterers shall pay to the steamer 30s. per hour.” In my opinion, the meaning and efficacy of the clause is this, that if the master does, after the expiration of a reasonable time after the named hours, remain waiting for orders, he does so upon the terms that the only damages which his owners would be entitled to claim is the named sum of 30s. per hour. For these reasons I think that the view taken by the learned judge on this point was right.

The other point is one which refers to the commission due under clause 35 of this charter-party, and that clause is in these terms: “ Four per cent. commission is due by the steamer upon the gross amount of freight, dead freight,

and demurrage, &c., on shipment of cargo to charterers.”

It is not I think, necessary in this case to endeavour to put a meaning upon this clause which will determine its operation in cases other than the present. It is very difficult to read the clause as covering anything except something which is ascertainable in amount on shipment, because it seems that the whole clause is governed by the words “ on shipment of cargo,” and if that is so, where the clause refers to demurrage it will be demurrage at the port of shipment and would not cover demurrage at the port of discharge. It is not necessary to decide that, because the only ground upon which the commission can be claimed in this case is that it is covered by the expression “ &c.”

Speaking for myself, where you find a claim for commission in a clause in which the only words which can be said to cover it are the expression “ &c.,” and when the “ &c.” is coupled with the difficulty which arises from the use of the words “ on shipment,” I am not prepared to say that there was any agreement between the parties that this commission should be paid on something which is not demurrage but which, though akin to demurrage, is different from demurrage, and is specifically dealt with in a clause by itself and is referred to as the amount payable for detention waiting for orders; and, on the ground that this clause is not sufficiently plain to carry to my mind conviction that the parties were contracting in reference to this amount payable for detention waiting for orders, I think that the learned judge and the learned umpire were right and that the cross-appeal must fail. I do not think that the question which the learned umpire has formulated in his special case quite covers our decision, because the question which he asks is based upon whether or not the respondents were entitled under the charter-party deliberately to neglect and refuse to send orders. In my opinion they were not so entitled, but in spite of that the amount recoverable by the shipowners is limited by the amount named in the clause; and I suppose it will be sufficient to answer this case in such a way as would indicate to the parties that the shipowners' claim is limited to that sum and that the claim for commission is not recoverable.

I think, therefore, that the appeal fails and that the cross-appeal also fails.

WARRINGTON, L.J.—I am of the same opinion. The argument for the appellants proceeds upon the footing that for the purposes of the construction of the clause in question there are two kinds of detention waiting for orders; the first the period during which the master remained at the port of call under an assumed obligation to wait there a reasonable time after the breach by the charterers of their obligations to give notice as to the port of discharge; and the second, detention waiting for such orders during the subsequent period when it is suggested that the master was under no such obligation to wait.

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In my opinion, on the construction of the clause there is no room for any such distinction, assuming it otherwise to exist. The clause seems to me to be reasonably clear. There is a clear and plain obligation on the part of the charterers to give the master notice within twenty-four hours after the receipt by the consignees of the master's report to the consignees of his arrival at the port of call, and if that notice is not given to the master within those twenty-four hours then there is a clear breach of the obligation of the charterers, and after the expiration of that time, if the ship remains in fact at the port of call waiting for orders, then this waiting amounts to detention within the meaning of the clause.

Now the clause provides that "for any detention waiting for orders after the aforesaid twenty-four hours" a fixed sum per hour shall be paid to the steamer. In my opinion, all that has to be ascertained for the purposes of the application of that provision is: Was the ship in fact detained waiting for orders? In this case the facts are quite plain—there is no dispute that the ship was, as the umpire has found, detained waiting for orders in consequence of the conduct of the charterers in deliberately refraining from giving those orders. In my opinion, therefore, as there was in fact detention waiting for orders, the fixed sum became due.

If that is the correct view it is unnecessary to decide whether, as part of the contractual obligation imposed by the contract upon his owners, the master is bound to wait for a reasonable time after the expiration of the twenty-four hours, or whether it is merely this, that he is entitled so to wait before he finally determines whether or not he shall treat the contract as broken and sail away to one or other of the ports of discharge selected by himself. On that I express no opinion because the question really does not arise, but in my view the clause is unambiguous. If the ship is in fact detained waiting for orders then the fixed rate of payment is introduced and that is all that the charterers have to pay.

With regard to the cross-appeal I have very little to add. The entire argument is founded upon the expression "&c.," and there are in other parts of the charter provisions for payment on shipment or, at the port of loading, for payment of other sums—for example, in clause 6 and clause 9—quite sufficient to satisfy the "&c.," even assuming that the clause is confined to payments to be made on shipment or even assuming that it goes further. It is therefore unnecessary to determine whether the word "demurrage" includes demurrage at the port of discharge or not.

In my opinion the cross-appeal fails and the main appeal fails also.

ATKIN, L.J.—This is one of the numerous and regular disputes upon the terms of the Chamber of Shipping River Plate Charter-party 1914, a charter-party which must have

resulted in the payment of law and other costs in disputes of this kind which, if put together, would, I imagine, be such as to cause an appreciable difference in the price of the quatern loaf. But we have to decide it; and apparently it is not to the interests of ship-owners or merchants to reduce the charter-party to terms which are plainly intelligible, and certainly in its present form it has been productive of much profit to practitioners in the law and of trouble to those who have to decide the questions of construction arising upon it. This time the question arises, as it has arisen before, on the terms of clause 22 of the charter-party, which provides, "orders as to port of discharge to be given to the master within twenty-four hours after receipt by consignees of master's telegraphic report to consignees of his arrival at the port of call, and for any detention waiting for orders after the aforesaid twenty-four hours, the charterers shall pay to the steamer 30s. per hour." In this case the charterers delayed, for a period of, I think, some thirteen days after receipt of the notice of arrival at the port of call, to give the orders; and the finding of the umpire is expressed in these terms:—"The charterers deliberately neglected and refused to give such orders until the 29th Aug. 1924, as it suited their business arrangements to keep the steamer at St. Vincent. This was the sole cause of the steamer's detention."

What is meant by that I am sure I do not know. I do not know what the evidence was, but I assume what is meant is that it was to their interests in their business to keep the ship waiting for orders until the 29th Aug. Whether that means more than that they could not at the time give the orders and that it was inconvenient to give the orders until they had settled the destination of the ship, I do not know. But what Mr. Dunlop, on behalf of the ship, says is that this clause should be read as meaning any detention waiting for orders for which the ship is bound to wait, and he says that, inasmuch as the ship was only bound to wait a reasonable time, and that there must be deemed here to be a finding that the ship was asked to wait more than a reasonable time, the clause does not apply, and that he is entitled to general damages for the breach of contract.

I think it is material on that argument to bear in mind that in fact there is here no finding that the ship was kept longer than a reasonable time, but even assuming that there was that finding, in my view the case on the words of the clause and on authority is reasonably plain against the view put forward by the shipowners. I think "detention waiting for orders" means "detention waiting for orders while the ship is in fact waiting for orders." Here the ship did wait for orders, and was waiting for orders, and she was detained waiting for orders. In those circumstances it has been agreed what the shipowners are to get: they are to get 30s. per hour.

On that view of the case the decision does not appear to me to depend upon whether the ship is under a contractual obligation to remain only for the twenty-four hours mentioned or is under a contractual obligation to remain a reasonable time beyond the twenty-four hours. I myself, upon reading the case of *Proctor, Garratt, Marston Limited v. Oakwin Steamship Company Limited (sup.)*, I think, would have come to the conclusion that there was an express decision by the court that there was a contractual obligation upon the ship to remain for a longer period than the twenty-four hours mentioned in the clause. Again, it does not seem to me to depend upon whether the charterer is under an obligation to give the orders within the twenty-four hours or whether his contractual right extends to giving the orders within a reasonable time after the expiration of the twenty-four hours; and I also apprehend that it does not in the least follow that the obligations of the shipowner on the one hand and the charterer on the other should be co-existent in point of time. I can quite imagine that the ship may be under an obligation to remain for a certain period longer than the period after which the charterer has committed the breach of his contract, for the simple reason that the contract has provided that if he were to commit a breach of his contract the compensation is fixed at a certain rate per hour. The reason why I say it does not make any difference is that in a clause of this kind I am quite unable to distinguish the legal rights from the legal rights that arise under the ordinary provision for payment of demurrage at the port of loading, and I express those rights in the terms of *Scrutton on Charter-parties*, because they seem to me to express exactly the effect of the case of *Inverkip Steamship Company Limited v. Bunge and Co.* (14 Asp. Mar. Law Cas. 110; 117 L. T. Rep. 102; (1917) 2 K. B. 193). The learned authors say at p. 348 of the 12th edit., art. 128:—

“Stipulations for demurrage may be

“(1) Exhaustive: as ‘10 days for loading and demurrage at 20l. per diem afterwards,’ which covers all delay. On such a provision the shipowner cannot say that the provision for 20l. a day demurrage only applies to a reasonable time, after the lapse of which he can claim damages for detention. After the lapse of a reasonable time he may take his ship away, but if he allows her to stay on he can only claim the agreed rate of demurrage.”

For that the learned authors cite the case of *Western Steamship Company Limited v. Amaral, Sutherland, and Co. Limited* (12 Asp. Mar. Law Cas. 493; 109 L. T. Rep. 217; (1913) 3 K. B. 366), and *Inverkip Steamship Company Limited v. Bunge and Co. (sup.)*, and the latter case is clearly an authority for that proposition. To apply that to this case, it appears to me that the twenty-four hours are the lay days and the 30s. per hour is the demurrage, and that the shipowner cannot say that the provision for 30s. per hour only

applies to a reasonable time, after the lapse of which he can claim damages for detention. The matter seems to me, as I say, to be concluded by authority and to give the full effect to the actual words used by the parties. Therefore, on the first point, I think that the learned judge was right, and that the appeal should be dismissed.

Then there is the question of the cross-appeal, which arises on a different clause of this charter-party, and I do not remember so far that there has ever been a dispute upon this. It arises upon clause 35, and a similar dispute may also arise on clause 37 when anybody wishes to raise it. Clause 35 says: “Four per cent. commission is due by the steamer upon the gross amount of freight, dead freight, and demurrage, &c., on shipment of cargo to charterers;” and I contrast that with clause 37, which, probably for the purpose of making things a little more obscure, puts the words in a different order, though probably it is intended to express the same idea. It says:—“The brokerage of 5 per cent. on the amount of freight, dead freight and demurrage is due on the signing of this charter to the agents by whom the steamer is to be reported at London should she discharge there.”

However, now we have got to deal with clause 35, “the gross amount of freight, dead freight, and demurrage, &c., on shipment of cargo to charterers.” Now what is meant by that? It is pointed out that the actual amount of the dead freight and the actual cost of freight—because freight is payable on the out-turn weight, and therefore the actual amount of dead freight—and the actual amount of demurrage, if demurrage includes demurrage at the port of discharge, cannot possibly be ascertained on shipment, and, indeed, that the amount can hardly be due or expressed to be due upon shipment. What is said is that the “&c.” would cover other claims of a kind similar to freight, dead freight and demurrage. I must say that I have some difficulty in distinguishing this class of claim under clause 22 from the claim for demurrage. It very closely resembles the claim for demurrage, which is a payment for the detention of the ship, except that here the detention is not in respect of the loading or unloading but is in respect of waiting for orders. But on the other hand there are words which clearly the word “&c.”, if it means anything, could cover. There is the extra cost of optional cargo in clause 6; there is the cost of shifting to a second safe shoot or berth at the port of loading in clause 9, and there is detention waiting for orders for the loading port in clause 11; and it would appear to have been a very simple thing to have said “any detention at the port of call.” I am very puzzled to know how these words “on shipment,” are really to be made applicable. I suppose a broker might earn commission on procuring a cargo, which might be due on performing his services but which could not be quantified or ascertained until the voyage had been completed. That is a possible view of a brokerage contract.

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But in respect of the amount payable to the charterers, I have great difficulty. All I can say is that upon this charter-party the learned judge has come to a conclusion against the charterers on this point, and I cannot say that I am satisfied that he is wrong. In these circumstances I think the only proper course to take is to dismiss the cross-appeal. Therefore I think that both the appeal and the cross-appeal should be dismissed.

Appeal and Cross-Appeal dismissed.

Solicitors for the shipowners, *Holman, Fenwick, and Willan.*

Solicitors for the charterers, *William A. Crump and Son.*

March 16, 17, and 18, 1926.

(Before Lord HANWORTH, M.R., SCRUTTON and SARGANT, L.JJ.)

GREENHILL v. FEDERAL INSURANCE COMPANY LIMITED. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Insurance (Marine)—Pre-carriage of goods insured—Exposure to severe weather on deck and open quay—Damaged when re-shipped—Pre-carriage material fact for disclosure—Not disclosed to underwriters—Waiver—Avoidance of policy—Marine Insurance Act 1906 (6 Edw. 7, c. 41), s. 18.

A cargo of celluloid was shipped in Jan. 1919 from Halifax, Nova Scotia, to France and was insured. The cargo arrived in a damaged condition and a claim was made under the policy. The defendants denied liability on the ground that the policy was avoided by the non-disclosure of material facts, such facts being that the celluloid had previously been carried from New York to Halifax on a very slow steamer, in the course of which part of the cargo was exposed to rough weather on deck, and having been unshipped at Halifax had been left there, much of it in cases on an open quay, exposed to severe frost and snow, and that if these facts had been disclosed the underwriters would have refused the risk.

Held, that the pre-carriage of the goods with the consequent exposure to sea-water and severe weather were material circumstances to be disclosed under sect. 18 of the Marine Insurance Act 1906, and not having been disclosed, the policy was avoided.

Held also, that there was no waiver of non-disclosure arising from absence of inquiry by the underwriters as to the manner in which the goods had been brought to Halifax.

Boyd v. Dubois (3 Camp. 133) dissented from.

Decision of Branson, J. affirmed.

APPEAL from a decision of Branson, J.

The action was brought by the plaintiffs on a policy of marine insurance on parcels of

celluloid shipped on the steamship *Watuka* from Halifax, Nova Scotia, to Nantes, France. The defence was that material facts relating to the pre-carriage of the goods from New York to Halifax were not disclosed to the underwriters, and that if they had been disclosed they would have refused to insure the goods. The facts are fully stated in the judgments of the Master of the Rolls and Scrutton, L.J. Branson, J. gave judgment for the defendants. The plaintiffs appealed, and contended that pre-carriage was not a material circumstance to be disclosed, but that if it were, the defendants had waived disclosure by making no inquiry as to how the goods, which could not have originated at Halifax, had been brought there. The arguments and authorities cited fully appear from the judgments.

Schiller, K.C. and S. L. Porter, K.C. for the appellants.

A. T. Miller, K.C. and Keogh for the respondents were not called upon.

LORD HANWORTH, M.R.—This is an appeal from a judgment of Branson, J., given on the 23rd Nov. of last year. The action was brought by the plaintiffs to recover from the defendants upon a policy of insurance upon certain goods. For the purposes of the present case it is sufficient to take the defence which was raised in par. 5 of the points of defence, namely, that "at the time of the insurance being effected the assured wrongfully concealed from the defendants certain material facts then known to the assured and unknown to the defendants." The insurance was a policy upon goods, the goods being celluloid, and it was a policy upon a voyage from Halifax to Nantes. It contained a clause "subject to particular average if amounting to 3 per cent., each case or shipping package separately insured." The learned judge, in a very careful and helpful judgment, has gone through the whole of the facts and the contentions which were placed before him, and for my part I am ready to adopt the judgment which he has given, and to say that I agree with its conclusion. For the purposes of the presentation of the case to this court, some of the points which had been discussed before the learned judge were not insisted upon, but the main point that was argued before us was the question of whether or not the learned judge ought to have found, upon the evidence and the materials before him, that there was a wrongful concealment from the defendants of the material facts. The learned judge held that there had been such a concealment, and gave judgment for the defendants. The plaintiffs have appealed.

It is clear from the authorities that the onus of establishing the defence under this par. 5 of the defence, lies upon the defendants; and it is important to observe, in the plea which is to be found in the old edition of Bullen & Leake on Pleading, correctly stated in the plea introduced into the defence, that what the defendants have to prove is that there was a wrongful concealment by the plaintiffs from the

(a) Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law

defendants of a fact then known to the plaintiffs and material to be known to the defendants, and material to the risk of the said policy.

The learned judge in his judgment has carefully gone through the evidence which was before him upon that point, upon which he comes to the conclusion that there was a material fact known to the plaintiffs which was concealed from the defendants. The material fact was this, that the goods lying at Halifax had suffered from what has been described as their pre-carriage.

The actual incident or experience of the goods is, I think, to be found on p. 150 of the evidence. It is put in the form of a hypothetical question. But I think as I gather from counsel that we may take the statement there made as being put in hypothetical form only for the purpose of complying with the rules of evidence. It appears that the parcel or parcels of celluloid were loaded upon a ship, the *Julienne*, a vessel which had been one of the lake steamers, on the 22nd Aug. 1918. The *Julienne* sailed from New York on that day, bound for Sydney, Cape Breton. On the 23rd Aug. she put into New London, and remained in New London until the 6th Sept. for the purpose of some repairs to her circulating pump. She sailed on that day for Sydney, arriving on the 16th Sept. at Sydney. She remained at Sydney from the 16th Sept. till the 16th Nov. and then sailed for Halifax. She arrived at Halifax on the 18th Nov., and there remained until the 7th Dec. The goods were unloaded at Halifax, and some were put into warehouse, some were left on the quay, a portion of those on the quay being covered by tarpaulins. But on the voyage from New York to Sydney she carried a part of the cargo on deck, and only part was stowed under deck. At Sydney, too, the goods remained, as they had been stowed, and were not unshipped; and therefore it is clear that by the time the goods were put on board the steamship *Watuka*, which sailed for Nantes on the 29th Jan. 1919, they had suffered many incidents upon this voyage (which had been protracted), and they had remained, as to part of them, stored either on the deck or on the quay, for a very considerable time, that part of them undoubtedly being subject to weather; and as to all the part that was carried on deck from New York to Sydney, they were subjected of course not only to weather, but to the possibility of injury by sea-water or sea moisture. We are told that celluloid does not substantially suffer from fresh water, but is seriously injured by contact with salt water.

It is claimed by the defendant that the fact of this pre-carriage, with the incidents which I have described, ought to have been disclosed to the defendants at the time when the policy was initiated. Upon that question there appears to be no doubt that the fact of this pre-carriage—I use that expression as including the incidents which I have recapitulated—was a material one for the underwriters to know.

Branson, J. summaries the evidence and gives quotations from it. It is unnecessary, therefore, for me to repeat it; but I will select two passages which in particular struck me. They are passages to which he refers, and the first passage is on p. 63 of the deposition taken in America. At that time Mr. Howe was giving evidence. He was the broker who was called on behalf of the plaintiffs. He says this on p. 63: "(Q.) You always regarded the fact that these goods had been shipped on the *Julienne* as material, didn't you? (A.) Yes, sir.—(Q.) And the fact that you disclosed it, if you did disclose it, you always knew was important for your clients? (A.) Exactly so." Well, Mr. Howe is unable to prove that the fact was disclosed; all that he is able to say is that as it was important to disclose it, he believes that he did disclose it, though he had got no note of the fact of disclosure, and there is an incident, the details of which are referred to by Branson, J. in his judgment, as to the affidavit which was proposed to be made, which undoubtedly goes to raise a doubt as to whether or not the surmise that Mr. Howe suggests, that he did disclose it, can be relied upon. On the other hand, Mr. Allen, who was acting for the underwriter, Mr. Chubb, in his evidence on p. 106 was asked: "(Q.) Can you tell us whether or not, at or about the time you accepted such insurance, Mr. Howe made any statement to you as to the previous carriage of the cargo that you were covering on the steamship *Julienne*? (A.) I am positive he did not."

Branson, J., having considered the evidence that I have referred to, and the other passages which he has specifically referred to, has come to the conclusion that there was no disclosure, and he accepts the evidence—as we must also do—that the pre-carriage on the *Julienne* was a material fact. Therefore the defendants have established that there was non-disclosure of a material fact in a contract which is a contract of *uberrimae fidei*, and in respect of which disclosure ought to be made; and disclosure, moreover, of facts then known to the plaintiffs, who were persons who were endeavouring to insure this cargo, which had made transit from New York via Sydney to Halifax and which had been lying at Halifax for some time owing to the difficulty at that time arising from the condition of shipping, in finding a vessel to take it from Halifax to Nantes.

Primâ facie, therefore, the defendants have established the defence that they set out to prove, and they are released from their contract of insurance.

The law as stated on this point is to be found in sect. 18 of the Code or Marine Insurance Act of 1906. By sub-sect. (4) of sect. 18—and this is not disputed—it is provided that: "whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact." As I have pointed out, it has been found in this case—and indeed it is agreed to by both sides—that this circumstance of the pre-carriage of the goods was a material fact to be disclosed. Therefore, *primâ*

facie, the defendants succeed; but it is said that under sub-sect. (3) there has been a waiver upon this point. Perhaps I ought to refer to sub-sect. (2), which summarises the law in this way: "Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."

Now, it is said that, this being an insurance upon goods, there was no duty to disclose the matter of the pre-carriage. I have already pointed out that within sect. 18, the pre-carriage has been found to be a material fact; but we have been much pressed in this way, that sect. 18 is no more than a statement of the law, and you must therefore go back to the earlier authorities to see how the law stood; and you find in a decision of Lord Ellenborough's in the case of *Boyd v. Dubois* (1811, 3 Camp. 132), a definite statement that it is not necessary for the assured to make a statement as to the state of the goods.

Boyd v. Dubois is a case which has had a history. It is important to observe that the report that we have of the case is at the trial *in nisi prius*, at a time when Lord Ellenborough tried four cases which appear in the same book, reported as tried on the same day. It was a case in which an action was brought on a policy of insurance on certain hemp. A fire broke out in the hold which consumed the greater part of the cargo, including the hemp, but the origin of the fire could not be discovered. The defendant counsel's undertook to prove that the hemp was damaged and that for this reason it was apt to ferment, and take fire, and that its condition had not been communicated to the underwriter, and that the fire actually had originated in the hemp itself. Lord Ellenborough says (3 Camp. at p. 133): "I most positively say, that they were not bound to represent to the underwriters the state of the goods." If that is to be taken as meaning that he is not bound to state a fact relating to the goods which is estimated as material to be known to the underwriters, it appears to me that that is a statement which is too wide and too large to be accepted as an authority at that date or at the present date. If it is so to be interpreted, it appears to have been received with hesitation by two great judges.

In the year 1864—and curiously, so far as I can discover, not until that time—*Boyd v. Dubois* was considered. In the Exchequer Chamber, in the case of *Carr v. Montefiore*, in May of that year, Cockburn, C.J. referred to it in these words (2 Mar. Law Cas. (O.S.) 25; 10 L. T. Rep. 294; 5 B. & S., at p. 423): "On the second point, I do not think that we are called on to pronounce an opinion on the matter decided in *Boyd v. Dubois*. It seems to me a strong proposition to say that where goods are insured, and when shipped are in such a condition as to contain in themselves the germ of their own probable destruction, that is a matter which need not be brought to the knowledge of the underwriters. It it were necessary for the decision of this case

to carry that dogma to its full extent, I should like time to consider." I very respectfully desire to associate myself with Sir Alexander Cockburn, and under his protection to suggest that the words of Lord Ellenborough cannot be interpreted as meaning that they are to apply to a material fact which has been proved to be—and, as it is in this case, proved on both sides—material.

In June of the same year, in the case of *Koebel v. Saunders*, the case of *Boyd v. Dubois* was again considered by Willes, J. He says (2 Mar. Law Cas. (O.S.) 68; 10 L. T. Rep. 695; 17 C. B. N. S., at p. 77): "It is a sufficient answer to the assured to show that the vessel was unseaworthy when she sailed on her voyage, without going on to say that the damage sustained was the consequence of that unseaworthiness." He is there dealing, first, with the case of the unseaworthiness of the vessel, as to which there is a warranty, which renders it unnecessary to deal with it further. Then in the next sentence he is dealing with the insurance of goods and he says: "But in the case of an insurance on goods, it is no answer to say that they were in an unfit condition to be shipped, unless it is shown that the loss arose from that unfitness." That is, from their inherent vice. But when he concludes the matter by summing up in his judgment, this is his phrase: "And suppose a vessel caught fire in the course of the voyage from some cause altogether remote from the condition of the cargo, that would be a case in which, fraud or misrepresentation or concealment apart, the underwriters would clearly be liable unless we are to introduce the new implied warranty which is attempted to be set up here." It appears to me that Willes, J. when he puts that parenthesis relating to "fraud or misrepresentation or concealment apart," is expressly reserving the point that there may be some material fact which ought to be disclosed, and in respect of which, if it is found that there is concealment, there would be sufficient to avoid the policy.

Those two great judges have, therefore, to my mind, clearly indicated that the passage in Lord Ellenborough's judgment in the case of *Boyd v. Dubois* is not to be taken as complete, and as being as wide as, *ex facie*, it appears to be. In other words, that it is not to be taken as excluding the duty of disclosure of material facts, where there are facts found to be, as a question of fact, material, and known to the assured at the time when the policy is entered into. It appears to me, therefore, that the statement in sect. 18 of the Marine Insurance Act of 1906 correctly summarised the law as it stood before the Act was passed; but even if that be not so, the short way in which Branson, J. has put it appears to me to be correct. We have to take that statement of the law as found in the Act of 1906, and that is binding upon us.

The addition that I make is this, that it does not go beyond what I believe to be the law as explained—if Lord Ellenborough is taken to be,

as he is, explained—in the two later decisions to which I have referred. Perhaps I might add that in its very nature the fact is material, because it is necesasry for the insurer to decide both whether he will undertake the risk, and, if so, at what premium. And unless he has got before him what is determined to be a material fact, he has not got the basis upon which he can come to that conclusion.

On the question of waiver, which again was insisted upon, it appears that, carried to its logical conclusion, the presentment of it in this court would mean that the doctrine of waiver was carried to a point at which it cancelled the duty of disclosure in these contracts *uberrimae fidei*. It is said that in this case there must have been a waiver. Branson, J. puts it clearly—“must be taken to have known, and by not inquiring as to how the goods got to Halifax”—and they must have got there by some transit by sea—“the insurer waived all information as to their previous history.” And upon that proposition attention was called to the case of *Mann Macneal and Steeves Limited v. Capital and Counties Insurance Company Limited* (15 Asp. Mar. Law Cas. 225; 124 L. T. Rep. 778; (1921) 3 K. B. 301). That was a case of an insurance upon hull and machinery, and it was held in the Court of Appeal that the policies were valid because the underwriters, by abstaining from inquiry, had waived the disclosure of the engagement to carry petrol. Bankes, L.J. refers to the case of *Boyd v. Dubois*, and he appears to refer to it, not for the purpose for which I have already discussed it, but as to whether or not there is a duty to make any disclosure in respect of the cargo which is to be carried, in the case of an insurance upon hull and machinery, not in relation to the question of the nature of that cargo in the case of an insurance upon that cargo itself. He says that if duty there be, that could only be a duty, in so far as the insurance on hull goes, in respect of a cargo already fixed and undertaken to be carried. I confess that I do not find any passage in that case which assists or governs the present case, where we have to consider whether or not there was a waiver of this disclosure of this material fact.

Now, there may be a waiver of what belongs to the very nature of the goods. Lord Mansfield, in the case of *Carter v. Boehm* (3 Burr. 1910), says this: “The underwriter needs not be told the secret enterprises they are destined upon; because he knows some expedition must be in view; and, from the nature of his contract, without being told, he waives the information.” It may well be that if an underwriter is told of the cargo, a cargo (we will say) of some chemical substance of which he has had no previous experience, and makes no inquiry as to it, it may be, following that rule of Lord Mansfield's, that from the nature of his contract, without being told, he waives the information. He does not care to inquire what is the particular nature of the cargo. But we are not dealing with such a case here; we are dealing with a cargo which has had a history, which has had

pre-carriage with many incidents; and we are dealing with a cargo as to which its voyage upon the *Julienne* has been, as I have said more than once, deemed to be on both sides, by those who are engaged in insurance matters, material to be known. I cannot find that that type of incident is included in the nature of the contract itself. It seems to me to be something outside and beyond, and something which ought to be divulged, and cannot be deemed to be waived because it has not been mentioned. It is not an incident which might be supposed to have taken place or one which could have been found out from the mere fact that the policy was upon a cargo of celluloid.

Branson, J., to my mind, puts the matter very clearly and very well in his judgment. I do not think it is necessary to deal further with that point, except to agree with Branson, J. in saying that there has not been in this case a waiver within the meaning of sub-sect. 3 (c), on the part of the insurer.

For those reasons, it appears to me that the judgment of Branson, J. was right, and therefore that the appeal must be dismissed with costs.

SCRUTTON, J.—I have arrived at the same conclusion as Branson, J. has in his very careful and helpful judgment; and I only express my judgment in words of my own, because the subject-matter of the case has an importance which goes beyond this decision.

The material question is, whether a policy on a certain cargo of celluloid on a voyage across the Atlantic has been avoided by non-disclosure, which involves the questions of whether there was any duty to disclose the particular fact, whether the particular fact was material to the risk, and whether, if there was a duty to disclose, it was waived by some action of the underwriter.

The facts are as follows: Just before the Armistice it is common knowledge that the transit of cargo across the Atlantic was a matter of difficulty. Ships were scarce; they had to start under convoy; they had to get to some point in British North America to join their convoy; and great quantities of goods were trying to get across the Atlantic. Amongst other goods was a large parcel of celluloid, which had been in New York for some time. After considerable difficulty in getting a ship, it was at length shipped on a lake steamer called the *Julienne*, a vessel primarily used for transit on the great lakes of America, though it had crossed the Atlantic from England to get there; and that vessel left New York for Sydney, Nova Scotia, on the 22nd Aug., when she left, she was so heavily overloaded, that when she got to her voyage end, having consumed a considerable proportion of her fuel, her load line was a foot under water, and it must therefore have been considerably more under water when she started. She proceeded on her voyage from New York, and at the end of the first day she had to put into New London with a broken-down engine, and she stayed there

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from the 23rd Aug. till the 6th Sept. She left there on the 6th Sept. and got to Sydney on the 16th Sept., having proceeded on her voyage at the magnificent rate of three and a half knots an hour. With that speed, it is hardly necessary to say that the officer commanding the convoy would have nothing to do with her, because a convoy that only proceeded at three and a half knots an hour would be an easy prey for any German submarine that happened to be in the neighbourhood. So she was not allowed to join the convoy. I should have mentioned that while the owners of the celluloid attached great importance to the cargo being under deck, there is no doubt that some of the cargo was on deck. On p. 45 of the correspondence the representative of the cargo owners says: "We paid for under deck space and got a positive guarantee from the Central Transportation, through Brown Brothers and Co., that every case of ours would be underdeck. I absolutely refused to deliver a case to the ship unless we had this guarantee. When the ship arrived at Halifax, Campbell reports that many of the cases had been stowed on deck. Of course, if we had gotten into an argument with the insurance underwriters, they would have learned this fact, and it is a question how much insurance would have been vitiated."

Celluloid appears to be very susceptible to salt water, but fresh water only slightly affects it to this extent, that if it is polished celluloid, the fresh water may dim it, and it may have to be repolished. It does affect it, but slightly. So far, we have got it that some of the celluloid cargo was on deck, and therefore exposed to salt water.

The vessel gets to Sydney on the 16th Sept. and she lies there till 16th Nov., with her deck cargo exposed all the time to the risk of any spray in gales. She then starts for Halifax, there being no chance of her getting across from Sydney, because the captain declines to take her and the crew will not go across the Atlantic in winter. She gets to Halifax on the 18th Nov. She lies there, still with her cargo on deck, till the 7th Dec., and then the cargo is discharged, and stacked, considerable portions of it in the open, and the portion that has been on deck, with no covering over it at all, until the beginning of February. There is evidence that the weather during December and January was what you might expect in that region at that time. The representative of the cargo owner, who went there at the beginning of January, bewails his sad fate, because he left spring-like weather in New York and got into a temperature of 20 degrees below zero at Halifax, and had to go and inspect the goods in the open in a very heavy snowstorm; and I think we can have no doubt, so far, that at the end of January that celluloid cargo had been through what one of the witnesses describes as an astonishing voyage, and what one of the plaintiffs' own letters describes as an abnormal voyage. And the question in the case is whether, when on the 29th Jan. 1919 the celluloid cargo which was then going to be shipped in the *Watuka*

was insured for that voyage, there should have been disclosed to the underwriters the fact that the cargo had gone through that voyage which I have described, before it was shipped at Halifax.

Insurance is a contract of the utmost good faith, and it is of the gravest importance to commerce that that position should be observed. The underwriter knows nothing of the particular circumstances of the voyage to be insured. The assured knows a great deal, and it is the duty of the assured to inform the underwriter of everything that he is not to be taken as knowing, so that the contract may be entered into on an equal footing. It has been expressed by many writers and in many textbooks; but I think it is as well expressed as by anybody by Park, J., when he wrote *Park's Marine Insurance* (1842), in cap. 10, which is headed, "Of Fraud in Policies," for at that time and for a considerable portion of the last century, concealment was always placed under the head of fraud. He says: "No contract can be good, unless it be equal; that is, neither side must have an advantage by any means, of which the other is not aware. This being admitted of contracts in general, it holds with double force in those of insurance; because the underwriter computes his risk entirely from the account given by the person insured, and therefore it is absolutely necessary to the justice and validity of the contract, that this account be exact and complete. Accordingly, the learned judges of our courts of law, feeling that the very essence of insurance consists in a rigid attention to the purest good faith and the strictest integrity, have constantly held that it is vacated and annulled by any the least shadow of fraud or undue concealment." Again, on p. 408: "The second species of fraud, which affects insurances, is the concealment of circumstances, known only to one of the parties entering into the contract. Upon this head, the principles of law are perfectly clear, free from doubt or possibility of error. Concealment of circumstances vitiates all contracts, upon the principles of natural law. Insurance is a contract of speculation. The facts, upon which the risk is to be computed, lie, for the most part, within the knowledge of the insured only. The underwriter must, therefore, rely upon him for all necessary information, and must trust to him that he will conceal nothing, so as to make him form a wrong estimate. If a mistake happen, without any fraudulent intention, still the contract is annulled, because the risk is not the same which the underwriter intended. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his belief of the contrary." That being the general principle which appears in sect. 18 of the present *Marine Insurance Act* as: "The assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured." The question is: was the previous history of this

celluloid, the voyage on the *Julienne*, by which it had got to Halifax, and the circumstances of the risk to which it had been exposed before it was shipped, material?

This case is rather novel. I have never heard a case like this before. Each side insists, vigorously, that it was a most material circumstance. I have never had a case where both sides have come solemnly protesting that it was a most material circumstance. The two parties who effected the insurance, the broker for the shipper, and the person who underwrote for the underwriter, each say that it was most material to know of the previous history of the *Julienne*; and they do it for this reason, that each of them says: "I do not remember anything about this particular case"; but the broker for the assured says: "It is so material that of course I disclosed it." Or, to use a phrase which has been used in another connection: "I am an honest broker, and an honest broker would of course disclose this most material question as to the previous voyage of the *Julienne*." Then, says the representatives of the underwriter: "If I had known this, I should never have dreamed of writing the policy." In fact, the plaintiff's witnesses say that Chubb and Sons, who are one of the best-known firms of underwriters in the United States, had refused an insurance on cargo on the *Julienne*. "And," says the representative of Messrs. Chubb, "of course I was not told this. Do you suppose that I should have written at the ordinary rate of premium an insurance on a cargo which I knew had been through this extraordinary voyage on the *Julienne*?" and he says: "Of course I was not told that. I do not remember about it, but of course I was not told it, because, if I had been, not only I should not have written it at the ordinary rate, but I should never have written it at all." One is therefore rather relieved from examining whether the circumstance was material.

Then the next question is, being material, was it disclosed? Here there is a conflict of evidence, in the sense that I have stated, that one side says: "I must have disclosed it, although I do not remember it," and the other side says: "It cannot have been disclosed, or I should have never written the insurance." But having read the evidence on each side, I agree with the conclusion to which Branson, J. has come, that it was not disclosed. I am influenced in that, first by the rate of premium, because it is inconceivable to me that the ordinary rate of premium should be charged for a cargo as to which an underwriter knew that all that had been over deck, and had been exposed to sea water for a very considerable time, and that all that had been stocked in the open had been exposed to fresh water for a considerable time at Halifax, and rain and snow storms. I am also influenced by the fact that when in the Commercial Court it was proposed to give evidence by affidavit, the broker for the assured had his attention called to what it was desired that he should say about

the insurance and the disclosure; and, having his attention called to it, he said nothing, and explained that he said nothing because he could not find any reference to the matter in the documents, the inference being that there would certainly have been a reference to the matter in the documents if he had disclosed it. I should not in any case interfere with the learned judge who heard the two witnesses, but those circumstances induce me to take a strong view that the learned judge was right in the conclusion to which he came.

Then, here is a material circumstance not disclosed. What is the excuse of the assured? As I followed the argument of Mr. Schiller and Mr. Porter, it ran on two lines: first of all, *Boyd v. Dubois* (3 Camp. 132), the decision of Lord Ellenborough which has stood for 100 years, and is quoted in all the text-books, shows that there was no obligation to disclose. Secondly, if there was an obligation to disclose, following the classical passage of Lord Mansfield in the case of *Carter v. Boehm* (3 Burr. 1910) the underwriter waived disclosure.

The first line of argument requires one to consider the authority of *Boyd v. Dubois*, which, although it is a hundred years old, has had a somewhat eventful life. In *Boyd v. Dubois* a ship had been lost by fire. There was a policy of insurance upon hemp. The underwriters proposed to prove that the hemp was damaged, that for this reason it was apt to ferment and take fire, that its condition had not been communicated to the underwriters, and that the fire actually had originated in the hemp itself. It is a report of a *nisi prius* case, and oddly enough, the defendant's counsel does not seem to have proposed to prove that the assured knew of the condition of the hemp, which one would have thought was a somewhat material matter. That is left out, either out of his contentions or out of the report of his contentions; but there was no proof that the fire had originated from the damaged state of the hemp. The case was tried with a jury, and seven lines of Lord Ellenborough are printed by Lord Campbell, whether an interlocutory remark or in summing up to the jury, it does not appear. There is nothing else printed that was said by Lord Ellenborough. He said this: "If the hemp was put on board in a state liable to effervesce, and it did effervesce and generate the fire which consumed it; upon the common principles of insurance law, the assured cannot recover for a loss which he himself has occasioned." That is the ordinary implied contract that you cannot recover for loss occasioned by a defect of the goods insured—"But I most positively say, that they were not bound to represent to the underwriters the state of the goods. It would introduce endless confusion and perpetual controversies, if such a duty were to be imposed upon the assured." Those four lines have ever since been quoted by every text-writer, generally without comment, as establishing that an assured insuring a cargo is under no obligation to tell the

underwriter of any defect in the cargo which may increase the risk.

I asked the learned counsel who argued the case on behalf of the assured this question: "Supposing it was an insurance on cattle against mortality, and the assured knew that the cattle had come to the port of shipment in a ship or a train infected with foot and mouth disease, would they be bound to disclose it?" And Mr. Porter, though he had the backing of Lord Ellenborough, was unable to say that the assured would not be bound to disclose it. It seems to me obviously to be a fact of which the assured would be bound to inform the underwriter if he knew it. Curiously enough, although Lord Ellenborough is reported as making that positive remark, he has used language himself which is quite inconsistent with the remark that he then made. Seven years before, in the case of *Haywood v. Rodgers* (1804, 4 East, 590), Lord Ellenborough had given a judgment that where there was an implied warranty in the policy as to the seaworthiness of the ship, the assured was not bound to disclose facts which would be a breach of the warranty, because those facts afforded the underwriter a defence to any action on the policy. Oddly enough, Lord Ellenborough does not seem to have considered, and the text-writers do not seem to have considered, that such a fact was of no use to the underwriter unless he knew of it; he could not use it as a defence to the policy unless he knew that there was such a fact; and it was not very much good to him to be told that he had a defence on the policy, of which he did not know, and which he could not use. But the reason why I cite the case—for it is no good saying it is bad law now, because it has passed into the Marine Insurance Act 1906, is because it is a considered judgment by Lord Ellenborough, a reserved judgment, and the last passage of his judgment is this: (4 East, at p. 599), "We think that an assured having impliedly warranted, as he has, his ship to be seaworthy, and having concealed no circumstance relative to the seaworthiness of the ship which he was required to disclose, and not having, at the time of effecting the policy, known of any fact which rendered her, with reference to the risk insured, otherwise than seaworthy, is entitled to retain the benefit of that verdict." I asked the learned counsel why on earth Lord Ellenborough put in that passage, "not having at the time of effecting the policy, known of any fact which rendered her, with reference to the risk insured, otherwise than seaworthy," if the assured was under no obligation to disclose such a fact, although he did know it. It seems to me that that passage represents what is the law, that if you know of a fact which materially affects the risk, you are bound to disclose it.

Boyd v. Dubois, being a *nisi prius* case, has, as I have said, been cited by the text-writers without any comment, except one exception. Lord Ellenborough went on to say (3 Camp., at p. 133): "It would introduce endless

confusion and perpetual controversies if such a duty were to be imposed upon the assured." Mr. Duer, in citing *Boyd v. Dubois* in his work on Marine Insurance, does say that he cannot see why on earth it should raise endless confusion and controversy, considering that there is such a clause in all the foreign codes, and it does not raise endless confusion and perpetual controversy. But notwithstanding that, *Boyd v. Dubois* got into the text-books, and it stays there without comment. But it did not stay without comment in the reports.

First of all, as my Lord has said, the Court of King's Bench doubted it in the case of *Carr v. Montefiore*, and Cockburn, C.J. says in that case: "It seems to me a strong proposition to say that where goods are insured, and when shipped are in such a condition as to contain in themselves the germ of their own probable destruction, that is a matter which need not be brought to the knowledge of the underwriters." Sir James Shaw Willes used language inconsistent with it, having had it cited to him, when, sitting in Common Pleas, he gives the first judgment of the court in the case of *Koebel v. Saunders* (*sup.*). He put the case, in the particular case that he was deciding, that, though there was an implied warranty of seaworthiness of the ship, there was no implied warranty that the goods were fit for the voyage, the effect of which, of course, would be that, there being an implied warranty as to the ship, if it was broken the policy was void, though the breach had nothing to do with the loss; but that in goods, there being no implied warranty at all as to seaworthiness, the fact that the goods were not fit to stand the voyage would not of itself be a defence to a policy, unless you showed one thing, that the unfitness caused the loss. But Willes, J. said that there would be another defence (2 Mar. Law Cas. (O.S.), at p. 68; 17 C. B. N. S., at p. 78): "Suppose a cargo of cotton was loaded in New Orleans for this country, and it went there in a damp state, so as to be liable to spontaneous combustion, and so that there would be a strong probability that it would catch fire before the end of the voyage, but the dampness of the cotton when put on board was not known to the assured, and consequently it was not a case of fraud." And again: "And therefore in the absence of fraud the insurers would be liable." If Willes, J. was agreeing with *Boyd v. Dubois*, there was no need to have put in that paragraph about concealment, because there would have been no obligation to disclose the condition of the cotton if *Boyd v. Dubois* was good law.

Therefore you have *Boyd v. Dubois* doubted by Cockburn, C.J. and a passage inconsistent with it in Willes, J.'s judgment.

Lastly, there is the Court of Appeal decision in the case of *Mann Macneal and Steeves v. Capital and Counties Insurance Co.* (*sup.*). Insurance on ship: question whether the person effecting the insurance on ship was bound to disclose the engagements she had for cargo; the Court of Appeal had *Boyd v. Dubois* cited

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to them, but they had not cited to them any of the authorities in which it has been doubted; but in spite of that, they got at the same result. Bankes, L.J. (15 Asp. Mar. Law Cas. at p. 226; 127 L. T. Rep., at p. 779; (1921) 2 K. B., at p. 306): "The plaintiffs' case was that in the case of an insurance upon hull it was no part of the duty of the assured to make any disclosure to the underwriter with reference to the cargo, but that it was the underwriter's business, if he wished to know anything as to the nature of the cargo, to make the necessary inquiries"—that is what Lord Ellenborough says in *Boyd v. Dubois*. "The defendants' case, on the other hand, was that even in the case of an insurance upon hull it was the duty of the assured to make full disclosure of every material circumstance connected with the cargo to be carried. In cross-examination the witnesses for both parties had to modify the general proposition contained in these contentions. For instance, the plaintiffs' first witness admitted that he could not contend that there would not be a duty to disclose the fact that dynamite formed part of a cargo, or that an entire cargo consisted of petrol; and several of the defendants' witnesses admitted that if quite small quantities of such articles as matches or cotton formed part of a cargo there would be no duty to disclose that fact, though there would be a duty to disclose the fact if considerable quantities of either were to form part of a cargo." And Bankes, L.J. came to the conclusion that the fact that the underwriter was told that this was a wooden vessel, with auxiliary motor engines which used petrol, put the underwriter upon inquiry and told him of the risk of petrol on a wooden vessel; and if he wanted to know more about the quantity of petrol that was on board, he must ask. Then Atkin L.J. says (124 L. T. Rep., at p. 781; (1921) 2 K. B., on pp. 313): "I do not think the reasons I have given for this decision necessarily apply to the case of a cargo which is unusual and of exceptionally hazardous character, such as the case put in argument of a cargo of dynamite. I should like to consider the circumstances of such a case when it arises." So that, without having the decision of Cockburn, C.J. cited to them, both those learned judges took exactly the same view, having had *Boyd v. Dubois* cited to them, as Cockburn, C.J. had taken in the case of *Carr v. Montefiore*. I can quite conceive that the proper limitation of *Boyd v. Dubois* is this, that if you are told facts about the cargo, and do not know the natural consequences which follow from such facts, you ought to have asked; but if they are unusual circumstances connected with the cargo, which would not follow from the facts that you are told, then they ought to be disclosed. I do not think that *Boyd v. Dubois* can possibly be taken as authority for a wider proposition than that, and it certainly, in my view, cannot be taken as an authority for a proposition that a person tendering cargo for insurance is never bound to tell the underwriter the condition of the cargo. If *Boyd v. Dubois*

is supposed to decide that, *Boyd v. Dubois* in my opinion is wrong.

The first argument, therefore, that was put forward by counsel for the assured appears to me to fail. There was a duty to disclose this unusual circumstance connected with this shipment of celluloid, that it had been on this extraordinary preliminary voyage for some five months, part of it exposed to salt water for a very considerable length of time, part of it exposed to fresh water, storms, unprotected except by its wooden cases, for another considerable length of time.

That only leaves the last contention put forward, which probably was intended to be the appellants' best contention, namely, that there was a waiver. I could understand that the way in which cargo is tendered may put the underwriter on inquiry. For instance, this celluloid shipment appears to have a variety of odd names, of which I never heard before, and which I daresay a good many people never heard—fibrolloid, pyralin, and other obscure names. I can conceive that if an underwriter is told: "I propose to ship pyralin," and does not ask: "What on earth is that?" he waives the disclosure to him of the ordinary qualities of pyralin or fibrolloid. But if any particular shipment of pyralin or fibrolloid has some peculiar quality which would not ordinarily follow, or be disclosed by saying: "This is pyralin," it seems to me that that is clearly a matter which ought to be disclosed.

The argument as to waiver was put before us in a way which would, if sound, have entirely destroyed the obligation to disclose at all, because it was said: "It is a possibility that this cargo which you were asked to insure may have suffered certain damage, and as there is a possibility, and you are told of this cargo, and you do not ask the question, you are bound by any possibility which might happen to the cargo." That line of argument would entirely destroy the obligation to disclose at all, because, if you insure on a ship, of course it is a possibility that anything may have happened to her. If you come to insure a cargo, it is a possibility that anything may have happened to it. I have always understood the proper line that an underwriter should take, except in matters that he is bound to know, is absolutely to abstain from asking any questions, and to leave the assured to fulfil his duty of good faith, and make full disclosure of all material facts, without being asked. And it seems to me to be of great importance to the general duty of disclosure that that position of the underwriter should be maintained, and not whittled away by alleged waiver.

Now, of course, waiver rests upon the classical judgment of Lord Mansfield in the case of *Carter v. Boehm* (1766, 3 Burr. 1905), which takes one into another world, because the insurance in *Carter v. Boehm* was on behalf of the governor of Port Marlborough in the island of Sumatra against its being taken by a foreign enemy, a class of insurance with which we are not familiar at the present time. In

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dealing with the question of whether a letter from the governor ought to have been disclosed, which said that there was every chance of the French taking the fort: "Now more afraid than formerly that the French should attack and take the settlement, for, as they cannot muster a force to relive their friends at the coast, they may, rather than remain idle, pay us a visit. It seems, that they had such an intention last year." And just above it was said: "The former of them notifies to the East India Company, that the French had the preceding year a design on foot to attempt taking that settlement by surprise, and that it was very probable that they might revive that design. It confesses and represents the weakness of the fort; its being badly supplied with stores, arms, and ammunition." Lord Mansfield, having that insurance before him, delivered the classical passage which is always cited about what an underwriter is taken to know, the special feature being this: (3 Burr., at pp. 1910, 1911) "If an underwriter insures private ships of war, by sea and on shore, from ports to ports, and places to places, anywhere, he need not be told the secret enterprises they are destined upon, because he knows some expedition must be in view; and, from the nature of his contract, without being told, he waives the information. If he insures for three years, he need not be told any circumstance to show it may be over in two, or if he insures a voyage, with liberty of deviation, he need not be told what tends to show there will be no deviation." Then on the same page up above, he says: "The underwriter need not be told what lessens the risque agreed and understood to be run by the express terms of the policy. He need not be told general topics of speculation as, for instance, the underwriter is bound to know every cause which may occasion natural perils, as the difficulty of the voyage—the kind of seasons—the probability of lightning, hurricanes, earthquakes, &c. He is bound to know every cause which may occasion political perils; from the ruptures of states from war, and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace; from the imbecility of the enemy, through the weakness of their counsels, or their want of strength."

But it seems to me to be a very long step from that passage to the conclusion that, if an underwriter is told that there is to be an insurance on some subject-matter, he is to be taken to know every possibility that may have happened to that subject-matter which the assured knows, and which he does not in fact know, because he does not proceed by questions to explore all the possibilities that may have happened to such a subject-matter. Such an argument, such a view of waiver, would, as I have said, entirely destroy, in my view, the obligation to disclose; and while I pressed counsel to tell me exactly upon what in the case of cargo which had been exposed to a quite unusual incident, the idea of waiver was rested,

I was unable to obtain any satisfactory answer except—and I do not say that that was satisfactory—the suggestion that you were taken to know of every possible thing which might have happened to the cargo.

For these reasons, the second defence, which is that information was waived, fails. One has then a material fact, a fact material to the risk, both because there was existing damage which might get larger, and because it would be extremely difficult to sort out the pre-existing damage from the post-shipment damage, and therefore the risk of the underwriter might be increased, which would very materially affect the rate of premium. The information was material. It was not disclosed. There was a duty to disclose it, and that duty was not waived.

For those reasons, which are substantially the same as are expressed in different words in the judgment of Branson, J., I think this appeal must be dismissed with costs.

SARGANT, L.J.—I agree with the full and careful judgment of Branson, J. in this case, and also with the judgment that has just been delivered. It is therefore unnecessary for me to express my views at any length.

That the prior history of the goods in question was within sect. 18 of the Marine Insurance Act 1906 a material circumstance, which would influence the judgment of a prudent insurer in fixing the rate of premium or determining whether he would take the risk, is clearly shown by the evidence of the brokers on each side; indeed, Mr. Howe, the broker for the assured, relied on his duty to disclose this past history as sufficient to convince him that he must in fact have made the disclosure. But whatever Mr. Howe's personal conviction, the learned judge has found, and in my judgment rightly found on the balance of evidence, that no such disclosure was in fact made. And therefore, on the express language of sect. 18, there appears to have been a clear right on the part of the insurer to avoid the contract.

But it is said that the Act of 1906 was merely a codifying Act, and could not have been intended to alter the law as laid down in the case of *Boyd v. Dubois* (*sup.*), and that that case shows that the past history of goods to be insured, as affecting their existing condition, can never be a material circumstance affecting the insurance, since all that is insured against is the risk of future damage to the goods. But this view leaves out of account an obvious consideration in cases where the damage already sustained may have been of the same kind as that which is likely to be sustained and is insured against, namely the difficulty which will be thrown on the underwriter of proving that a part only of the ultimate damage has been caused during the currency of his insurance. And it is this very difficulty which, according to the evidence in the present case, would have affected the insurability of the goods had the facts been known.

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In my judgment, *Boyd v. Dubois*, at any rate in view of the subsequent criticisms of it—which I need not repeat—cannot be held to have laid down as an inflexible and universal rule that in no case can the past history of the goods as affecting the probable condition of the goods at the time of insurance, be a material circumstance. And if it did lay down such a rule, I agree with the learned judge in thinking that the rule has been modified by sect. 18, sub-sect. (1) of the Act. Under that section, if the history of the goods is found as a matter of fact, as in the case here, to have been a material circumstance, then the result specified in the section must follow.

But it is said that here there was, within sect. 18, sub-sect. (3), sub-head (c), a waiver by the insurer of information as to the previous history of the goods so far as pre-carriage was concerned, and this because such goods were known not to have originated in Halifax; that there must have been some pre-carriage, and that it was therefore for the insurers to make inquiries as to the circumstances of such pre-carriage. Had the pre-carriage necessarily or ordinarily involved incidents—vicissitudes—of the same character as those which occurred in the actual pre-carriage here, there would have been much in favour of this argument. But it is clear from the evidence that this is not so, and that the circumstances of the pre-carriage were so exceptional that they would necessarily be material and ought to have been disclosed. Indeed, the argument of the plaintiffs, if pressed to its logical conclusion, would in almost every case negative mere non-disclosure as a defence, since in almost every case appropriate enquiries would have got behind the non-disclosure and have elicited the material circumstances, unless indeed they had resulted in a positive misstatement by the assured.

In my judgment, in such cases, in order that waiver by the insurers should be established, they must at least have received information such as would put an ordinarily careful insurer on inquiry, and nevertheless he fails to inquire. The mere omission to make inquiry where, as here, there was nothing to suggest the possibility or necessity of doing so, cannot in my view be held to be a waiver within sect. 18.

I agree that the appeal should be dismissed.

Solicitors for appellants, *Parker, Garrett, and Co.*

Solicitors for the respondents, *Rawle, Johnstone, and Co.*, for *Laces and Co.*, Liverpool.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

April 14, 15, and 26, 1926.

(Before GREER, J.)

THE VERGOTTIS v. WILLIAM CORY AND SON LIMITED. (a)

Charter party—Entry into dock delayed owing to no cargo being ready in accordance with dock regulations—Damages for detention, liability of charterers for—Implied term.

While there is an absolute obligation on a shipper to have a cargo ready, the obligation does not arise till the shipowner has performed his side of the bargain by the ship becoming an "arrived ship" according to the contract. At the same time there is an implied term in the contract that the shipper will do all on his part to assist the vessel to become an "arrived ship," and so a shipowner is entitled to damages for the detention of his ship where, owing to the failure of the shipper to have sufficient cargo ready in accordance with the dock regulations, she was not allowed to enter dock and thus become an "arrived ship" under the terms of the charter-party.

ACTION tried before Greer, J. without a jury.

The plaintiff was the owner, and the defendant company was the charterer of the steamship, *P. V.* By a charter-party dated the 26th March 1923, the vessel was chartered to carry a cargo of coal from Cardiff, Penarth, Barry, or Newport (Mon.) to Pauillac. The vessel arrived in Barry Roads on the 10th April 1923. Owing to the congestion she could only be admitted to Barry Dock on an "emergency stemming note," which was a document signed by the master of the vessel that his ship was ready to receive cargo, and also signed by the cargo-owners that there was cargo ready to load. There was no cargo ready, and the vessel was not admitted to dock till the 19th April. Under the charter-party the vessel was not an "arrived ship" till her entry into dock, and the lay days did not commence to run till the 20th April. The plaintiff claimed damages (which were agreed) for the detention of the vessel in Barry Roads from the 11th to the 19th April, which detention they alleged was due to the failure of the defendant company to have any cargo, or even sufficient cargo to ensure continuous loading, ready at the tip when the vessel arrived, and which, it was alleged, constituted a breach of an implied term in the charter-party that the shippers should do what was required by the practice of the port to enable the ship to enter the dock and thus become an "arrived ship."

Clement Davies, K.C. and *Sir Robert Aske* for the plaintiff.

Langton, K.C. and *Lewis* for the defendants.

(a) Reported by R. A. YULE, Esq., Barrister-at-Law.

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GREER, J.—In this case the plaintiff, who was and is the owner of the steamship *Panaghis Vergottis*, claimed against the defendants, the charterers, by charter-party dated the 26th March 1923, demurrage and damages for detention of his ship at Barry in April 1923. The claim for demurrage was admitted by the defence, and the amount claimed was paid into court. The amount of damages, if any, payable for detention was agreed at the trial at the sum of 250*l*. The only question remaining for me to decide is whether the plaintiff has established his claim for damages for detention. I find the material facts as follows: In Feb. 1923 the defendants agreed to buy from Messrs. Thomas Davey Limited, the sales agents of the Cambrian Mines, 1800 to 2000 tons of Cambrian Navigation small coal for shipment by a steamship expected ready to load in March at Barry. It was the duty of the vendors under this contract to send the coal to Barry and load the steamship when named by the purchasers. On the 28th March the defendants chartered the *Panaghis Vergottis* to proceed to Cardiff, Penarth, Barry, or Newport, and there load, always afloat in the customary manner, a full and complete cargo of nominated coal in such dock as may be ordered by them not exceeding 2700 tons nor less than 2400 tons. By clause 3 of the charter-party the cargo was to be loaded in colliery scale running hours. Calculated by hours as applied to the cargo of this vessel, colliery scale meant 144 running hours. This was very much in excess of the time required in the ordinary course for loading the vessel. She could be, and in fact was, loaded in thirty-six running hours. On the 27th March the defendants nominated this vessel to their sellers "expected ready 9th/10th April with colliery scale hours for 24/2700 tons of Cambrian small steam coal" on account of their purchase. Messrs. Davey accepted the nomination, and on defendants' instructions on the 7th April ordered the vessel to Barry Dock to load her cargo under the charter-party. The steamer arrived in Barry Roads on the morning of the 10th April. In ordinary times steamers are allowed to enter dock upon arrival. When they are in the dock their admission to a tip, and the conditions on which they are allowed to be loaded, is provided for by printed and published regulations. One of these regulations provides that no vessel will be ordered to a tip unless in the judgment of the shipping superintendent there is sufficient coal in hand to ensure continuous loading. It is not usual in Barry Dock to have coal in readiness at the dock in large quantities before the ship for which it is intended arrives in dock or at the tip. A considerable number of the collieries supplying steam coal are only a short distance from the dock, and a train-load of coal can be brought down in a few hours. The usual practice is for the colliery companies to send their output down to the docks without allocating it to any of the ships for which it is

intended. It is left to their agents on the instructions of the merchants who have bought the coal for shipment to allocate the coal as it arrives.

It would be quite impossible to store in the sidings in advance the whole cargo of each ship on or before the day of arrival of the ship in the dock or at the tip. The business of loading ships could not be carried out at Barry if each shipper was obliged to have at the dock or in the port the whole of the coal required for each ship. In ordinary times when he wants to start loading a shipper must, by the regulations, have sufficient cargo there to ensure continuous loading. There is no absolute rule as to what proportion the shipper must have before the ship is allowed to go to the tip. From the evidence the conclusion left in my mind is that a ship would generally be allowed to go to the tip if she had one-third of her cargo ready to load. In the case of the *Panaghis Vergottis* this would mean something between 800 and 900 tons. It follows that unless there is an absolute duty on charterers to have the whole of her cargo ready in the loading port when the chartered ship arrives, the charterers could have complied with their obligations in this case by leaving the vessel without any coal for a few days after her arrival, then getting, say, 850 tons down, commencing to load after obtaining a tip, and finishing within 144 hours of the ship's arrival. The times, however, were not normal. The Barry Dock was crowded with vessels loading and waiting to be loaded. This was not an infrequent state of things, and it must have been contemplated by the shipowner and the charterers as a state of things that might easily happen. In times of congestion the practice of the dock authority is to require what was called at the trial a special emergency stemming note to be signed by the captain and the shipper. The note reads as follows: It first contains a statement to be signed by the master:

I declare that the steamship — now lying in Barry Roads, is in every respect ready to receive her cargo of coal, and that I am ready to proceed with her loading immediately upon admission to dock.

And then a note to be signed by the firm loading her, which represents the charterers for this purpose:

Please stem the steamship —, — tons register, to load cargo and (or) bunkers.

Then:

The vessel will be ready to commence at —. Wharfage payable by —. Tolls payable by —. Mixing charges payable by —. Signed on behalf of — (loading firm).

and a note at the end:

This stemming note is for use only in cases where it is impossible to admit the vessel into dock when they arrive in the Roads, and the Barry Company do not accept any responsibility or liability of any kind whatever owing to the temporary suspension of the ordinary custom. The acceptance

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by the shipper of this note is to be accepted as a contract to this effect.

Before the dock official will accept the shipper's signature to the stemming note he must be satisfied that there is then sufficient in hand to ensure continuous loading. I conclude from the evidence that a stemming note would have been accepted from the shippers in the position of the defendants if they had ready at the dock one-third of the coal to be shipped. On the 11th April the master signed the emergency stemming note. The representative of Messrs. Davey was willing to sign the note on the 12th April in the expectation that he might be able, out of the stream of coal coming into the dock from the Cambrian Mines, to allocate sufficient Cambrian small to the plaintiff's ship to load her within the lay days, but as he could not satisfy the dock authority's representative that he had any actually in hand, he was not allowed to sign the stemming note, and the *Panaghis Vergottis* was not allowed to enter the dock. There was in fact no coal ready for the vessel until the 16th April, and then only 450 tons of Ferndale small coal, which the defendants accepted in place of Cambrian coal. The result of this was that a number of other vessels were allowed in before the *Panaghis Vergottis*, though they had arrived in the Roads after her. She lost her turn, and was not admitted to the dock until the 19th April, when the congestion had somewhat abated. Under the charter-party she was not an "arrived ship" until she got into dock. Her lay days began then, and not before. The plaintiff could not use the delay outside the dock for the purpose of calculating the amount of demurrage to which he was entitled. He claimed damages for the detention between the 11th and the 19th April on the ground that the defendants' failure to have the cargo ready at the dock side when the vessel arrived outside the dock, and their failure to sign the emergency note, constituted breaches of an implied term in the charter-party.

The claim was put in two ways by the plaintiff's counsel. (1) It was argued that the defendants had failed to comply with the absolute obligation to which a charterer is always subject, to provide a cargo:

(2) It was put as a breach of an implied undertaking to do what was required on the part of the shippers by the practice of the port to enable the plaintiff's ship to enter the dock, and so become an "arrived ship." On the first point counsel chiefly relied on the *Ardan Steamship Company v. Andrew Weir and Co.* (10 Asp. Mar. Law Cas. 135; 93 L. T. Rep. 559; (1905) App. Cas. 501) and *Krog v. Burns* (1903, Court of Sessions Cases, 5th Series, vol. 5, p. 1189. It has been frequently laid down in both Scottish and English cases that a shipper's obligations with regard to the loading of the cargo are twofold: (1) an absolute obligation to provide the cargo at the port of loading, and (2) an obligation to do his part of the loading in the agreed time,

that is the fixed lay days, or a reasonable time, as the case may be: (*Grant v. Coverdale*, 1884, 5 Asp. Mar. Law Cas. 353; 51 L. T. Rep. 472; 9 App. Cas. 599, per Lord Blackburn; *Gardiner v. McFarlane*, 1893, 20 Rettie, Court of Session, 414).

The duty to provide the agreed cargo is sometimes stated as if it meant that when the vessel arrives the shipper is bound to have his cargo, that is the whole of it, at the loading port. This is not, in my opinion, an accurate way of stating the primary obligation of the charterer. There are, of course, many ports in the world where the shipper would be unable to load the ship in the lay days, or within a reasonable time thereafter, if he had not brought the whole of the cargo to the port of loading when the ship arrived, and in these cases it may be right to say that the charterer's duty is to have the cargo at the loading port when the ship arrives. In the *Ardan Steamship Company v. Andrew Weir and Co.*, Lord Halsbury states the duty as an absolute duty "to supply" the cargo, or, in another part of his judgment, "to provide the cargo." This cannot, and does not mean, in my judgment, that he must always have the whole of the cargo at the port when the ship arrives. Lord Herschell said in *Little v. Stevenson and Co.* (8 Asp. Mar. Law Cas. 162; 74 L. T. Rep. 529; (1896) A. C. 108): "It is alleged that the obligation existed in point of law, that at all ports, under all circumstances, however unreasonable it might be to anticipate such a contingency, however deficient the quay might be in the means necessary for storing, or protecting, or preserving cargo, whatever difficulties there might be, in short, that was an obligation always resting upon the shipper." The House of Lords in that case held that the obligation was not as wide as that. In my judgment the obligation to provide the cargo would be fulfilled if the shipper made and carried out arrangements for the delivery of the cargo at the ship's side in time to load her in accordance with the terms of the charter-party. Further, it is difficult to understand how there can be any duty to provide the cargo before the ship completes her inward journey and becomes an "arrived ship." It seems to me that it must be the duty of the ship to become an "arrived ship" before the shipper's duty to provide the cargo can arise. The promises on the part of the shipowner to present his vessel in the agreed place, and on the part of the charterer to there provide her with the agreed cargo and load it in the agreed time, are mutual interdependent promises. And until the ship has performed its part by arriving at the agreed place, the shipowner cannot complain that the cargo has not been provided. Unless the decision of the House of Lords in the *Ardan Steamship Company v. Andrew Weir and Co.* compels me to decide otherwise, I should hold in the present case that the defendants' failure to provide a cargo by the time the ship arrived in the Roads did not constitute a breach by them of the absolute

duty to provide a cargo. They could, in my judgment, have complied with their obligation if, after the vessel arrived in the dock, they had provided a cargo in sufficient time to enable them to finish the loading in the lay days. At first sight the decision of the House of Lords in the *Ardan* case seems to establish that a shipowner can complain of the non-provision of a cargo before the ship has arrived at her loading place. The headnote of the case accurately states the facts and the decisions. It looks as if the House of Lords had decided that the duty to provide a cargo arises before the vessel is an arrived ship. I do not think the decision necessarily involves such a doctrine. The facts proved in that case were very special. No distinction seems to have been suggested in the argument between the damages for delay before the vessel got to her berth, and the damages that arose subsequently. And at the time the vessel was ready to go to the tip the charterers' failure to make proper provision for a cargo completely demonstrated that he had disabled himself from performing his contract to have a cargo ready when the vessel should get to her berth. However this may be, the facts were very different from the present case, and if the plaintiff had no other ground on which he could support his claim than the failure to provide a cargo between the 11th and 19th April, I should have hesitated to hold that his claim could succeed. I am, however, of opinion that the plaintiff is entitled to succeed on the other point argued before me. It must have been known to the defendants, who are one of the largest shippers of coal from the ports of Barry Dock, Penarth, and Cardiff, that at times periods of congestion occurred at Barry, and that the Dock Authority had to take special measures to ensure the prompt loading of ships and the rapid clearing of their dock, and that such measures might involve their being called upon to comply with requirements beyond those which they had ordinarily to observe. It is impossible to read the judgments in *Little v. Stevenson* (sup.) without seeing that if the case had been one in which the charterers had failed to have the cargo ready to begin loading when the ordinary time of the plaintiffs' ship came to enter the dock, they would have been held liable. The decision in the case was that they were not bound to have cargo ready when a casual vacancy in the dock occurred owing to the cargo of an earlier vessel not being ready. Lord Herschell says in his judgment: "I do not for a moment deny that he is bound to do whatever is reasonable on his part with the view of getting the ship berthed at the earliest period that is reasonably possible." I think there is an implied term in the charter-party that the defendants would do whatever was reasonable in order to enable the plaintiffs' ship to get into dock and so become an "arrived ship."

It may be urged that it is unreasonable to require that a charterer, who, by the terms of his bargain, need only have his cargo ready in time to load the ship in 144 hours after she gets

into dock, should have a substantial part of his cargo ready before she gets into dock at all. But I think that shipowners and shippers of coal doing business at the South Wales ports would regard it as reasonable in times of congestion that the dock authority should require at least one-third of the vessel's cargo to be ready before she was admitted to the dock, and I think, in refusing to assist the plaintiffs' ship to get into dock by complying with the requirements of the dock authority, the charterers broke their contract, and are liable to pay the agreed damages.

Judgment for plaintiff.

Solicitors: for the plaintiff, *Botterell and Roche*; for the defendants, *Ingledew, Sons, and Brown*.

House of Lords.

Friday, June 18, 1926.

(Before Lords DUNEDIN, SUMNER, PHILLIMORE, CARSON, and BLANESBURGH.)

THE CHEKIANG. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision — Damages — Detention of warship — Measure of damages — Owner's repairs proceeding contemporaneously with collision repairs—Owner's repairs necessary for periodical outfit—Time for overhaul advanced in order to take advantage of the vessel being in dry dock for collision repairs—Assessment of damages for detention of a non-profit earning vessel.

The defendants admitted liability for a collision between their vessel and a light cruiser, and the question of damages was referred to the registrar and merchants for assessment. After the collision the cruiser was sent for repairs to a dockyard. It appeared that she was due for her annual refit within four months of going into dock to perform the collision repairs, and it was accordingly decided by the naval authorities that she should go through her refit whilst the collision repairs were being carried out. The two sets of repairs accordingly proceeded simultaneously. At the reference the registrar allowed twenty days' detention, that being the length of time which in his opinion could be properly allocated to the repairs, at a daily figure based upon a percentage of the capital value of the ship. He also allowed a sum for the pay and allowances of the officers and crew, whilst the repairs were being carried out. It was proved that the decision at once to refit the cruiser was not taken until after it was decided to perform the collision repairs.

Held, (1) that inasmuch as it was found in fact that there was no necessity to make the refit, the Admiralty were entitled to take advantage of

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

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the vessel being in dry dock without being called on to contribute to the expense of docking or to forgo the payments in full to which they were entitled as for the loss of the use of the vessel for the period of detention which had been properly fixed at twenty days for the collision during which the vessel was rendered unfit for her active service.

Ruabon Steamship Company v. London Assurance (9 Asp. Mar. Law Cas. 2; 81 L. T. Rep. 585; (1900) A. C. 6) followed.

(2) That the registrar had not proceeded upon a wrong principle in an assessment of the damages, which was based on a calculation of a percentage of the actual value of the ship, with an allowance for depreciation.

Decision of the Court of Appeal (16 Asp. Mar. Law Cas. 495; 133 L. T. Rep. 31; (1925) P. 80) reversed.

APPEAL from a decision of the Court of Appeal (Bankes and Atkin, L.JJ. and Lawrence, J.) (reported 16 Asp. Mar. Law Cas. 495; 133 L. T. Rep. 31; (1925) P. 80).

The plaintiffs were the Admiralty Commissioners, and the defendants were the owners of the steamship *Chekiang*. The defendants admitted liability in respect of a collision which took place at Hangkow, on the Yang-tse-Kiang, on the 22nd Aug. 1921 between the *Chekiang* and H.M.S. *Cairo*, a light cruiser on the China station.

After the collision H.M.S. *Cairo* proceeded to Hong-Kong dockyard to undergo repairs, where she arrived on the 3rd Sept. 1921. She went into dry dock, where the work of repairing the collision damage was carried out. It appeared that she was due to undergo her periodical general refit in Dec. 1921, and after it was known that the collision repairs would be carried out it was decided that the refit should be performed at the same time as the collision repairs. The repairs necessary for the periodical overhaul, which involved an expenditure of some 4000*l.*, were therefore carried out simultaneously with the collision repairs. H.M.S. *Cairo* remained in the dockyard until the first week in Nov. 1921, during which time working parties were kept on board.

The following sums were respectively claimed and allowed in his report by the registrar :—

	Claimed.			Allowed.		
	£	s.	d.	£	s.	d.
1. Cost of repairs, <i>Cairo</i> ..	675	11		675	11	
2. Loss of use of H.M.S. <i>Cairo</i> , for the period the 23rd Aug. to 27th Sept. 1921, inclusive, i.e., thirty-six days at £100 per day ..	3600	0	0	2000	0	0
3. Pay and allowances of officers and men for above period ..	7460	17	4	3800	0	0
4. Survey fee and superintendence of repairs ..	15	15	0	15	15	0
5. Office and incidental expenses ..	21	0	0	5	5	0
	£6496			11		

Interest was allowed thereon at 5 per cent. per annum from the 29th Oct. 1921 until paid. The registrar gave the following reasons for his report :—

In this reference, the Lords Commissioners of the Admiralty claimed damages arising from a collision between the light cruiser *Cairo* and the *Chekiang*, which occurred at Hankow on the 22nd Aug. 1921 and for which the *Chekiang* was to blame.

The *Cairo* was temporarily repaired at Hankow and left that place on the 3rd Sept. for Hong-Kong, where she was permanently repaired. The *Cairo* was due for her annual refit in Dec. 1921, but it was decided that as the collision repairs would take some time the annual refit should be done at the same time. The combined work was finished on the 2nd Nov., but the Admiralty did not claim for loss of time in respect of the collision repairs beyond the 27th Sept. The defendants contended that they were not liable for any loss of time or, in the alternative, for a shorter time than that claimed by the plaintiffs. As regards the time from the 22nd Aug. to the 2nd Sept., I am of opinion that this period cannot be taken into account in estimating the damages for loss of time. The *Cairo*, so far as can be ascertained, after the collision still fulfilled the purpose for which she was stationed at Hankow, and no evidence has been given to prove any loss to the Crown during that period. As regards the later period, it is clearly proved that the decision at once to refit the *Cairo* was not taken until after it was decided to repair the collision damage. The question, therefore, resolves itself into one as to the length of time which can be properly allocated to the collision work. The estimate of Mr. King-Salter, who was in charge of the work, was three weeks, and he is in a position to form a judgment. On the other hand, this estimate is an assumption only, and is not corroborated by any independent evidence. For the defendants two very competent witnesses estimated the time as seven days, which again is an assumption, and by gentlemen who did not see the work being done. The evidence of a person who has had charge of the work for the plaintiffs naturally, but unconsciously, has a bias in their favour, and the weight of the defendants' evidence cannot be altogether passed over. The conclusion to which the merchants and myself have come is that a reasonable time to allow from the 3rd Sept. is twenty days.

As regards the items in respect of officers' and crew's wages, there is evidence that they were employed to some extent on the refitment of the *Cairo* and, having regard to this fact and to the time allowed, the amount allowed for this item is reduced to 3800*l.*

The defendants having appealed against the allowance of items 2 and 3, Sir Henry Duke, P. dismissed the appeal and confirmed the report, but leave was given to appeal.

The Court of Appeal held (1), that the damages in collision cases being measured in accordance with the ordinary principles of common law, the registrar had proceeded upon a wrong principle in applying a fixed rule and ignoring considerations relevant to the question of the actual loss sustained by the plaintiffs by being deprived of the use of their chattel; (2) that there is no rule of general application for the assessment of damages for a non-profit earning vessel; (3) that if it could be shown that the period of collision damage enabled the

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owners to execute owner's repairs, the completion of which would otherwise with reasonable certainty have deprived the owners of some period of beneficial use, the time so saved may properly be taken into account in determining the loss sustained.

The Admiralty Commissioners appealed.

Sir *Douglas Hogg*, K.C. (A.-G.), *Raeburn*, K.C. and *Balloch* for the appellants.

Dunlop, K.C. and *R. F. Hayward* for the respondents.

The House took time for consideration.

LORD DUNEDIN.—In this case *H.M.S. Cairo*, a light cruiser, was being employed in the China waters by the Admiralty when she had her stem injured by a collision with the *Chekiang*, for which collision the *Chekiang* is admittedly to blame. The occurrence took place on the 22nd Aug. 1921, the *Cairo* being at that time at Hankow. There are no facilities at Hankow for permanent, although there are for temporary repairs. Temporary repairs were effected at Hankow, but the *Cairo* sailed on the 2nd Sept. for Hong-Kong, where permanent repairs could be executed. The *Cairo*, according to Admiralty instructions, had to undergo an annual refit, and that refit was due to begin, unless unforeseen circumstances arose, on the 11th Dec. 1921. Accordingly, when the authorities found that the *Cairo* was necessarily in dock at Hong-Kong for the purpose of making the permanent repairs rendered necessary by the collision, they decided that the annual refit should be anticipated, and take place concurrently. In consequence of this decision the *Cairo* remained in dock from the 7th Sept. 1921, when it entered, until the 29th Oct. 1921. The Commissioners of the Admiralty having raised an action against the owners of the *Chekiang* for the damages occasioned by the collision, the defendants admitted the fault and proceeded before the registrar and merchants for the assessment of damages. The registrar found the facts as above quoted, and, further, found that the collision repairs demanded a detention of twenty days. The plaintiffs claimed the cost of repairs, survey fee, and superintendent's office and incidental expenses; all those items were admitted. But they further claimed thirty-six days' loss of the use of the *Cairo* at 100*l.* a day, this sum representing interest on the capital value of the ship at the time of the collision, and pay and allowances of the officers and men for the like period, these being the actual amounts expended. The registrar allowed for loss of time for twenty days only at 100*l.* a day, and allowed a sum in respect of the pay and allowances of the officers and crew for that period after making a deduction in respect of the work done by them in connection with the refit. The defendants objected, but the learned president confirmed the report. On appeal the Court of Appeal recalled the judgment and remitted to the registrar for reconsideration of the sum due. Against that judgment the present appeal has been brought.

It seems to me that there are here two questions, and two questions only, to be considered. The first is, Was it right for the registrar to allow damages as for the total deprivation of the vessel for the period of twenty days during which the vessel was undergoing collision repairs, while, at the same time, refit repairs were going on? The second, if the first be answered in the affirmative, is whether the damages have been properly calculated.

As regards the first question, I think it is concluded by authority of a case in your Lordships' House. I refer to the case of *Ruabon Steamship Company v. London Assurance* (9 Asp. Mar. Law Cas. 2; 81 L. T. Rep. 585; (1900) A. C. 6). In that case a ship having been put into dock for repairs rendered by a collision, the owners took advantage of her being there to have her classification made, there being at the time no actual necessity for having classification made. The underwriters who were liable for the damages ensuing on the collision claimed to have a contribution from the owner from the dock dues. This was refused and the judgment was put on the general proposition, that where the damaged vessel is perforce kept in dock for the expense of which detention the wrongdoer who caused the damage is liable, no liability to contribute is created by the fact that the owner takes advantage of the situation to do what he pleases with his own vessel, such act not interfering with the necessary operations for which the wrongdoer is liable. This decision was applied by Sir Francis Jeune in *The Acanthus* (85 L. T. Rep. 696; (1902) P. 17; 9 Asp. Mar. Law Cas. 276), where a vessel being dry-docked for collision repairs, the owner took the opportunity to fix bilge keels on the vessel, that not being a work of necessity, and was held not liable to contribute towards the dock expenses.

If the act of the owner was of necessity it would be otherwise. It follows, in my opinion, that inasmuch as it is found in fact that there was no necessity to make the refit, the Admiralty were entitled to take advantage of the vessel being in dry dock without being called on to contribute to the expense of docking or to forgo the payments in full to which they were entitled as for the loss of the use of the vessel for the period of detention due to the collision during which the vessel was rendered unfit for her active service. This period, as already mentioned, was fixed at twenty days.

There remains the second question, as to whether the damages had been properly calculated. My Lords, in the case we are about to decide I have discussed the subject of the calculation of damage, and I shall not repeat what is there said. In the present case the registrar and merchants, acting as a jury, might have arrived at a certain sum based on a calculation of a percentage of the actual value of the ship. There is no absolute rule enjoining such a calculation. I can imagine in some circumstances it would bring out an extravagant sum,

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but in the present case I cannot say that it has that effect. I do not consider that the registrar has worked on any absolute or fixed rule, and, viewing the award as a jury award, I do not think we should interfere with it. The expenses of the officers and men have not been allowed in full.

I therefore move to recall the judgment of the Court of Appeal and to restore the judgment of the president which confirmed the report of the registrar. The respondents to pay to the appellants their costs in this House and in the courts below.

LORD SUMNER.—I agree. It is with lively satisfaction that I concur with the noble and learned viscount in thinking that the time has come when your Lordships may, without any sacrifice of dignity, devote some short time to the rules applicable to the measure of damages in collision actions. After all, little as this question has engaged the attention of the courts, parties take more interest in it than in any other issues in litigation, and they are not alone in thinking that it is one in which platitudes and rules of thumb are no good. Damages may be a "jury question," that is a question of fact for the jury, if there is one, but they must be measured under a proper direction as to what the law requires. To say, as judges have come as near to saying as decorum permits, that juries must find a figure as best they can and escape criticism by being anonymous and dumb and accordingly proof against everything but "perversity" is a poor position in which to leave the matter. In this class of case there is an opposite system of practice, and, in lieu of a jury, a highly important and experienced official of the court acts judicially in the first instance. He has to arrive at a conclusion without any previous directions upon the law from the learned judge, and then to state that conclusion in writing and, unless he risks such a criticism, erroneous as I venture to think, as was passed on him in this case by the Court of Appeal, namely, that he had proceeded on a rule of thumb as if it was binding law in all cases, he must give the legal reasons which support his conclusion. The measure of damages ought never to be governed by mere rules of practice nor can such rules override the principles of the law on this subject. I find the following passage in the learned registrar's excellent work on this topic (2nd edit., p. 106), alluding first to *The Mediana* (9 Asp. Mar. Law Cas. 41; 82 L. T. Rep. 95; (1900) A. C. 113) and next to *Mersey Docks and Harbour Board v. Owners of Steamship Marpessa*; *The Marpessa* (10 Asp. Mar. Law Cas. 464; 97 L. T. Rep. 1; (1907) A. C. 241): "The House of Lords, though it has established a rule, has not given any practical assistance towards the difficult question of formulating a standard of damages in cases to which such a rule is applicable, which difficulty was chiefly responsible for the doubt as to the propriety of a claim for demurrage by a non-trading body. Indeed, the tribunal somewhat ostentatiously

put this difficulty on one side, stating in this last decision that, though it did not agree with the registrar's report, it would not vary its conclusions."

I acknowledge with contrition the justice of these strictures. In *The Greta Holme* (8 Asp. Mar. Law Cas. 317; 77 L. T. Rep. 213, at p. 234; (1897) A. C. 596, at p. 604) Lord Watson says: "The data for estimating the amount of substantial damages are not precise. In cases like the present that difficulty is sometimes inevitable and is of common occurrence; but it is a difficulty which can be easily and is often satisfactorily overcome by a jury under proper directions. Personally I have a dislike, which I have reason to believe is shared by other judges, to the task of assessing damages."

In *The Mediana* (sup.) Lord Halsbury, L.C. says: "What right has a wrongdoer to consider what use you are going to make of your vessel? . . . The broad principle seems to me to be quite independent of the particular use the plaintiffs were going to make of the thing . . . except . . . when you are endeavouring to establish the specific loss of profit, or of something that you otherwise would have got, which the law recognises as special damages. . . . When we are speaking of general damages no such principle applies at all, and the jury might give whatever they thought would be the proper equivalent for the withdrawal of the subject-matter then in question."

Lord Loreburn, L.C. observes in *Mersey Docks and Harbour Board v. Owners of Steamship Marpessa*; *The Marpessa* (10 Asp. Mar. Law Cas. 465; 97 L. T. Rep., at p. 2; (1907) A. C., at pp. 244 and 245): "The plaintiffs were entitled to put their case in another way. They might say: 'The cost to us of maintaining and working this dredger, while it is working, amounts to so much per day, and its depreciation daily amounts to so much more. We take the total daily sum which it costs us as a fair measure of the value of its daily services to us. Those services are at least worth what we are habitually paying for them year after year, including what we sacrifice in depreciation.'"

I would point out that, as examination of of the reports of the case before the president and the Court of Appeal will show, this was not by any means the way in which the plaintiffs had actually put and proved their case. Lord Loreburn proceeds: "There is a confusion in the registrar's award in these respects, and also in regard to general damage in the circumstances of this particular case. . . . In my opinion, though there is error in the registrar's report, there is no case for the interposition of this House. We cannot correct every minute mistake."

It must be admitted that the learned registrar, as the tribunal before whom the assessment of damages takes place, did not get very ample guidance from these declarations.

When the *Chekiang* ran into the *Cairo*, she imposed on the Admiralty, as the direct consequence of this wrong, the necessity for

docking the *Cairo* at Hong-Kong during the repair of the collision damage. Why should not the *Chekiang* pay for that docking? Her overhaul was not then due. It had not been determined upon for that time, and the programme of overhauls was itself liable to alteration. The overhaul imposed no extra burden on the *Chekiang* when it took place; in fact, the dock charges are claimed only to the end of the collision repairs and not till the *Cairo* left the dock. There is abundant authority for saying that the fact that the owners of an injured ship take the opportunity of the docking required for collision repairs to do work on their own ship, which had not already become necessary at the time of the collision, nor was brought about by the owners' negligence contributing to the collision, is no ground for reducing the wrongdoer's liability to make good the damage his wrongdoing has caused. It is not, like *The Haversham Grange* (10 Asp. Mar. Law Cas. 156; 93 L. T. Rep. 733; (1905) P. 307), a case of both to blame and of a second collision following a first one, which had already made docking inevitable. The proposition of Lord Macnaghten in *Ruabon Steamship Company v. London Assurance* (9 Asp. Mar. Law Cas., at p. 6; 81 L. T. Rep., at p. 588; (1900) A. C., at p. 15), no doubt, is applicable, viz.: "There is no principle of law which requires that a person should contribute to an outlay merely because he has derived a material benefit from it," but the present matter depends on the law relating to liability for damage caused by wrongdoing, not on anything arising out of a contract of indemnity, and in this case at any rate the dock dues were not a "common factor." Nor is there here any question of minimising the damages. The object of that principle is to prevent a tort-sufferer from recovering for damage which is really self-inflicted, because with reasonable effort he could have avoided it. This does not extend to investing the tort-feasor with a right to call on him to do things which do not follow from the collision in order to diminish liability for the wrong.

The precise question therefore comes to be this: Was there evidence before the learned registrar which justified him in law in measuring, as he did, that part of the claimants' damage, which consisted in the loss of the use of the *Cairo* during the time occupied in repairing the collision damage? He took the *Cairo's* original cost, written down for two years' depreciation to the date of the collision, and allowed 5 per cent. per annum on it.

Such a measure was applied with approval to craft in non-trading civil employment in *Mersey Docks and Harbour Board v. Owners of Steamship Marpessa; The Marpessa (sup.)*, though neither the rate of interest nor the rate of depreciation nor the mode of reckoning it was there defined. In the Admiralty Registry, as instances quoted in Mr. Roscoe's book show, varying rates of interest have been allowed according to circumstances, and this ought also to be done when depreciation is reckoned.

I think, therefore, it becomes crucial to ask whether, and if so, on what ground, such a calculation can be applied to a King's ship.

That a tort-sufferer is not to go short of compensation for damage at a tort-feasor's hands merely because he does not trade for profit is well settled. Equally little can the tort-feasor escape because his wrong is done to a King's ship. This has been recognised for some fifteen years in *The Surf* (Roscoe's Measure of Damages in Maritime Collisions, 2nd edit., p. 179) and other cases in the Registry and in *The Astrakhan* (11 Asp. Mar. Law Cas. 390; 102 L. T. Rep. 539; (1910) P. 172), by Deane, J. The plan on which the damage is to be calculated is a different matter. King's ships differ among themselves very widely; and, even as a class, they differ as much from the dredgers and lightships of the Mersey Docks and Harbour Board as these do from common tramps. What, then, is the principle on which the present calculation was made, and is it applicable to King's ships in general and to the *Cairo* in particular? *Mersey Docks and Harbour Board v. Owners of Steamship Marpessa; The Marpessa (sup.)* was a decision which was consequent on *The Mediana (sup.)*, and *The Mediana (sup.)* professed to follow the "principle" of *The Greta Holme (sup.)*. The only principle as to this measure that I can find there stated is in Lord Herschell's words (8 Asp. Mar. Law Cas. 320; 77 L. T. Rep., at p. 234; (1897) A. C., at p. 605): "How can they the less be entitled to damages because, instead of hiring a dredger they invested their money in its purchase? The money so invested was out of their pockets and they were deprived of the use of the dredger, to obtain which they had sacrificed the interest on the money spent on its purchase. A sum equivalent to this, at least, they must surely be entitled to."

To this I would add Lord Loreburn's words above quoted: "Those services are at least worth what we are habitually paying for them year after year, including what we sacrifice in depreciation."

Interest is, in any case, a thing that has little to do with non-commercial transactions and, apart from cases of contract, is always a highly fictitious factor in calculations. Further, a calculation based on the cost of construction of a ship written down to the date of the collision, is, of course, much more appropriate to the case of a total loss than to demurrage during repair, and although, by manipulating the percentage of depreciation and the percentage assumed for annual value, a flexibility is obtained, which theoretically is almost infinite, the calculation must be a very uncertain test of the true daily value of the user lost. The assumption on which this calculation seems to rest according to the two passages above quoted is that in a well-conducted business the machinery which you buy will generally be found in use to be worth what you spend on it, and this is emphasised by the fact that Lord Herschell's proposition was not really a

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statement of anything that the Mersey Docks and Harbour Board had actually sacrificed, but was rather directed to the position of a private firm, trading for profit with its own capital. I think, however, that when one gets away from personal trading, this assumption may quickly become unsound. For a dredger, working at a limited task under settled local conditions, or a lightship always discharging the same duty in the same place, it may well be that an admirably managed dock authority aided by the best engineering advice, can insure that they get full value for what they spend, and may reasonably reckon both depreciation and annual value by dividing expense into the prospective life of the vessel. For some Admiralty craft the same assumption may reasonably be made, for tugs for example, and oilers, or harbour launches and ferry boats, or floating docks, or even, it may be, for the old Indian troopships. There is a regularity of duty and a close analogy to commercial undertakings in these cases that justify the assumption. Beyond such craft the analogy tends quickly to vanish. There is no presumption that ships of war are worth to the State what was spent on building them, or that their daily user is worth the cost of running them, for outlay on the Navy is not a matter of commercial investment of money but of State policy. What, for example, is the daily value of the user of a mine-layer or a submarine in time of peace or what can be made of interest on the capital laid out on the guns and armour of a battleship? In ships of war fashion changes, or perhaps I should say the science of war advances; ships are built in a hurry or when prices are high, or are continued in service when they are obsolescent or have proved to be failures, and this for reasons of policy and not of economics. Much depends on the kind of ship; more on the existence of profound peace or the imminence of the outbreak of war. In the last event the value of the time, when collision makes a man-of-war unavailable, may truly be at once vast and inestimable; in some of the others the value of the user may really be no more than that of floating accommodation for officers and crew, who have among other things to be kept under discipline and busy. To all these matters in the appropriate case the registrar would have to direct his mind. No formula can fit them all and no formula could fail to vary in regard to its factors from time to time. The practical question is whether it can be said that, in applying the principle of *The Greta Holme* (sup.) to the case of the *Cairo*, the learned registrar misdirected himself in law.

On the record the learned registrar had very little evidence about the *Cairo* before him, but there are two things always to be borne in mind about proceedings in the registry. The great experience of the registrar and the knowledge of the merchants, who assist him, make evidence on many topics quite superfluous, and the participation in the proceedings of experienced counsel constantly justifies the conclusion that, by tacit, if not by express consent, statements

are accepted of which no formal proof appears on the note. I think that on the present point there was a large measure of consent, nor was this much contested. It seems to me reasonable to conclude that, whether by the knowledge which he had acquired in the course of his duties or by the advice of the gentlemen who assisted him, or by the acquiescence of counsel, specially familiar with such matters, or by all of these, the learned registrar was warranted in assuming that the *Cairo*, a ship about two years old, performing duties and designed to perform duties *inter alia* which appear to have consisted in patrolling the Yang-tse-Kiang near Hankow and in giving moral rather than material support to British interests, was doing work for which the outlay upon her was economically well designed, and that in allowing a rate of interest not I think excessive upon what is really a wasting security he was committing no error in law.

I am of opinion that, in the present case, there is no ground for interfering with the conclusion of the learned registrar, but I think that, except in cases very strictly comparable with the present case, or in cases where admissions are made, the Admiralty should be required, as part of their claim, to give evidence of the character of the ship, to explain what her duties are and the true relation of the original cost to her duties at the time of the damage, and so to enable a clear judgment to be formed of the appropriate rates of depreciation and of interest. I think also that the limit of comparable cases will soon be reached, and that beyond it some modified calculation will have to be found.

LORD PHILLIMORE.—Public bodies who are owners of ships employed in local public service may, when their vessels have been injured by collision, recover, among other sums, damages for their detention while under repair, although no gain which could be measured in money accrues to such bodies by the use of their ships or is lost by reason of their being put out of action.

This has been decided by your Lordships' House in three cases: *The Greta Holme* (sup.), *The Mediana* (sup.), and *Mersey Docks and Harbour Board v. Owners of Steamship Marpessa; The Marpessa* (sup.).

It has not yet been settled by your Lordships' House that the same principle extends to men-of-war and to Sovereigns as owners of men-of-war. But this step has been taken in the Admiralty Division in the reported case of *The Astrakhan* (sup.), and, as your Lordships have been informed, in several unreported cases.

Men-of-war are not built or commissioned or put on their station except for purposes of utility to the State which owns them; and the principle which your Lordships have applied to local public bodies seems logically to extend to the Crown and to other Sovereigns, and I presume that your Lordships will take this opportunity of giving your sanction to the

practice which has been followed in the Admiralty Division. I might add that it seems to have been anticipated by Lord Halsbury in the case of *Clyde Engineering and Shipbuilding Company v. Castaneda and others* (91 L. T. Rep. 666; (1905) A. C. 6) that such would be the case.

This determines the first point under consideration in the case of the *Chekiang*.

A period of twenty days has been fixed by the registrar as the probable time which repairs to H.M.S. *Cairo* for the damage caused by the collision would take. He has not allowed for the period whilst she was undergoing temporary repair at her station at Hankow, because he conceives that even in her damaged state she sufficiently represented the power of Great Britain; and no claim appears to have been made for the two days lost in steaming to Hong-Kong, where her permanent repairs were done. The registrar has estimated that these repairs at Hong-Kong would, in any event, have taken twenty days, and for this estimate there is sufficient warrant in the evidence, and your Lordships have not had any serious challenge of its finding on this point.

But it is contended on behalf of the owners of the *Chekiang* that in reality the repairs of the *Cairo* caused no detention, because the opportunity of her being in dry dock was taken for submitting her to the periodical overhaul to which ships in H.M. Navy are submitted, and this overhaul ran *pari passu* with the repairs and lasted longer than the twenty days which the repairs in normal course would have taken. This contention has been accepted by the Court of Appeal.

It appears that the usual rule is that this periodical overhaul or refit should take place at intervals of twelve months, that the period of twelve months would have expired at the end of Nov. or early in Dec. 1921, and that the *Cairo* went into dry dock for her repairs on the 6th Sept. But it is not a rigid rule that directly on the expiration of a twelve months' period the refit should begin. All such matters are subject to the exigencies of the public service and the orders of the commander-in-chief of the station. The time is approximate only.

It was found by the registrar and must now be taken to be the case that the *Cairo* was not sent to Hong-Kong with a view to this refit, and that the idea of combining the repairs and refit was not accepted by the authorities till after she had got to Hong-Kong. It was not a case where collision or no collision she would have gone into dock then for her refit. It is a case where the going into dock for repairs being necessary, the authorities on the whole thought it convenient to advance the period of refit (though that advance is itself open to some objection) and combined the two operations, or it may be said superadded the refit on the repair.

This being so, there is no question that the detention for twenty days was due to the

collision, and all that can be said on behalf of the owners of the *Chekiang* is that the Admiralty employed the time profitably and thereby saved a part of the period which would at some later date, if no accident had happened and nothing special had supervened, have been taken up for a refit.

It seems to me, as indeed to all your Lordships, that a wrongdoer cannot claim to have the damages given to him reduced by any such consideration. The principle laid down by your Lordships' House in *Ruabon Steamship Company v. London Assurance (sup.)* applies, notwithstanding the way in which the Lords Justices have distinguished it. The decision of Sir Francis Jeune in *The Acanthus (sup.)*, where advantage was taken of the vessel being in dry dock to add the improvement of bilge keels and yet the whole period of detention was allowed against the wrongdoer, was, I think, sound.

The decision in the Court of Appeal in the case of *The Haversham Grange (sup.)*, when rightly understood, is an authority to the same effect. In that case the injured vessel was the subject of two collisions, in both of which the other ship was the wrongdoer, and the repairs occasioned by the second collision proceeded simultaneously with and took a shorter time than the repairs due to the first. In the action against the second ship a claim was made for demurrage during the time taken for the repairs due to the second collision, and the court expressed itself so strongly against this claim that it was given up. But it was not the contention of anybody that the owners of this injured vessel should not have this period of detention. The claim against the second ship was disallowed because the first ship had got to pay it. The owners of the injured ship were entitled to claim the full period of detention against ship No. 1, though they utilised part of it for repairing damage caused by ship No. 2.

It is true that the Court of Appeal did make ship No. 2 pay a proportion of the charges due for the use of the dry dock; but the court distinguished this charge from the charge for detention on a ground which it is not very easy to appreciate, that the charge for the dry dock must be considered as part of the charge for repair. This point may some day have to be reconsidered; but on the question of detention the case is an authority in favour of the Admiralty.

I think that the point may be put quite shortly as follows: If a vessel has got to go into dry dock for a periodical survey for class, or in the case of King's ships by the practice of the Admiralty, or to repair previous damage, her detention for repairs due to some collision which occurs after the previous damage or after the determination to put her into dry dock has been made will not be a charge against the wrongdoer; otherwise it will. This covers the second point in the case.

The third point is as to the amount of compensation estimated day by day during

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the twenty days. The registrar has arrived at this in accordance with the practice which apparently has obtained in other similar cases. There being no other measure to guide him, he has allowed interest at a certain rate upon the estimated value of the vessel, this value being arrived at by taking prime cost and deducting depreciation from the time when she was launched.

As I have ventured already to observe, ships of war are not built, commissioned, or put on station for idle purposes, and it is to be presumed that they are worth to the State which owns them what it has cost the State to construct and to run them.

To this interest the registrar has added a further sum for the pay and allowances of the officers and crew, after making a deduction which must be rough and ready for their assistance during the work of repair.

It might be observed with some force that his deductions here are hardly large enough. I do not, for instance, see that he has reckoned for the fact that at any rate the commissioned and higher warrant officers were entitled at least to half-pay whether actively employed or not. But the deductions to be made would be small, nor have they been seriously insisted upon at this stage of the case. From the nature of things, both items of the estimate must be arrived at by what is, to use the old Admiralty phrase, a *judicium rusticum*, and I think that your Lordships need not interfere, and that the registrar's report, confirmed as it was by the president, should stand, and the judgment of the Court of Appeal should be reversed.

Lord CARSON and Lord BLANESBURGH concurred.

Appeal allowed.

Solicitor for the appellants, *The Treasury Solicitor*.

Solicitors for the respondents, *Wallons and Co.*

April 16, 19, and June 18, 1926.

(Before Lords DUNEDIN, SUMNER, PHILLIMORE, CARSON, and BLANESBURGH.)

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ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision — Damage — Oil tanker owned by the Admiralty — Detention during repairs — Vessel which could have been chartered for commercial purposes — No intention on the part of the Admiralty to charter — Market rate — Measure of damage.

On the question of damages there is no difference between the position in Admiralty law and that of the common law; the damages due in either case are such as will give the injured

party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act. If there be any special damage which is attributable to the wrongful act, it must be averred and proved, but the quantification of the damage is a jury question.

Where an oil tanker belonging to the Admiralty Commissioners was withdrawn from the service of the Admiralty for a period during which collision repairs were being performed, her place during such period being taken by another vessel belonging to the Admiralty, which might otherwise have been idle,

Held, that the damages ought not to be assessed on the basis of treating the oil tanker as a vessel to be let out on a mercantile charter or on the footing that the Admiralty required a similar vessel to take her place while she was under repair and so get a charter lien of a similar vessel, but should be based upon the cost of the daily upkeep and upon a calculation of a percentage of the actual value of the vessel subject to an allowance for depreciation.

Decision of the Court of Appeal (14 Asp. Mar. Law Cas. 551; 134 L. T. Rep. 45; (1925) P. 196) affirmed.

The Greta Holme (8 Asp. Mar. Law Cas. 317; 77 L. T. Rep. 231; (1897) A. C. 596) applied.

APPEAL from the decision of the Court of Appeal (Bankes, Scrutton, and Atkin, L.JJ.) (reported 14 Asp. Mar. Law Cas. 551; 134 L. T. Rep. 45; (1925) P. 196) on the defendants' objection to the registrar's report, referring the report back to the registrar for re-assessment of the damages sustained by the plaintiffs by reason of the loss of the use of their oil tanker *Prestol*. The plaintiffs were the Admiralty Commissioners, owners of the oil tanker *Prestol*, and the defendants were the United States Shipping Board, owners of the steamship *Susquehanna*. On the 20th Nov. 1920 the *Prestol*, an Admiralty oil tank vessel engaged in the supply of oil fuel to the fleet, of 2626 tons gross and 939 tons net register, 319ft. in length and 4ft. beam, fitted with engines of 246 horse-power nominal, was lying moored with her port side to the wharf on the east side of the Neufahrwasser, at Danzig. The French destroyer *Somme* was moored to the *Prestol's* starboard side. In these circumstances the steamship *Susquehanna*, which was bound up-river, struck the stern of the *Prestol*, carrying away her after moorings and cutting in between the *Prestol* and the wharf, so that the *Prestol* sustained considerable damage. The plaintiffs, among other items, claimed 7200l. for loss of use of the *Prestol* from the 17th Dec. 1920 to the 17th Jan. 1921, being the time during which it was admitted she was detained in dock for repairs. The registrar allowed 6400l. in respect of this item. The facts were that in consequence of the collision the *Prestol* had been brought from Danzig to Rosyth to be repaired and had been replaced by another oiler, the *Benzol*, from the Clyde. In his reasons for his report the registrar said: "There is clear evidence that such a

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

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vessel as the *Prestol* has a commercial value and that she could be profitably chartered, if not in use by the Admiralty, who, in fact, from time to time do charter some of their oilers." The Court of Appeal held, affirming the decision of Lord Merrivale, P., referring back the report of the registrar, that the damage sustained by the Admiralty owing to the detention of their vessel was not measured by the market rate of hire for such vessel prevailing during the period of repair, since the Admiralty Commissioners would not in any case have chartered the vessel. The plaintiffs appealed.

Sir Douglas Hogg, K.C. (A.-G.), *Raeburn*, K.C., and *Balloch* for the appellants.

Dunlop, K.C. and *Stenham* for the respondents.

The House took time for consideration.

LORD DUNEDIN.—The *Prestol* was an oil tank steamer belonging to the Admiralty, and was being used to supply the needs of the oil-driven ships of the British Navy which were stationed in the Baltic. Whilst on this service she was injured in collision with a steamer called the *Susquehanna*, near Danzig. It was admitted that the *Susquehanna* was to blame for the collision. In consequence of the injury the *Prestol* had to be sent home to Rosyth. The repairs occupied thirty-two days. The place of the *Prestol* was filled by the *Benzol*, another oil tank steamer belonging to the Admiralty, which, for that purpose, was withdrawn from her service on the Clyde. The owners of the *Susquehanna* admitted liability to pay (1) for the necessary repairs, (2) for the pay and victualling of the crew of the *Prestol* during the period of repairs, and (3) for survey and office expenses. But the Commissioners of the Admiralty further claimed a sum of 225*l.* a day for the period of thirty-two days. This was not admitted by the owners of the *Susquehanna*, and the present action is as to that sum. The matter was in the ordinary course remitted to the registrar and merchants; they, having regard to the fact that if the *Prestol* had been let on a time charter she would have earned a sum slightly less than 225*l.* a day and also to the fact that she was in dock, where she was secure, allowed an overhead sum of 6400*l.* as damages for the detention of the *Prestol*, that is to say, at the rate of 200*l.* a day. The facts on which they based their judgment were these: There is a good commercial demand for oil tank ships, and they held that if the Admiralty had gone into the market and offered an oil tanker of the class of the *Benzol* for hire they would have got it taken on these terms. On appeal to the president, that learned judge referred the case back to the registrar and merchants. He held that the naked fact that a vessel of that sort could, if let out, have earned the money was not *per se* a sufficient reason for finding the defendants liable in that sum but that various other elements fell to be considered. On appeal the Court of Appeal unanimously

upheld the judgment of the learned President and the appeal has now been taken by the Admiralty to your Lordships' House. The actual question for decision is therefore only whether the judgment referring back the case to the registrar for further consideration should stand, or whether the registrar's award of 200*l.* a day should be confirmed *simpliciter*; but inasmuch as the decision involves the general question of the proper method of calculating damages in such cases, it will, I think, be right that your Lordships should express your opinion on the principles on which such cases should be decided.

As a preliminary to any opinion which I would wish to give it will, I think, be well to see exactly how the authorities stand which have received the imprimatur of this House and are consequently binding upon us to-day. It would not, I think, serve any useful purpose to cite other decisions where the ground has been covered by the decisions in this House. The first case that need be quoted is *The Greta Holme* (8 Asp. Mar. Law Cas. 317; 77 L. T. Rep. 231; (1897) A. C. 596). That case laid down that damages were due for the period during which a ship was rendered useless, even though the ship was not a ship of the kind which could secure commercial employment and earn consequent reward. That, and that alone, was the true point of the case. It is true that a sum was then fixed, but it was fixed by your Lordships much as a jury would fix it. The *Greta Holme* was a dredger. Her services were lost during the period which was occupied in her repair. She could not be, and was not, replaced by any other dredger. There was evidence that if anyone had had a dredger of the same sort he could have let it out at the rate of 100*l.* a day. The dredger was disabled for fifteen weeks. Their Lordships, really acting as a jury, assessed the damages at 500*l.*

The next case was *The Mediana* (9 Asp. Mar. Law Cas. 41; 82 L. T. Rep. 95; (1900) A. C. 113). The *Mediana* was a lightship used by the Mersey Docks and Harbour Board for the lighting of the Mersey. They had need of four lightships, but they kept six; one of the extra ones, namely, the fifth, was used when a periodical overhaul of each of the four was undertaken. The other, or sixth, was kept as an extra one for contingencies. The result was that one being injured, No. 6 was brought into play and the Mersey Board were put to no extra expense. It was not a case like that of *The Greta Holme* (*sup.*) of the work of the authority being partly suspended. The board claimed 4*l.* 4*s.* a day for the deprivation of the services of the lightship which had been put *hors de combat* by a collision for which the defendants were responsible. Phillimore, J., before whom the action depended, held that he was bound by four authorities in Admiralty to find nothing due. This was admittedly so unless *The Greta Holme* (*sup.*) had displaced the earlier authorities. He held that it did not, looking to the difference of circumstances as

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above described, but his judgment was reversed by the Court of Appeal and that judgment was upheld, by this House. They held that *The Greta Holme* (sup.) did apply. The sum awarded, however, was taken as admitted, so that there was no discussion in either the Court of Appeal or in this House on the precise principles upon which the sum awarded was fixed. It was taken as if it had been found by a jury. Nevertheless, Lord Halsbury, L.C., gave a long opinion on the general question of the ascertainment of damages. I analyse his opinion as follows: Small damages are not synonymous with nominal damages; damages which are not nominal may be either small or large; no exact rules for the valuation of damages can be given; special damage must be specially proved, but general damages only admit of such evidence as is in the circumstances available, and the amount becomes a jury question; depriving a person of the use of his chattel is a ground for real and not for nominal damages. I am not here concerned with that part of his judgment which explains and distinguishes the judgment in *The City of Peking*; *The Steamship City of Peking v. Compagnie des Messageries Maritimes* (6 Asp. Mar. Law Cas. 572; 63 L. T. Rep. 722; 15 App. Cas. 438).

Then came the case of *Mersey Docks and Harbour Board v. Owners of Steamship Marpessa*; *The Marpessa* (10 Asp. Mar. Law Cas. 464; 97 L. T. Rep. 1; (1907) A. C. 241). This was the case of a dredger employed by a harbour board, and the point of dispute was what allowance was to be made for the days during which, owing to the necessary repairs due to the collision, the dredger was *hors de combat*. It was not replaced during that time by any other dredger, and no direct pecuniary loss could be proved. The claim as made was for 102*l.* a day, which was based on a theoretical calculation which first of all took what had been paid in the past for another vessel which had been hired, and, adding the expenses of running, brought out an owner's profit of 27 per cent. after allowing 7 per cent. for depreciation. Then, applying the same method to the dredger in question and taking the original cost as the sum on which depreciation was to be calculated, the sum of 102*l.* per day was arrived at.

The registrar refused to accept this method, and dealt with the claim in much the same way as a jury would have done. He reduced the amount to 35*l.* a day. In doing so he made his own calculations, in particular allowing 7 per cent. to cover establishment charges, owner's profit and general damage, and calculating that 7 per cent. not on the original value but on the depreciated value of the vessel. His award was upheld by the president, by the Court of Appeal and by this House, Lord Loreburn, L.C. pointing out that in some respects the judgment was wrong, e.g., in calculating for owner's profit; in others inadequate, e.g., in taking the upkeep as what it was in dock instead of what it was on service, but with the registrar's decision, as a jury finding, he would

not interfere, as he did not see that it was based on principles that were absolutely wrong.

I think that the result of the decisions may be stated in the following propositions:—

(1) There is no difference in this matter between the position in Admiralty law and that of the common law, and the common law says that the damages due either for breach of contract or for tort are damages which, so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act.

(2) If there be any special damage which is attributable to the wrongful act that special damage must be averred and proved, and, if proved, will be awarded.

(3) If the damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question.

(4) For a jury question no rigid rules, or rules that apply to all cases, can be laid down, but in each set of circumstances certain relevant considerations will arise which, were the matter before a judge, it would be the duty of the judge in the case to bring before the jury. Now the registrar and merchants are not a jury; in one sense they have the advantage of a jury, for they have great experience, whereas a jury may be composed of persons who never had the opportunity of being in a case before the case in which they are called. None the less the functions of the registrar and merchants are those of a jury. That being so, I consider that I am doing no despite to their experience, which I cheerfully admit if in this case I make to them the same class of remarks as I should make if I had a jury before me.

I therefore come straight to the circumstances of the case. This is not a case where special damage has been attempted to be proved. If it could have been shown that the disabled oil tanker had, by contract, been let to some party at a stipulated rate for the period during which it was disabled, or that owing to its disablement it had missed a contract, then the terms of the contract it had secured or would have secured would have served rightly as the basis of the sum to be allowed as damages.

This is where, I think, the registrar went wrong in his original judgment. He took it as if there had been proof of special damage, but there is nothing of that sort in the case; the Admiralty were able to supply the gap made by the accident out of their resources. That does not mean that they are not entitled to any damages. If their fleet were sufficient to provide a stand-by, then the expenses of keeping that stand-by may fairly be taken into consideration. Such expenses mean not only the daily upkeep but something representing the amount of capital which had been parted with in order to have another ship, but the initial figure of cost does not necessarily represent that capital. Not only has there been necessary deterioration by lapse of time, but a vessel's condition may not be worth what was originally

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paid for it, quite apart from the deterioration. All these are mere considerations; the registrar must do his best to allow a just but not an extravagant figure, and compensate, as far as money can do, the detriment which was in the whole circumstances imposed on the Admiralty by the deprivation of the services of the *Prestol* for twenty-two days.

I have gone at some length into this matter, but I think that though I have done so, I have not in any way deviated from the view expressed by Bankes, L.J. I find the nucleus of all I have said in the concluding words of his judgment, but as the authorities are authorities in this House I thought it right to put the matter in my own words.

I move that the appeal be dismissed with costs.

LORD SUMNER.—I agree that this appeal should be dismissed. As the *Prestol* would not in any case have been hired out during the time of repair, the Admiralty did not lose any hire, and consequently cannot claim it as damage caused by the *Susquehanna*. Again, no stand-by oiler was substituted for the *Prestol*, and therefore, calculations based on the value of a non-existent stand-by are irrelevant. Nor is there any evidence that, in consequence of this collision, any other Admiralty oiler refused a charter, which otherwise would have been taken. The whole suggestion of chartering at this time is pure speculation. The fact is, that the Admiralty, by prompt effort and economy in consumption, acting in accordance with their obligation to minimise the damages, managed to get through their work without the *Prestol*, and they cannot get damages based on the use of a stand-by when in fact they did very well without one. There is no proof that any ship was without its due supply of oil, when required, or that any service of any ship was foregone or stinted for want of oil in consequence of this collision. If this had been so, it could and should have been proved, for the Admiralty knew the facts. In no case can this be matter of presumption. Unless such loss is proved the reduction of the margin of supply or its total disappearance is not a head of pecuniary damages, for no actual harm was done. All the same, the *Prestol's* services during the time of repair were lost and accordingly the "principle" of *The Greta Holme* (*sup.*) may be applied, with such rates of interest and depreciation as the evidence may justify. In other words the loss of user for the time of repair, in effect, made the *Prestol's* then capital value infructuous for the time being, even though by special effort more benefit was got out of other ships, in which other capital was invested than would otherwise have been the case. Apart from this I do not think that there is any evidence of cost of maintenance or of any damage beyond the dock dues and the repair bill, nor do we know of any expenditure on officers and crew which can be said to have been thrown away. As to these heads nothing can be presumed. If such loss can be proved, it will be

dealt with by the learned registrar on ordinary principles. If, furthermore, any special expense was incurred in making the re-arrangement necessitated by the *Prestol's* injuries, this may be taken into account also, but, if the re-arrangement was brought about simply by greater effort on the part of the officers and crews or shore officials, without extra expenditure, the Admiralty can make no claim, not having suffered any loss.

I would add that, if this matter were *res integra*, it is the Admiralty which suffered by this collision, not the *Prestol*, and accordingly the loss which is material is that suffered by them, taking their business as a whole and not such as might be shown if they owned nothing but the *Prestol* and an isolated account in respect of her were alone taken. Nothing, however, was made of this theoretic view in *The Greta Holme* (*sup.*), and the subsequent cases, and the practice of treating the injured ship, by a sort of personification, as a separate claimant is too inveterate to be disturbed now.

LORD PHILLIMORE.—I think that the judgment of the registrar was rightly overruled. I do not think that the case ought to be treated as one where the oil tank ship *Prestol* could have been treated as a ship to be let out on a mercantile charter, or that the Admiralty could claim on the footing that they required a similar vessel to take her place while she was under repair and so get a charter hire of a similar vessel. The facts are against this view. The Admiralty dared not have let her out because they would have lost their margin of provision, and they did not require to hire another vessel because they had this margin. But it is a case, I think, in which the court which refers the matter back ought to give assistance and instruction to the registrar and not leave the matter at large.

That the Admiralty may have some compensation for the detention of the *Prestol* must be taken as agreed. For if no such compensation were obtainable, the president ought not to have made any reference back. But there has been no cross-appeal from his order.

Still, when I listened to the argument of the leading counsel for the respondent, it seemed to me to be in logic an argument against any compensation. The only matters for which, according to his argument, any claims could be made, were the cost of letters and telegrams, which I suppose is nil (as they would have been transmitted on the King's service), and possibly the difference of expense between sending the *Belgol* to the Baltic from the Clyde instead of from Rosyth—damages which one might almost call contemptuous.

The case is not an unusual one. It must arise with every mail packet company which, in order to be sure of carrying out its engagements, must keep some margin of supply beyond its immediate requirements.

It may be a definite stand-by ship. It may be only such a luxury of provision that, without serious inconvenience, the service can be

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THE SUSQUEHANNA.

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carried on by re-arrangement. In such cases, the loss is the loss of the margin of safety. If there was a second accident, a ship would have to be hired to fill the gap.

If this were a case where there was a definite stand-by ship, the principle in the case cited by counsel for the respondent—*The M. J. Hedley* (referred to in Roscoe, *Measure of Damages in Maritime Collisions*, 2nd edit., p. 98), where interest was allowed on the loss of a stand-by ship—would seem to be applicable.

And this is, I think, the rationale of the allowance made in *The Mediana* (sup.).

It may be said that the present case cannot be put so high because there is no definite stand-by ship. Still, during the period of detention, the Admiralty was without its margin of safety. If another vessel of the Fleet had been put out of action by any marine peril, they would have had to hire.

As it was, it is to be presumed that some one or more of the King's ships was or were not supplied with oil at the proper time, and so some loss of service was entailed or some risk run.

As was pointed out in the course of the argument, the judgment of Bankes, L.J. seems to indicate this principle, but for myself, I should like to make sure of this. I find some difference in the expressions used by the other noble and learned Lords in their several opinions, but I desire to adopt the language of Lord Sumner: "The loss of the user for the time of repair, in effect, made the *Prestol's* then capital value infructuous for the time being, even though by special efforts more benefit was got out of other ships in which other capital was invested than would otherwise have been the case." This, as I understand it, means that the case of *The Greta Holme* (sup.) applies, and further, as Lord Blanesburgh says, "The true measure of damage is that adopted by the learned registrar in the case of *The Chekiang*."

Lord CARSON.—I concur.

Lord BLANESBURGH.—The *Prestol*, the Admiralty unit innocently involved in this collision, is an oil tanker and not a vessel of war. This fact has led the learned registrar to the interesting conclusion that he is justified in basing the sum to be allowed to the Admiralty in respect of the *Prestol's* detention for the necessary repair of her collision damage upon what may be described as her charterable value for the time so occupied. The question whether he was justified in taking that course is the main subject for consideration on this appeal.

So regarded, the case, I think, differs from the case of *The Chekiang* only in the fact that the *Prestol*, unlike the *Cairo*, is not a ship of war. A tanker of an ordinary commercial type, she is one of a fleet maintained by the Admiralty for the service of His Majesty's ships in their different stations throughout the world. Distinguished in two relevant respects from an ordinary ship of war in that the latter is both *extra commercium* and is never let on hire, a

tanker, when the needs of the naval service so permit, may be and is occasionally let out by the Admiralty at ordinary commercial rates, and this circumstance—although it is not suggested that such a letting would be other than exceptional, or that any letting was actually in contemplation for the *Prestol* either at the time of collision or during the period of subsequent consequential detention—has led the learned registrar to raise the question already stated and to answer it as he has done. The president and the Court of Appeal have both disagreed with him.

A consideration of the *ratio decidendi* in *The Greta Holme* (sup.)—the first case in which a sum for demurrage was included in the general collision damage awarded to a public authority in respect of a vessel engaged upon public duty—leads, I think to the clear conclusion that the learned registrar, in acting as he did here, proceeded upon a wrong principle.

The claim, as the noble and learned Viscount on the Woolsack has already pointed out, is one for general and not for special damage; and while *The Kingsway* (1918) P. 344, is an instance of such a claim being allowed in the case of a vessel normally employed by her owners in plying for hire or profit, the case of *The Greta Holme* (sup.) itself shows that the court does not proceed upon that basis where the money loss sustained by the temporary withdrawal of the damaged vessel cannot be quantified directly, and where the vessel is not maintained and kept by her owners for the acquisition of gain.

The damaged vessel, in *The Greta Holme* case, was a dredger belonging to the Mersey Docks and Harbour Board not intended by the board to be let, but a vessel for which a rent of 100*l.* a week could have been obtained by the board without difficulty had they offered her for hire. The board quantified their demurrage damage at 1500*l.*—the charterable value of the dredger for fifteen weeks during which she was, at the least, under repair for collision damage. This House, however, did not accede to that claim. Their Lordships assessed the demurrage damage at 500*l.* only, acting doubtless as a jury, but rejecting, it would seem, quite clearly the basis on which the harbour board formulated their claim—the basis which the learned registrar has here adopted.

This, of course, is not to say that such a basis may not properly be used where the claim is one for special damage. This is shown very neatly in the case of *Commissioners for Executing the Office of Lord High Admiral v. Owners of the Steamship Valeria* (15 Asp. Mar. Law Cas. 218; 128 L. T. Rep. 97; (1922) 2 A. C. 242), where a vessel, chartered by the Admiralty, was at the time employed by them as an ordinary trading vessel for freight. It was held by this House that the proper measure of damage for repair demurrage was the amount of freight which, but for the accident, the ship would have earned during the period of detention, plus working expenses.

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But if regard is had to the principle upon which in such cases general damage under this head is recoverable at all, the exclusion of such a basis where the claim is for general damage only almost necessarily follows. The question, of course, only arises, where, as here, the value of the service which would have been rendered by the damaged vessel during the period of repair cannot be quantified in money. Are public authority owners in such circumstances to receive no compensation at all for the compulsory withdrawal of their vessel from service?

This House, in *The Greta Holme* (sup.), answered that question in the negative and, as it was put by Lord Loreburn in *Mersey Docks and Harbour Board v. Owners of Steamship Marpessa*; *The Marpessa* (sup.), the daily sum which it costs to maintain the service may in such cases be regarded as the fair value of that service, and may well form the basis of compensation for its withdrawal.

In some way or other it must be the value to the owners of the service lost or the cost to them of replacing it which is represented in the sum awarded. So much is required by the rules of the common law which must be followed in such matters. The sum cannot properly represent the value of something else altogether.

And while the cost of the service itself may be a good indication of its value, the hire which the vessel employed to render that service may be capable of earning in a totally different *milieu* can, one would suppose, be no such indication at all.

Accordingly, I reach the conclusion with the rest of your Lordships that the case must go back to the learned registrar for reconsideration.

It would, I feel sure, be of great assistance to him if as definite a direction as to his proper course as is possible be now given. I should myself in this case be prepared to say that here the true measure of the main item of damage is that foreshadowed in *The Greta Holme* and adopted, as developed in subsequent cases, by the learned registrar in the case of *The Chekiang*. That measure has been approved in many cases: it has been frequently adopted in chambers, as is made apparent in the case of *The Chekiang*; and its adoption by the learned registrar in that case is not disapproved of by your Lordships. It seems in no way inappropriate in the present case: it has the merit of simplicity, and it appears to me that in a class of case where, however elaborate the inquiry, the result must always be as applied to the real situation, more or less arbitrary, the application of a measure which has had the sanction of your Lordships' House, which is convenient of application and is not extravagant in result, may well be encouraged in any proper case.

If I am not mistaken, my noble and learned friend, Lord Sumner, is not averse to the application of this principle as applied to quasi-mercantile vessels like the *Prestol*, but

if I am in this under any misapprehension I am well content that the learned registrar should take his direction from my noble friend's opinion.

Appeal dismissed.

Solicitor for the appellants, *Treasury Solicitor*.

Solicitors for the respondents, *Thomas Cooper and Co.*

April 19, 20, and June 11, 1926.

(Before Lords DUNEDIN, SUMNER, PHILLIMORE, CARSON, and BLANESBURGH.)

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ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision—Position of assessors—Questions of seamanship—Advice of nautical assessors in Admiralty Court overruled by nautical assessors in Court of Appeal—Responsibility of court.

In a case in which there has been a difference of opinion between the nautical assessors advising the respective courts, the Court of Appeal is not bound to pay more attention to the opinion of its own assessors than to that of those who advised the court below. The assessors occupy much the same position as do skilled witnesses, and if they differ the court must make its own choice. In every case the responsibility is with the court, which has to make up its mind alike on questions of nautical skill and on the value of the advice given upon them.

Decision of the Court of Appeal reversed on the facts (Lords Carson and Blanesburgh dissenting).

APPEAL by the owners of the steamship *Australia* from a decision of the Court of Appeal (Bankes, Atkin, and Sargant, L.J.J.), assisted by nautical assessors. The action arose out of a collision which occurred after dark on the evening of the 20th Jan. 1923 in the River Scheldt, a little below Antwerp and close over to the north shore between the steamship *Nautilus*, on which the respondents' cargo was laden, and the steamship *Australia*, which was owned by the appellants. Upon the night in question the *Australia* was proceeding up the Scheldt, while the *Nautilus* was coming down with the tide, which was ebbing. At the place in question the Scheldt forms a sharp turn. The *Australia* was going to enter a sluice called the Royers sluice, and had anchored downstream because the dock was full, but about 7.15 p.m. she got notice that the dock was ready to receive her. A tug came down, and about 7.30 p.m. she got under way. She was passed by a ship called the *Auckland Castle*, which had come out of the Royers sluice. In order to get into the sluice quickly she left her proper water, which was on the starboard side

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

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of the channel, and her invasion into the port side was increased by the ebb tide. This happened when she was about half a mile from the Royers sluice.

The *Nautilus* had been approaching the bend when she saw the *Auckland Castle* coming out of the sluice, and she moderated her speed in consequence, but after the *Auckland Castle* had gone away she resumed her full speed round the corner, but before she got to the corner she saw the lights of the *Australia* across the land, and when she got round the corner she saw the green light of the *Australia*. That meant that the *Australia* was on her wrong side. At the same time, the *Australia* sounded three blasts, that is to say, that she was going astern; after a short interval came the collision in which the *Nautilus* was sunk. Lord Merrivale, P. came to the conclusion that there was no doubt as to the fault of the *Australia*, and there was no appeal as to that finding, but he further held, after consulting his assessors, that as a matter of seamanship it was wrong for the *Nautilus* to come round the bend at full speed, and that the *Nautilus* was also to blame.

The Court of Appeal put the same question to their nautical assessors as had been put by the President to his assessors, and received answers exactly to the opposite effect, and allowed the appeal.

The owners of the *Australia* appealed.

Stephens, K.C. and *L. F. C. Darby* for the appellants.

Dunlop, K.C. and *H. C. S. Dumas* for the respondents.

The House took time for consideration.

June 11.—Lord DUNEDIN.—The story of the collision which is the origin of this case can be told in a very few words, though the case itself has given rise to a sharp difference of opinion. The ship of the appellants, the *Australia*, was proceeding up the Scheldt, on the 20th Jan. 1923, to Antwerp. The ship of the respondents, the *Nautilus*, was coming down. It was 8 p.m., and consequently dark. The Scheldt at the place in question forms a sharp turn which may be conveniently likened to the curve of a fish hook when laid on its side and looked at. The *Nautilus* was coming from the shank with the tide, which was ebbing. The *Australia* was coming from the barb, which I assume to be on the left. The *Australia* was going to enter a sluice called the "Royers sluice," which was situated just where the curve of the hook begins, and consequently on the port side of the channel as looked at from the deck of the *Australia*. She had anchored down stream because the dock was full, but about 7.15 she got notice that the dock was ready to receive her. A tug came down, and about 7.30 she got under way. She was passed by a ship called the *Auckland Castle* which had come out of the Royers sluice. In order to get into the sluice quickly she left her proper water, which was on the starboard side of the channel, and her invasion into the port side was increased

by the fact that she sheered and the ebb tide drove her farther in. This happened when she was about half a mile from the Royers sluice. Now the *Nautilus* had been approaching the bend when she saw the *Auckland Castle* coming out of the Royers sluice, and she moderated her speed in consequence, but after the *Auckland Castle* had gone away she resumed her full speed round the corner. Before she got to the corner she saw the lights of the *Australia* across the land. She therefore knew that she would have a ship to pass. She sounded one blast and was answered by one blast. That meant at that time that she was going to pass port to port, but when she got round the corner she saw the green light of the *Australia*. That meant that the *Australia* was on the wrong side, and at the same time the *Australia* sounded three blasts, that is to say, that she was going astern. The *Australia* did so because when she saw the *Nautilus* and knew that she herself was over on the wrong side she thought that she had better stop if possible, and then, after a very short interval, she sounded three blasts again, and then, after a time which has been variously estimated at from one to two minutes, came the collision in which the *Nautilus* was sunk. The President who tried the case came to the conclusion that there was no doubt as to the fault of the *Australia*. She had got into the wrong water for her own purposes, and she was therefore in fault. No appeal was taken by the *Australia* against his judgment so far as it found her in fault; consequently, there could be no question as to that before your Lordships. But then there was the further question: Was the *Nautilus* also in fault and did that fault contribute to the collision? The President consulted his assessors and they answered him that as a matter of seamanship, it was wrong for the *Nautilus* to come round the bend at full speed—seven knots plus the tide, which was reckoned at three, or, in all, ten knots over the ground. The *Nautilus*, they considered, after she had checked her speed to allow the *Auckland Castle* to proceed, ought not subsequently to have increased her speed but really rather to have lowered it, keeping in view that she knew that she had a vessel to pass, and, further, they considered that it was quite wrong to go on at full speed when those on board of her became conscious of the fact that the *Australia* was in front of them and on the wrong side of the river—for it was proved that they never saw the red light of the *Australia* till a moment before the collision—and when they heard the repeated three blasts showing that the *Australia* thought that something ought to be done. Had the *Nautilus* acted properly in either of these matters they were of opinion that the collision would not have happened. Accordingly the President held the *Nautilus* also to blame.

The case went to the Court of Appeal. Their Lordships did not differ from the conclusion of the President as to the facts of the case, except in so far as they thought that the time

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which elapsed between the last three blasts and the collision was more likely to be the short time of one minute than the longer time of two minutes. But they then put just the same question to their nautical assessors as had been put by the President to his nautical assessors, and received answers to exactly the opposite effect. Upon this the Court of Appeal reversed the judgment of the President, saying no doubt that they were themselves inclined to agree with their assessors, but at the same time saying frankly that but for that advice they would not have ventured to disturb the judgment given.

In these circumstances we thought it necessary to put to our nautical assessors the same questions, and they gave the same advice as the President had received; one of them, indeed, was not as strong as the other on the mere question of the speed round the point *per se*, but both were very determined as to the fault, which consisted in not slackening speed when the position became apparent and still more when the three blasts were heard.

This sharp divergence of opinion among the skilled assessors who have assisted the various courts has more than once given cause for comment. Speaking for myself, I come to the same conclusion as that to which the majority of the assessors here have come, and I should have done so unassisted by the opinion of any assessor. But as it stands, the case raises in an acute form the propriety of what has been called an appeal from assessors to assessors. I do not know if anything more useful can be said than what was said by Lord Birkenhead, L.C., in the case of *Owners of Steamship Melanie v. Owners of Steamship San Onofre* (35 Times L. Rep. 507), and I gather that his remarks had the concurrence of the present Lord Chancellor, and were also agreed to in another case by Lord Buckmaster and Lord Phillimore. Yet I do think it necessary to protest against a view which, if I am not doing them an injustice, has seemed to prevail in the Court of Appeal in a recent case, to wit, that the court is bound to pay more attention to the opinion of its own assessors than to that of those who advised the court below. There is no hierarchy of assessors. They occupy much the same position as do skilled witnesses, with this difference that they are not brought forward as the partisans of the one side or the other; and just as, for instance, in a patent case, the court must make its own choice between the views which may have been put forward by one witness or by another, so if assessors differ, the court must make its own choice. In every case the responsibility is with the court. Personally, I think that while assessors may be used to the full for information, it is a pity if it can be helped to put a question to them in such a shape that it is tantamount to asking them whether they would find for the plaintiff or for the defendant. I cannot forget that when assessors were introduced, ships were sailing ships, and the naviga-

tion of a sailing ship is an art which the landman cannot be expected to understand without much explanation. In these modern times it seems to me that it is much oftener a question of common sense in the application of the rules to avoid collision than a question of seamanship in the true sense of the word; so that, speaking for myself, except for the purposes of explanation, I shall always ask an assessor as little as possible. Certainly to find, as we have found not only in this case but in several cases which have lately occupied your Lordships' attention, that the different assessors are at variance is much more of a hindrance than an assistance.

I move that the appeal be allowed and the judgment of the President restored, the appellants to have the costs in the Court of Appeal and in this House.

LORD SUMNER.—There is but little doubt or controversy about the circumstances of this collision. The relative positions of the two vessels, when the *Nautilus* first saw the *Australia* and heard her first three-blast signal, their distances apart, bearings and courses, the manœuvres of the *Australia* and the speed of the *Nautilus*, and finally, the force of the tide and the configuration of the channel were all such as made it easy to state to the assessors the assumptions, on which they were to consider the questions put to them. These were questions of nautical skill and of seamanlike prudence and judgment and on the view, which, under advice given upon them, your Lordships may see fit to adopt, the decision of this appeal depends.

That advice was, I confess, not what I had expected, nor, as it appeared to me at the time, such as I was much disposed to accept. It was, that, under the circumstances, it was unskilful and unseamanlike for the *Nautilus* to keep her speed, and that but for this error the collision would not have occurred.

A mere lawyer might well be forgiven, if he felt unable to set his own opinion against that of assessors on so professional a matter. The fact that the Court of Appeal had been advised to the contrary by equally competent advisers, might well increase his embarrassment, and when it is remembered that the Trinity Masters had advised the President in the sense in which the House is now advised, he might be tempted in his perplexity to renounce the task of judgment.

This, however, is exactly what he must not do. Technical advisers are not the judges even of such issues as these. The appointed court must exercise its function of deciding, and find consolation in a consciousness at any rate of blank impartiality. An opposite road of escape might seem to open—namely, that of accepting, as of course, the advice of the assessors consulted, who are provided for that very purpose by the law itself. In reality there is no escape here. This is what leads to the "intolerable situation," as it is called, of "appeals from assessors to assessors." After

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all, the technical advice given below is advice available for the consideration of the appellate tribunal, as well as that given by its own assessors. The latter are not substituted for those previously consulted; they are additional to them, and, if one adviser or two advisers are to be preferred, it is because in the judgment of the court the advice given is such as, in itself, is the more acceptable.

The phrase "an appeal from assessors to assessors," which has been much used recently—*The Melanie*—collision action; *The Melanie*—salvage action (reported 16 Asp. Mar. Law Cas. 479); *The Artemisia*, pungent as it is, requires some examination. Strictly, it is a figure of speech, for there is no such thing as an appeal either from or to assessors. It is really a criticism of the conduct of one Court or of both courts below. It specially describes the effect of an appeal, when an appellate tribunal adopts a certain attitude towards its assessors, an attitude which is equally open to criticism in a court of first instance. That attitude is the court's surrender to the assessors of the judicial function of itself deciding the issue, however technical it may be. Authority for the proposition that assessors only give advice and that judges need not take it, but must in any case settle the decision and bear the responsibility is both copious and old. It is for them to believe or to disbelieve the witnesses, and to find the facts, which they give to their assessors and their assessors must accept. If they entertain an opinion contrary to the advice given, they are entitled and even bound, though at the risk of seeming presumptuous, to give effect to their own view—*The Alfred* (3 W. Rob. 232); *The Swanland* (2 Spink, 107); *The Magna Charta* (1 Asp. Mar. Law Cas. 193; 25 L. T. Rep. 512); *The Aid* (4 Asp. Mar. Law Cas. 432; 44 L. T. Rep. 843; 6 Prob. Div. 84); *The Beryl* (5 Asp. Mar. Law Cas. 321; 51 L. T. Rep. 554; 9 Prob. Div. 137), per Brett, L.J.; *The Koning Willem II.* (10 Asp. Mar. Law Cas. 591; 98 L. T. Rep. 13; (1908) P. 125), per Kennedy, L.J.; *The Gannet* (8 Asp. Mar. Law Cas. 43; 82 L. T. Rep. 329; (1900) A. C. 234), per Lord Halsbury. Such being the position of the judges, what is that of the assessors? In Admiralty practice they are not only technical advisers; they are sources of evidence as to facts. In questions of nautical science and skill, relating to the management and movement of ships, a court, assisted by nautical assessors, obtains its information from them, not from sworn witnesses called by the parties—*The Sir Robert Peel* (4 Asp. Mar. Law Cas. 321; 43 L. T. Rep. 364); *The Assyrian* (6 Asp. Mar. Law Cas. 525; 63 L. T. Rep. 91)—and can direct them to inform themselves by a view or by experiments and to report thereon—Admiralty Court Act 1861 (24 Vict. c. 10), s. 18.

Now, however much Admiralty judges may from time to time seem to have treated the Elder Brethren as members of the tribunal—*The Andalusian* (2 Prob. Div. 231); *The Marathon* (4 Asp. Mar. Law Cas. 75; 40 L. T. Rep.

163); *The New Pelton* (7 Asp. Mar. Law Cas. 81; 65 L. T. Rep. 494; (1891) P. 258)—however informal these consultations may have been—*The Banshee* (6 Asp. Mar. Law Cas. 130; 56 L. T. Rep. 725)—the principles above stated have never been in doubt. The precise method of making use of the assessors provided for it must rest in the discretion of each court, and, except by statute, as in Scotland—Nautical Assessors Scotland Act 1894 (57 & 58 Vict. c. 40), ss. 3 and 6—written questions and answers cannot be prescribed or required of them, though nothing can be of greater assistance to the appellate tribunal in case of an appeal. What is, however, the function of a Court of Appeal is to impose upon itself and to urge upon the court below the duty of making up its own mind, alike on questions of nautical skill and on the value of the advice given upon them. I have seen such phrases as these in judgments which have come before us. "I do not find myself in matters of seamanship competent to differ from the assessors below or the assessors in this court, but the assessors in this court are provided to advise me on matters of pure seamanship, and I feel it my duty to follow them without expressing an opinion, whether they are right or wrong," or "That being the advice given us by the gentlemen, who are sent by Parliament to advise us, I feel bound to follow it. . . . I think we are bound . . . to follow the advice of our assessors, without expressing any opinion of our own," or "without this skilled assistance, I am not at all sure what conclusion I should come to, if I had to decide these matters for myself"—*The Artemisia* (unreported); *The Llanelly* (unreported). With great respect they seem to me to be quite contrary to authority. If, as may happen, a judge cannot decide in his own mind, whether or not the advice he receives is sound, his position is simply that the point is not proven, and the loss falls on the party, who bears the burden of proof on that issue. It is just as if necessary proof had failed. After all, experience at sea is not everything. Assessors are not chosen for their personal conversance with collisions, and an experienced judge or counsel may boast that he has, in a sense, been in hundreds of collisions while the assessors have hardly seen tens.

Accordingly, I have tried again, and after careful reflection have found my judgment to be eventually in agreement with the advice given to us. The *Nautilus* almost got through as it was. Her damage, though it proved fatal to her, resulted from engaging an anchor fluke sufficiently to tear a gash in her side under water. The parts of the two vessels first in contact and the angle then made between them are strong to show that, on the other hand, a very small retardation of the down-coming *Nautilus* would have opened a clear eye for her before she arrived. I was much impressed as to this with the junior counsel's (for the appellants) presentation of the facts. Accordingly, the error in not reducing speed cannot be laid aside on the ground that

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it did not and could not contribute to the collision.

On the other point we are concerned not with any general rule to be laid down now for other circumstances, but solely with the case in hand. No maximum speed is prescribed for the navigation of the river Scheldt. That is left to good judgment in the circumstances of the moment, and I fully appreciate that good judgment directs one to give safety the benefit of the doubt. The advice given to us is not that it was the duty of the *Nautilus* to make the navigation of the Scheldt foolproof for the *Australia*, but that, knowing the *Australia* to be in difficulties at a short distance round the bend, she should not have assumed that they would have been overcome before she herself got so far down, and that she should have got herself in hand by a reduction of speed, in case those difficulties persisted longer than seemed likely. She would then be able to take effective action of her own to avoid collision, and this at no cost to herself, but that of a very brief delay and the temporary annoyance of slackening speed for a ship which was mismanaging her own business. I have, accordingly, come to recognise that the advice given to us was right, and to think that the *Nautilus* was to blame as well as the *Australia*.

Accordingly, in my opinion, the appeal should be allowed and the judgment of the President should be restored.

I am asked to add that my noble and learned friend Lord Phillimore concurs in the opinion I have just read.

LORD CARSON.—It is essential before dealing with the case of the *Nautilus* to have clearly before one's mind not only the fact that the *Australia* has been held to blame, a conclusion which is not now in controversy, but also the facts and findings upon which that conclusion was based.

The president has found that the *Australia*, according to the rules for the navigation of the Scheldt, was at a place where the navigable channel was only 150 yards wide, out of her proper water, being on her port side, whereas she ought to have been on her starboard side. He has found that this was caused by the decision of her pilot that he could take a course which lay nearer to the north bank than to his starboard hand with a view of approaching the entrance to the docks by the Royers sluice so as to enter the docks by the shortest route. The president further points out, and this appears to me to be a very important matter when we come to consider the action of the *Nautilus*, that the pilot for a considerable time held the view that if necessity arose the *Nautilus* (to whom he ought to have given way under the rules) would give way to him—that she could come under starboard helm and give him a passage on the port side. Now, of course, the *Nautilus* was entirely ignorant of the chances which the pilot of the *Australia* was prepared to take, and in considering the speed at which the *Nautilus* was proceeding,

which is the only imputation of negligence suggested against her, one must not leave out of consideration that the officers of the *Nautilus* were entitled to assume until the contrary was apparent that the *Australia* would conform to the regulations and take no chances which were opposed to the rules of proper seamanship. Those being the circumstances of the *Australia* when the *Nautilus* came round the bend it is, I think, clear that all might have gone well were it not for what has been called the "sheer" of the *Australia*—a sheer which, according to the president, canted her head in the first instance to her port side and subsequently brought her under the influence of the ebb tide and so placed her somewhat further on the port side than she otherwise would have been. Personally, I cannot up to this point impute any blame to the *Nautilus* for not anticipating such handling of the *Australia* as I have already indicated, nor do I see on what grounds it can be suggested that under the circumstances the *Nautilus* was proceeding at an undue speed (seven and a half knots through the water, or, with the tide, ten knots). More especially is that I think a fair conclusion to come to when we know that up to the time of the sheer referred to, the only signals given were, first, one short blast from the *Australia*, and, second, a similar short blast from the *Nautilus*, indicating that the two vessels intended to pass port to port. It is said, however, that when the sheer occurred and the pilot of the *Australia* had given three short blasts indicating that he was reversing his engines, the *Nautilus* could have avoided the accident by reversing her engines and stopping the ship. My Lords, there is, in my opinion, considerable doubt as to what was the period of time which elapsed from the time when the three blasts were given after the sheer and the time when the collision occurred, and one has only to read the analysis of the evidence upon this point made by the president to see how speculative any conclusion must be when we are dealing with questions of one minute or two and find such discrepancies as exist in the engine-room book and the bridge book. Moreover, we have no clear evidence as to the speed of the *Australia*, and I am not prepared to come to any definite view as being satisfactory to lead to a conclusion that anything the *Nautilus* could have done would have avoided the collision. Nor do I think that the *Australia* being herself to blame has discharged the onus cast upon her of showing that the *Nautilus* had by negligence on her part contributed to the loss or damage. In further support of this conclusion I may add that I was much struck by the references to the evidence very fully presented by Mr. Dumas to show that the pilot of the *Australia* and I think also the officers of the *Nautilus* both were of opinion up to the last that there really was no risk of any collision. Under the circumstances it appears to me that the appeal fails and that the order of the Court of Appeal should be affirmed.

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I have not hitherto said anything about the advice given in the various courts by the nautical assessors in reply to the questions put to them. I do not myself think that there was any question of seamanship involved upon which their opinion could relieve the courts from the responsibility of drawing their own conclusions. The whole question of negligence depends upon the view which is to be taken and the inferences to be drawn from the facts as they existed at the moment when a decision for action became necessary, and in my view one ought to be very careful first to come to a conclusion upon the existing facts and from them if necessary evolve with minute accuracy the expert question on which the advice of the nautical assessors is to be obtained.

I should like to add that upon the question of the position of the nautical advisers and the ultimate responsibility of the court for the conclusions arrived at, I am in entire agreement with the views so clearly expressed by my noble and learned friend Lord Sumner.

Lord BLANESBURGH.—Upon the respective rôles of nautical assessor and judge in cases like the present I am in entire agreement with my noble and learned friend Lord Sumner, whose considered judgment I have had the privilege and advantage of reading.

The advice of your Lordships' nautical assessors to which my noble and learned friend has referred was to me also something of a surprise, and if, notwithstanding that advice, I remain, I hope without presumption, upon the merits of this dispute of the opinion in favour of the *Nautilus*, which I had formed during the argument, it is because I find in the conduct and signals of the *Australia* on the occasion in question circumstances which preclude her, as I think, from pressing against the *Nautilus* the one error which, treating the matter purely as one of seamanship, your Lordships' advisers think she made; and also because on a critical question of fact I have reached a conclusion which, no specific advice tendered by the assessors being thereby disregarded, seems to me decisive in the *Nautilus's* favour.

In the view I take of the facts any other decision than one against the *Australia* alone could not, I feel, be justified, and it is accordingly with real satisfaction that I believe myself free so to decide without departing in any way from principle or encroaching unduly upon the province of the expert.

The whole conduct of the *Australia* in relation to this collision stands, in my judgment, condemned by every consideration, whether of duty, prudence, or propriety. It was not at the Bar sought to justify or excuse her, but the responsibility, if any, of the *Nautilus* in the matter cannot, I think, be duly appraised unless the behaviour of the *Australia*, both in the abstract and in direct relation to the *Nautilus*, is throughout borne in mind.

There is no justification to be offered for the *Australia* being where she was at the time

of the collision. She was an upcoming vessel, in a narrow navigable channel, against a strong tide and near a bight. She was under both a regulated and obvious duty to keep to her own southern side of the channel and to leave the northern half of it free for the passage of any observed vessel coming down with the current. And yet at a time of substantial downgoing traffic, and as the learned president finds, deliberately and for her own convenience only, she chose to be in the northern half of the channel where eventually the collision with the *Nautilus* took place. It may be that to a negligible extent—although even of that I am sceptical—the *Australia* was there as the consequence of the so-called involuntary sheering which her witnesses exploited to the full. But the learned president has said she was in no sense the victim of inevitable accident. In truth and substance she was where she was of her own choice, directing her course to the red light on the north side of the river at the entrance to the dock which it was her purpose to enter. She was pursuing that course regardless of everything and everybody but herself.

Even so, however, the *Nautilus* is not to be relieved of all responsibility for the collision which supervened if the *Australia* can establish affirmatively that notwithstanding her own negligence the conduct of the *Nautilus* was such as to entitle her on well recognised principles to say that responsibility for the collision must be shared by both vessels. The question whether or not the *Australia* has succeeded in making such a case is, of course, the real issue of this appeal.

In its determination, the behaviour of the *Australia* in direct relation to the *Nautilus* will become of prime importance, and the view taken at the time by those in control of the *Australia* upon the question how far her position in the river affected the passage down stream of the *Nautilus*, throws a light upon much of her conduct and upon all her signals, and may finally determine her liability. What this view was, is not in doubt. It was the convinced, if mistaken, belief of those in control of the *Australia* up to the moment of her sounding her second three short blasts, by which time everything was over, that her position in the river left for the *Nautilus*, as the *Australia's* then position had left for the vessel which preceded the *Nautilus*, a free passage down stream port to port; and the successive helm signals of the *Australia* to the *Nautilus* were intended to be an intimation to her as the oncoming vessel that she might so pass.

That such was the meaning and intent of the one short blast signal is beyond controversy, for, like the learned president, I reject entirely the fantastic suggestion of the *Australia's* pilot, that, notwithstanding that signal, it was, in the circumstances, the duty of the *Nautilus* to pass the *Australia* starboard to starboard and that he believed she would. Only a little less clear is it that there was no intention to qualify the intimation of

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the one short blast signal by the first of the *Australia's* three short blast signals. Followed as that latter signal was by the circumstance, important also in another connection, that the *Australia's* engines were put only half speed and not full speed astern, the signal, I am satisfied in the minds of those who gave it, amounted to no more than an intimation that the passage—not then as they thought too narrow—was being further widened, and that the *Nautilus* might still act on the first signal. It is, indeed, noteworthy, reflecting as it does the state of mind up to the last moment of those in command of the *Australia*, that at no time did she give the four short blast signal—that which by art. 16 of the Scheldt Regulations is authorised and appropriate when intimation is intended to be given that a vessel is not in a condition to manœuvre, and that any vessel approaching will do so at her peril.

Now at this point three facts in relation to the *Nautilus* must be stated. The first relates to her speed. Upon this your Lordships are advised that her speed in itself—that is to say, her speed apart from any duty imposed upon her by the first of the *Australia's* three blast signals—was not excessive for a vessel of her size navigating this part of the Scheldt and coming down the river with the tide. The second fact relates to her navigation. Admittedly that was, in relation to the *Australia* and in every respect other than the disputed exception of speed, free from fault. In particular, the *Nautilus* kept as close as it was safe for her to be to the north bank of the river. The third fact is that the space left for the *Nautilus* by the *Australia* almost sufficed to enable her to pass in safety, port to port. And it seems certain that the space left would have been sufficient, if not ample, for that purpose had the *Australia* for the half minute following her first signal of three short blasts put and kept her engines at full speed astern as she should have done instead of at half speed as she did.

Here then is the position. Concede it you must, that, on the three short blast signal from the *Australia*, if it had not been preceded as it was by a signal of one short blast, it would have been the duty of the *Nautilus* coming at ten knots, to slacken speed and even to stop, as your Lordships are advised. Even so, is it permissible in law for the *Australia* to rely upon the omission of the *Nautilus* so to do, when what as between these two vessels happened was that the *Australia*, the giving way vessel, was inviting the *Nautilus* to come on, and that the *Nautilus*, coming on, and at no excessive rate of speed, was only acting as she believed she might act, and as the *Australia* intended that she should, believed that she would. It seems to me, on almost elementary principles, that it is not open to the *Australia* in such circumstances as these, to make with respect to the *Nautilus* the complaint as to the speed of her approach, not normally excessive, which in

other circumstances would, I am assuming, be competent to her. On that ground, by itself, I am prepared to hold that the *Australia* alone is to blame for this collision. But there is another ground, on which the same conclusion may be based. This, I will state very shortly. The records of the *Australia*, which appear to me to be the most reliable data extant upon the subject, show that between the first of her three short blast signals and the collision there was an interval of not more than a minute. I do not think that the *Australia* in the circumstances is entitled to ask a court to hold that the interval was greater. On that basis of fact the *Australia* has entirely failed to establish, and the burden is on her that any engine action by the *Nautilus* would have affected the result and I notice that the Court of Appeal was advised that it would not. For this reason also I am prepared to hold that the *Australia* has failed to relieve herself at the expense of the *Nautilus* of her full responsibility for this collision.

It follows that in my judgment the Court of Appeal was right and that this appeal should be dismissed.

Appeal allowed.

Solicitors for the appellants, *Waltons and Co.*

Solicitors for the respondents, *Parker, Garrett, and Co.*

May 13, 14, and June 21, 1926.

(Before Lords SUMNER, PARMOOR, PHILLIMORE, CARSON, and BLANESBURGH.)

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ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Bill of lading—Non-delivery of goods shipped—Original destination changed by mutual consent.—Deviation—Overcarriage—New contract not adhered to—Loss of goods—Exception clause inapplicable—Shipowners liable for loss as common carriers.

The plaintiffs in March 1919, shipped eight cases of cloth, the value of which was about 360l. each, to Odessa in the defendant company's steamship V., and brought an action to recover damages for their non-delivery and loss. The defendants pleaded that they were protected by an exceptions clause in the bill of lading under which they were not to be liable in respect of goods of any description of a value exceeding 20l. per package unless the value was declared at the time of shipment, and extra freight—to be agreed—was paid. It was admitted that the value of the goods was not declared nor was any extra freight paid. Upon the arrival of the steamship at Constantinople it was discovered that the Soviet Army was

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

approaching Odessa, and it was agreed between the representatives of the parties that delivery of the goods at Odessa being impracticable, three cases should be discharged at Constantinople, and the remainder at Batoum. The contract of carriage as so altered was not adhered to; the goods were not discharged either at Constantinople or Batoum, or delivered to the plaintiffs or their agent at any other port in the Black Sea, but were put ashore at Novorossisk or some other port and pillaged or lost.

Held, that the delay in and the ultimate abandonment of the three cases at Novorossisk and the overcarriage of the five cases beyond Batoum were sufficient to constitute a deviation from the contract of carriage, such that the conditions and exceptions contained in the bill of lading limiting the liability of the appellants had no application.

Decision of the Court of Appeal (16 Asp. Mar. Law Cas. 514; 133 L. T. Rep. 309) affirmed.

APPEAL by the defendants from the decision of the Court of Appeal (Sir Ernest Pollock, M.R., Atkin and Sargant, L.J.J.) (reported *sub nom. Buerger v. Cunard Steamship Company Limited*, 16 Asp. Mar. Law Cas. 514; 133 L. T. Rep. 309).

The facts, which are sufficiently summarised in the headnote, appear fully from their Lordships' judgments.

The Court of Appeal held, reversing the decision of Rowlatt J., that on the facts there was not mere misdelivery, but deviation from the voyage contracted for, and therefore the exceptions clause had no application, and the shipowners were liable for the loss of the goods upon the basis of common carriers. The exceptions clause was only available to the shipowners when they were doing what they had contracted to do.

The shipowners appealed.

Jowitt, K.C. and James Dickinson for the appellants.

Sir John Simon, K.C. and Van den Berg for the respondents.

The House took time for consideration.

LORD SUMNER. — This was an action by owners of cargo, now respondents, against voyage-charterers of the steamship *Verentia*, now appellants, for non-delivery of eight cases of textile goods. Except for a small sum not now in dispute or material, Rowlatt, J. decided in the appellants' favour, but in the Court of Appeal the cargo-owners were held to be entitled to judgment for a large sum as the agreed value of the goods. The story of this adventure is curious.

The *Verentia* was, it is said, the first ship to pass the Dardanelles after the Armistice with a large general cargo for Constantinople and Black Sea ports. The plaintiffs, enterprising and hopeful export merchants, had shipped by her for Odessa eight bulky cases, worth nearly 3000*l.* under one bill of lading, and they sent out a

Mr. Macdonald to meet the ship and represent their interests with regard to this and other cargo. On reaching Constantinople at the end of April 1919 he found that the *Verentia* had arrived there; that the French troops had evacuated or were just evacuating Odessa; and that accordingly the voyage to this port was to be abandoned. He was told by the appellants' agents that the ship would proceed to Batoum and Novorossisk, and, partly on their advice, he decided that Batoum would be the best port to which to send five of the cases; the other three he sold to a Stambuli firm. A question has been raised as to the contract terms for the altered voyage—namely, whether the bill of lading voyage was put an end to by consent and such goods as went forward were carried under a fresh contract on the terms of a common carrier's liability and without the protection of bill of lading exceptions, or whether the arrangement made was simply to substitute other destinations for Odessa in the bill of lading, that document remaining otherwise in force. Both courts below have found that the latter was the true arrangement, and with this I agree. Except by extreme inadvertence, I cannot imagine an arranged voyage of this kind being made without such terms, and it would require much stronger evidence than any that we have here to make such a case even plausible.

When Mr. Macdonald asked for immediate delivery at Constantinople of the three cases sold to the Stambuli firm, he was told that they were stowed underneath a great quantity of other cargo, and that, if they could not be got at (as, in fact, they were not) before the *Verentia* sailed, they must go the round of the ship's Black Sea ports of call and would then be delivered at Constantinople on her return. For the other five, Batoum was agreed to be the destination.

Your Lordships have re-examined with much care the evidence, which was elaborately examined in the Court of Appeal, and I need not now review it in detail. At the trial, as is very usual, the whole of the correspondence which was forthcoming was by consent, along with sundry other documents, read as evidence of the truth of the statements contained in it without any objections as to admissibility, hearsay, and otherwise, and I think we are free to draw reasonable inferences from the facts thus appearing. The result is this. The *Verentia* reached Batoum without having parted with any of the cases. The five consigned to Batoum remained on board, when the ship left that port, and have never been heard of since. She did not bring them back to Constantinople, and nothing is known of their fate. The three cases which were to have been brought back to Constantinople were landed at Novorossisk, her last port of call, no one knows why, but it was done contrary to express instructions and without any evidence of necessity or even any attempt at an explanation. Two months afterwards they were still in the hands of the appellants' agents there, who wrote on the 31st

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Aug. 1919 that they would be forwarded to Constantinople by the next ship. Nothing more has been heard of them. Though much has been made of the indignant letters of Mr. Macdonald, according to which Batoum (and Constantinople, too) must have been a den of thieves, and much also of the gradual advance of the Soviet forces, which eventually reached Novorossisk, it is noticeable that no proof of actual capture, seizure, theft or pillage of these cases has been offered, and the appellants' agents, felt themselves so unable to affirm any of these things as facts that they refused, and properly so, to certify to that effect in order to assist a claim upon underwriters.

The present action was not begun till April 1924. To the plaintiffs' claim for non-delivery the defence was raised that, by the bill of lading, the defendants were not to be accountable for any goods, which were above the value of 20l. per package, unless the value was expressed in the bill of lading and extra freight paid, a precaution which, rather short-sightedly, the plaintiffs had not taken. This was met by a plea of deviation in reply, and on the request of the defendants' solicitors a letter was written by the solicitors acting for the plaintiffs which stated as particulars of this plea that the deviation consisted of the carriage of three bales of cloth past their destination, Constantinople, and five bales of cloth past their destination, Batoum.

An objection has been raised on these particulars which I must explain, so that it can then be briefly disposed of. It is a mistake to say, as was said in argument, that the Court of Appeal found that mere misdelivery had occurred, and then treated misdelivery as equivalent to a deviation. Lord Hanworth, M.R. and Sargant, L.J. came to the conclusion that the three cases were not landed at Novorossisk for any temporary purpose, but as goods reaching their destination, and that no resumption of the transit was intended. Atkin, L.J. dwelt on the fact that they were left there for at least eight weeks, as being such a delay in the course of their agreed transit as would support the plaintiffs' reply. Put into technical language the first view is that there was an abandonment of the voyage, on which these three cases were adventured, and the second is that there was such unreasonable delay in forwarding them as constituted a deviation, to say nothing of abandonment of its further continuance. The appellants' counsel drew attention to the fact that the particulars above mentioned referred neither to delay amounting to deviation nor to total abandonment of the transit, and objected to the admission of such contentions on the ground that if they had been raised on the pleadings, evidence in rebuttal might have been obtained.

I think that this objection ought not to prevail. I am satisfied that no further evidence could have been got. The singular feature about this case is that, either because they did not choose to seek it, or because they found that they could not get it, the appellants'

Constantinople agents throughout produced no evidence of the fate of these goods. They met complaints by evasion, and when they made inquiries of the other agents received only evasive replies. The course of post continued between Constantinople and Novorossisk, though probably it was subject to delays. Emissaries were sent to Novorossisk and Batoum to try to trace these and other goods, but nothing came of it. The whole eight packages were only a matter of six tons weight. It is useless to say that no means of forwarding such a parcel were available. We know that there was a mail and passenger service, and the Novorossisk agents evidently treated it as a fairly frequent one. I decline to believe that any credible evidence could have been found to account for the delay on the ground that all means of conveyance failed, or to modify the inference that any further transit to Constantinople had long been given up.

In the next place it is clear that these particulars were, even at the trial itself, tacitly treated as insufficient, and were largely laid on one side. Rowlatt, J. had before him, apparently without objection, the evidence that the three cases went on to Batoum and Novorossisk with Mr. Macdonald's consent and on the terms that they should come back to Constantinople and be discharged there on the ship's return, yet on the face of the particulars this was new matter and was outside the pleaded deviation, consisting in any carriage of the three cases past their destination, Constantinople, at all.

Thirdly, this is at most only a matter of amendment, and I think that, in their discretion, the Court of Appeal virtually allowed any necessary amendment. After all, deviation by delay and abandonment of the voyage, so far from being new matters, arise obviously on the dates and on the face of the letters written by the appellants' agents. Some objection was taken by their counsel in the Court of Appeal, in what precise terms we do not know, but in spite of this all the members of the court dealt with these matters as if they were properly open to the plaintiffs. I think that we cannot now exclude them.

In the absence of special provisions in the bill of lading the overcarriage of the five cases beyond Batoum and the landing of the three at Novorossisk, without reloading them on the *Verentia* at once or otherwise promptly forwarding them to their destination would be a complete answer to the defence that for want of a declaration of the value of the cases the appellants were not accountable. Each would constitute a fundamental departure from the course of the agreed transit, after which such a clause of exception would cease to apply. Of course, however, this bill of lading contains special provisions on the point, and the question is whether they suffice for the appellants' protection under the circumstances.

The first and principal clause is No. 2, where a formula is elaborated, strongly reminiscent of *Glynn v. Margelson* (7 Asp. Mar. Law Cas.

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366; 69 L. T. Rep. 1; (1893) A. C. 35) and other familiar cases on liberties to deviate. The words are:

The company reserves liberty for the steamer . . . before or after proceeding towards her port of discharge, to proceed to and stay at any port or ports wheresoever, although in a contrary direction, once or oftener, in any order backwards or forwards, for loading or discharging cargo or passengers or any purpose whatsoever, and all such ports, places and sailings shall be deemed included in the said intended voyage, although in doing so the vessel may be altogether departing from the customary or advertised route from the port of shipment to the port of discharge or may be making in substance another and different voyage or voyages.

For any particular parcel of goods "her port of discharge" means the port at which the ship is to discharge those goods, though she may have a comprehensive itinerary to perform afterwards. The acts complained of with regard to the five cases—namely, the overcarrying beyond Batoum—were not done "before or after proceeding towards her port of discharge," but after leaving it. As to the three cases which she landed before proceeding towards her port of discharge for them—that is, Constantinople—the best words to be found in clause 2 are these: "Reserves liberty to land and store, for such time as may be deemed expedient, and thence to reship." Now the landing of these three cases (we do not know if there was any storing or not) was a landing once and for all, not followed by any reshipment and not explained by any evidence to show why there was no reshipment, but effected, as a matter of fair inference, without any real intention of reshipping them at all. Clause 2 accordingly affords no answer to the allegation of deviation.

There are some further casual references to deviation in clause 5, which clearly do not apply. The chief reliance is, however, placed on the following passage in clause 4:

In case the whole or any part of the goods specified herein are not from any causes, including negligence on the part of the company's servants, found for delivery, or it is inconvenient for the ship's purposes to deliver during the vessel's stay at their port of destination, the company is only bound to forward them to such port of destination from any subsequent port by any other steamer or steamers either belonging to the company or to other persons, and proceeding either directly or indirectly to such port, such carriage to be at the company's expense but the merchant's risk in every respect, and the company shall be under no further responsibility.

I think that upon two grounds this clause is of no avail. Firstly, it applies only in specified circumstances, which are not proved to have occurred, and it does not expressly reserve to the company the right to act under these words without the consequent overcarriage of goods being deemed to be a deviation. In a clause framed so arbitrarily in the company's favour, this further and equally arbitrary term cannot be implied.

In the second place the burden is, in any case, on the appellants to prove that the events occurred which would bring this protective clause into operation however we construe it. Neither Rowlatt, J. nor the Court of Appeal found this issue in the appellants' favour. It would require clear evidence indeed before your Lordships would consent to do so now for the first time. The evidence is this and no more. A letter is produced from the appellants' agents at Batoum, dated two days before the ship sailed, which informs the captain that five parcels of goods, loaded from Constantinople for Batoum, are missing, and among these occurs "P. K. & Co., five cases of cloth." The mark on the cases in question was really "P. & Co.," but as the manifest contains no entry of goods marked "P. K. & Co." it is suggested that "P. K. & Co." is an inexact reference to the goods marked "P. & Co." The letter concludes by asking the captain to "take the necessary measures to find same, if possible." There the whole proof stops. There is no evidence at all that it was inconvenient for the ship's purposes to make delivery, nor is there any that the goods were not found for delivery, nor do these two expressions between them necessarily exhaust all the possibilities of such a situation. The goods may have been found and forgotten again. Accordingly it is not self-evident that the words of the clause must have been satisfied, and it is not proved that events happened to which this clause would apply. So much for the facts. Further, on construction, the clause itself is framed so as to define the limits of the obligation, falling on the company in the named event, with regard to sending the goods back to their port of destination from a subsequent port. As to the company's liability the terms are that the carriage back is to be at the company's expense but the merchant's risk. Thus the limited liability provided is in respect only of transit from the subsequent port to the port of original destination. During the overcarriage between that original port and the subsequent port nothing is stipulated, and the liability of the company must, therefore, be such as the general law imposes—that is, that during this deviation by overcarriage the protection of the 20^l. clause does not apply. To eke out the company's reservations of liberties by implying the reservation of a right to extend the contractual voyage beyond the original port of destination to the subsequent port, so as to prevent a deviation, is too much to be allowed *contra proferentes*, nor is an ambiguous clause, for such it is at best as regards this overcarriage, any protection to them. The bill of lading accordingly leaves the appellants without answer both as to the delay in and the ultimate abandonment of the transit of the three cases, as well as to the overcarriage of the five. I move your Lordships to dismiss the appeal with costs. I am requested to state that my noble and learned friend Lord Carson agrees with the motion I have proposed and in the reasons which I have just given.

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LORD PARMOOR.—The appellants are ship-owners and at all material times the steamship *Verentia* was running under charter in their line. The respondents consigned eight cases of cloth in the *Verentia* which, at that time, was intended to sail to Odessa, under the terms of a bill of lading dated the 24th March 1919. During April it became evident that the steamship *Verentia* could not safely proceed to Odessa. In consequence an arrangement was made at Constantinople under which Batoum was substituted as the port of destination for five of the cases of cloth and Constantinople was substituted as the port of destination for three of the cases of cloth either on the outward or return voyage. In all other respects the bill of lading was not altered, and, so far as it was applicable, covered the carriage both of the five cases and of the three cases of cloth.

The bill of lading contained a clause under which the appellants became not accountable for any goods of whatever description which are above the value of 20*l.* per package, unless the value be expressed in the bill of lading and extra freight agreed on and paid. The cases of cloth did exceed 20*l.* in value, but the value thereof was not expressed in the bill of lading and no extra freight was agreed on or paid. If this clause covers the goods conveyed by the appellants at the time and under the conditions when the loss occurred, then the appellants would succeed in this appeal. It has, however, been held by the Court of Appeal that the appellants are not protected by the said clause and that the eight cases of cloth were lost under conditions such that the terms of the bill of lading did not apply, and that in substance the appellants were liable to the ordinary liabilities of a common carrier. If the appellants are liable, outside the terms of the bill of lading, the amount of damages has been agreed between the parties.

It will be convenient to consider, in the first place, the relevant facts in reference to the five cases of cloth of which the port of destination was Batoum. It is difficult to form an exact conclusion, but there is sufficient evidence to support the case of the respondents, in the absence of any explanation on behalf of the appellants. At one time the respondents asked for a certificate from the appellants that the cases of cloth had been stolen in order to recover against the underwriters, but such certificate was not given, and on the 23rd May 1921, the appellants write, "At present we have been unable to obtain any definite evidence that these goods were stolen. Such evidence as we have is to the contrary effect, as we are informed that three of the cases were actually discharged at Novorossisk."

There is evidence that the five cases of cloth were not discharged at Constantinople on the outward journey. Only two days before the ship left Constantinople on her outward voyage, on the 17th May, the agent of the respondents wrote to the agent of the appellants: "It is also understood that three

cases of cloth will be discharged here and the remaining five cases in Batoum." The accuracy of this quotation was not questioned. The ship on leaving Constantinople sailed to Constanza, stayed at Constanza from the 18th to 20th May, and reached Batoum on the 23rd May, staying there until the 13th June. There is no suggestion that the five cases of cloth were discharged at Constanza. On the 30th June the agent of the respondents wrote to the agent of the appellants at Batoum, "We have your letter of to-day's date stating that this parcel (the five cases of cloth) has not been discharged." The accuracy of this quotation was not challenged by the appellants, and, on the evidence generally, I come to the same conclusion as Atkin, L.J., that the five cases of cloth were in fact carried beyond Batoum and that this is sufficient to establish the liability of the appellants.

It is a well-established principle, that stipulations in a contract of carriage, limiting or negating the liability of carriers, by land or water, for loss or damage to goods entrusted to them for carriage, do not apply when such loss or damage has occurred outside the route or voyage contemplated by the parties when they entered into the contract of carriage, unless the intention that such limitations should apply is expressed in clear and unambiguous language. The counsel for the appellants argued that the limitations of liability contained in the bill of lading did apply to the carriage of the five cases of cloth beyond Batoum, and that such carriage was within the route and voyage contemplated when the bill of lading was signed. They relied upon clauses 2, 4, and 5 of the bill of lading in support of their case. No doubt clause 2 of the bill of lading gives a wide power of deviation between the port of shipment and the port of destination, but there is no suggestion that the steamship *Verentia* after leaving Batoum would return again to that port as the port of destination for the discharge of the five cases of cloth. In other words, when the steamship *Verentia* left Batoum, it was not a deviation in the course of the agreed voyage between the port of shipment and the port of destination, but the start of a new voyage after the agreed voyage had been finally determined. As to clause 4 of the bill of lading, there is no evidence on behalf of the appellants that the whole or any number of the five cases of cloth were not from any cause, including negligence on the part of the servants of the appellants, found for delivery at Batoum or that it was inconvenient for the ship's purposes to deliver during the *Verentia's* stay at their port of destination. Clause 5 might have been applied to the port of Odessa, but is not applicable to the port of Batoum, where the steamship *Verentia* stayed from the 22nd May to the 13th June. In the result I agree with Atkin, L.J. that the five cases of cloth were carried beyond Batoum, and that this constituted a deviation from the route contemplated in the contract of carriage, such that

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the limitation of liability to an amount of 20*l.* per package unless the value be expressed in the bill of lading and extra freight agreed on and paid has no application.

The three cases of cloth were carried on the agreed voyage down to the time of their arrival at Novorossisk. At Novorossisk they were not temporarily put on shore, but were detained by the agents of the appellants as goods reaching their destination. This is sufficient to constitute a deviation from the contract of carriage, such that the conditions and exceptions contained in the bill of lading limiting the liability of the appellants have no application.

In my opinion the appeal should be dismissed with costs.

LORD PHILLIMORE (read by Lord Blanesburgh): Upon the whole I think that your Lordships should agree with the conclusion of the Court of Appeal that the five cases of draperies were not landed at Batoum but were carried forward.

If this be so, the contract of carriage had, as far as they were concerned, terminated, and the special conditions of the bill of lading no longer remained to protect the Cunard Company unless the company can avail itself of the provision in the bill of lading to the following effect:

In case the whole or any part of the goods specified herein are not from any cause including negligence on the part of the company's servants, found for delivery, or it is inconvenient for the ship's purposes to deliver during the vessel's stay at their port of destination; the company is only bound to forward them to such port of destination from any subsequent port by any other steamer or steamers, ship or ships either belonging to the company, or to other persons, and proceeding either directly or indirectly to such port, such carriage to be at the company's expense but the merchant's risk in every respect, and the company shall be under no further responsibility.

I should not be disinclined to hold that these goods were not "found for delivery" within the meaning of this clause; but this does not much help the company because there is a failure of all proof as to what happened to them afterwards. They were probably landed at Poti or at Novorossisk, but whether for the purposes of being forwarded in compliance with the terms of the bill of lading or otherwise we do not know. At any rate by the time the writ in this action was issued (three and a half years later) they had not been forwarded; and this unreasonable delay amounts to a deviation and puts the parties outside the contract contained in the bill of lading and leaves the Cunard Company unprotected.

As to the three cases, we know that instead of being brought on to Constantinople they were landed at Novorossisk, and that when last heard of they were in the custody of agents of the Cunard Company, holding them apparently for the Cunard Company. This being so, the same long delay in forwarding (for which it is possible there was some excuse, but for which

no excuse is proved in evidence) amounts to a deviation.

Therefore it seems to me that the judgment of the Court of Appeal was right.

LORD BLANESBURGH.—I have had the advantage of reading the judgment which my noble and learned friend on the Woolsack has just delivered. I entirely concur in it.

Appeal dismissed.

Solicitors for the appellants, *William A. Crump and Son.*

Solicitors for the respondents, *Cosmo Cran and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

July 7 and 8, 1926.

(Before BANKES, ATKIN, and SARGANT, L.JJ.)

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ON APPEAL FROM THE ADMIRALTY DIVISION.

Submerged cable picked up by ship's anchor in entering dock—Damage to electrical works—Action by owner of docks—No negligence—Liability by owners of vessel—" . . . answerable . . . for any damage done by such vessel . . . to the harbour, dock, or pier, or the quays or works connected therewith"—Harbours, Docks, and Piers Clauses Act 1847 (10 Vict. c. 27), s. 74.

The appellants were the owners of the docks at Swansea under special Acts incorporating (inter alia) sect. 74 of the Harbours, Docks, and Piers Clauses Act 1847, by which it is provided as follows: "The owner of every vessel . . . shall be answerable to the undertakers for any damage done by such vessel . . . or by any person employed about the same, to the harbour dock or pier or the quays or works connected therewith, and the master or person having the charge of such vessel . . . through whose wilful act or negligence any such damage is done, shall also be liable to make good the same. . . ."

The respondents' steam vessel M., in entering the appellants' docks, dragged her anchor, and in consequence the anchor became engaged with an electrical cable laid at the bottom of the dock entrance, doing damage to the electrical works on shore with which the cable was connected. There was no negligence on the part of those in charge of the vessel, nor on the part of any other person.

Held, by the court (affirming Lord Merrivale, P.) that the appellants were not entitled to recover damages under sect. 74 of the Harbours, Docks, and Piers Clauses Act 1847, upon the authority

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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of the River Wear Commissioners v. Adamson (3 Asp. Mar. Law Cas. 521; 1877, 37 L. T. Rep. 543; 2 App. Cas. 743). By Banks, L.J., upon the ground that the River Wear Commissioners v. Adamson was a decision that the statute did not apply to this case having regard to the fact that the court was unable to find any negligence on the part of those in charge of the vessel. By Atkin, L.J., upon the ground that the ratio decidendi of the River Wear Commissioners v. Adamson is to be found in the opinions of Lord Cairns and Lord Blackburn to the effect that the damage contemplated by sect. 74 is injuria cum damno. By Sargant, L.J., upon the ground that the court was bound by the authority of River Wear Commissioners v. Adamson, and further that if the Lord Justice had had to express his own view apart from authority, it would have been a view entirely in accordance with the reasoning of Lord Cairns in that case.

DAMAGE ACTION.

The appellants, the Great Western Railway Company, the owners of the King's Dock at Swansea, sued the respondents, the owners of the steamship *Mostyn*, to recover damages for injuries to certain electrical cables laid in the King's Dock entry, caused by the *Mostyn*. The following statement of the facts is taken from the judgment of Lord Merrivale, P.

"The plaintiffs are the owners of the docks at Swansea. In a masonry chaseway at the bottom of the communication passage which leads from the King's Dock Lock there to the adjoining Prince of Wales' Dock, electric cables are laid for lighting purposes and the supply of power. Damage done to one of these cables through fouling by the anchor of the steamship *Mostyn*, owned by the defendants, is sought to be recovered by the plaintiffs in this action. The plaintiffs founded their action in the first instance upon allegations of negligence, but by an amendment made after the pleadings upon the case so framed had been closed they allege that 'the damage complained of was damage done by the *Mostyn* to a harbour dock or pier or works connected therewith, and the defendants are answerable therefor to the plaintiffs as undertakers of the said harbour dock, pier, or works by reason of sect. 74 of the Harbours, Docks, and Piers Clauses Act 1847, as amended by sect. 15 of the Pilotage Act 1913.' The case of negligence on which the plaintiffs originally proceeded raised some interesting questions of fact and gave rise to a learned and able discussion as to the proximate and remote causes of damage. The amended claim involves the decision of a question upon provisions of the statute of 1847, which were found in the Court of Appeal and in the House of Lords about fifty years ago to be difficult of construction, and as to which in the meantime nothing has been determined.

"The case of alleged negligence arose under curious circumstances. The casualty occurred at night, and was the sequel of an accident

which caused the *Mostyn* to be suddenly held up at the entrance of the passage in question. Entry to the passage is controlled by the plaintiffs' officers. Another steamship, the *River Dee*, was ordered on, and while she was making her transit the *Mostyn* was ordered to proceed. Through some breakdown which was not explained, the *River Dee* stopped and blocked the way, at a time when the *Mostyn* was 300ft. or less from the entrance. To bring up the *Mostyn* it was necessary to put her engines astern and drop her port anchor. When the way ahead was again clear engine action with helm action was required to square the vessel's head for the passage. As soon as she had been brought to the correct heading engine action ahead was ordered, quite properly, and an order was also given, properly and at the right time, to heave up her anchor. The advance of the *Mostyn* to the passage way and the bringing of her anchors awash would in ordinary course have taken place concurrently. On the floor of the dock outside the passage way there lay, however, a cable, the property of the Postmaster-General, said to have been laid by his authority, the exact situation of which at the time in question is not definitely ascertained. As to its presence no notice was given and there were no indications apparent to those using the docks. The anchor of the *Mostyn* fouled, or was fouled by, this last-mentioned cable, and by reason of such fouling was held down as the *Mostyn* advanced into the passage, with the effect that by the combined operation of the vessel's winch and of the fouled cable the anchor's fluke dragged upon the cables lying in the chaseway under water on the floor of the passage and carried away the cable in question from its attachments in the plaintiffs' distributing chamber on shore."

The learned President then proceeded to consider the allegations of negligence, and came to the conclusion that the damage caused to the plaintiffs' cable was not negligently caused but was, so far as the defendants were concerned, accidental and in the circumstances unavoidable.

By sect. 74 of the Harbours, Docks, and Piers Clauses Act 1847, which was incorporated by the plaintiffs' special Act, it is provided that "the owner of any vessel . . . shall be answerable to the undertakers for any damage done by such vessel or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith, and the master or person having the charge of such vessel . . . through whose wilful act or negligence, any such damage is done shall also be liable to make good the same."

Raeburn, K.C. and Wilfrid Lewis for the plaintiffs.

Langton, K.C. and Carpmal for the defendants.

Jan. 29.—Lord MERRIVALE, P.—It is necessary, therefore, to deal with the claim raised

by the amended statement of claim, par. 6, founded upon the Harbours, Docks, and Piers Clauses Act 1847, s. 74.

While the language of sect. 74 was under discussion before me certain of the terms there employed presented themselves for particular consideration; and more especially the phrase "damage done by such vessel." Is the word "vessel" used in the sense of the definitions in the Merchant Shipping Acts or with the wider meaning which is commonly given to it in this court in inquiries into damage, where one vessel or another is held to blame, or free from blame. Must damage be said to be done "by" the vessel although the immediate cause of the fact of damage is extraneous to the ship and not due to any act or omission of the ship's company or of any person having control of her; or indeed is suffered in spite of their utmost efforts to avoid the casualty. Does "damage" mean all injury causing loss or is it used to describe what is commonly called "actionable damage"? The answer to the last-mentioned question may be the decisive factor in this case. The damage was, I think, "done by the vessel," within the meaning of the section, in the sense that she was so handled that her anchor fouled the cables and broke them. What is necessary is to ascertain whether, this mishap having come about without negligence of the *Mostyn's* owners, master or crew, or her pilot, does the statute cast upon her owners liability for the loss it caused to the plaintiffs. A question was raised as to whether the cable in question comes within the description of "works connected with" the undertaking of the plaintiffs. Not without doubt, upon examination of the various sections which bear upon the matter, in this Act and the Amendment Act of 1862, I think it does.

There are decisions as to the effect of sect. 74, and counsel on each side relied on them in claiming judgment in the event of a finding that the damage done to the plaintiffs' cable was not due to negligence. In *Dennis v. Tovell* in 1872 (2 Asp. Mar. Law Cas. 402; 27 L. T. Rep. 482; (1872) L. R. 8 Q. B. 10) Blackburn, J., as he then was, delivered a concise judgment of the Court of Queen's Bench, of which the material words are these: "It is clear that the Legislature, whether intentionally or not, has made the owner of a vessel liable for all damage, whether caused by negligence or wilful default, or by inevitable accident from stress of weather." In the case of *River Wear Commissioners v. Adamson* (3 Asp. Mar. Law Cas. 242; 35 L. T. Rep. 118; (1876) 1 Q. B. 546), however, the Court of Appeal held that damage done by a vessel to a pier but caused by what is called "act of God," is not recoverable under the section, and upon appeal the judgment was upheld in the House of Lords (1877; 3 Asp. Mar. Law Cas. 521; 37 L. T. Rep. 543; 2 App. Cas. 743).

The case of *River Wear Commissioners v. Adamson* (*sup.*) was that of a steamship, the

Natalian, overtaken at sea by a violent storm, driven ashore by force of the storm at the entrance of a dock, quitted there by her crew in imminent peril of their lives, and cast by sea and wind against a harbour pier which was thereby damaged. The vessel floated, canted round and struck and injured the pier. The Court of Queen's Bench found itself bound by the decision in *Dennis v. Tovell* to hold the owner of the *Natalian* liable for the damage. The Court of Appeal pronounced against the claim "on the ground," as stated by Kelly, C.B., "that it is implied in the Act of Parliament that the exception of the Act of God will protect the owner against the liability imposed by the literal terms of the enactment."

The House of Lords, while it upheld the decision of the Court of Appeal in *River Wear Commissioners v. Adamson* (*sup.*) did not concur in the reasons upon which the judgments given in that court had proceeded. Material differences in point of principle appear when the opinions pronounced by their Lordships are examined. Indeed, it was argued before me, on behalf of the present plaintiffs, that the whole effect of the case is no more than to exempt the owner of a vessel cast by irresistible force of the elements against a pier from liability in an action for damage caused by the impact. Counsel relied upon various passages from the speeches of noble and learned Lords in support of his argument that, under sect. 74, an owner must in general be held liable for damage done by his vessel to the works of a dock undertaking even though no proof of negligence can be made against him. Counsel for the defendants, on the other hand, contended that upon the reasoning and the specific conclusions found in the opinion of the Lord Chancellor, Lord Cairns, the defendants are entitled to judgment. It is undoubtedly true that among the conflicting opinions expressed in the discussion of the *Wear Commissioners* case in the House of Lords the pronouncement so relied upon is distinguished by definite certainty of view, and if its conclusions are not displaced by those of other of their Lordships it is clear authority for holding that the liability cast on owners is liability only for what is sometimes called actionable damage. It is equally true, however, that the judgment of the House proceeds on different and less positive grounds. Still, the case does at least determine that the liability for damage imposed upon owners by sect. 74 is not absolute in all circumstances.

What is left undetermined by *River Wear Commissioners v. Adamson* (*sup.*) is whether the generality of the words creating liability is limited only by an exception or exceptions applicable to some particular state or states of facts—for example, to what may be concisely called the case of the *Natalian* and like cases—or whether there is some rule of construction, plain and definite, as the words of the section are in their *primâ facie* meaning, whereby dock proprietors and ship owners are informed of their respective rights and liabilities.

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The dissent expressed in the House of Lords from the main ground of the decision of the Court of Appeal in *River Wear Commissioners v. Adamson* does not extend, at least in the case of some of their Lordships to the whole reasoning of the Lords Justices. For instance, exception was made by some of their Lordships in favour of certain passages in the judgment of Mellish, L.J. Two of the opinions expressed by Mellish, L.J. bear on the present case. "I am of opinion," said the learned Lord Justice, "that the statute only contemplates the case where either directly or indirectly through the act of man, the vessel is caused in some way or other to run against the pier." And further, "I am bound to agree . . . that the section points to something done by the act of man, or to the act of the person in charge. It looks as though the Legislature considered that, somehow or other, through the act of man damage might be done to the pier, and then, in order to get the owner of the pier out of the difficulty of having to prove that it was owing to some particular person's negligence, and that that person was the servant of the owner they say the owner shall be liable." Lord Hatherley, while he differed from the reasoning on which generally the Court of Appeal had proceeded, said: "Possibly the expression of . . . Lord Justice Mellish may come nearer to the mind of the Legislature. . . . His notion of the general intent of the clause is this; that it points to something in which man is concerned . . . that is to say in which human agency intervenes." Lord O'Hagan agreed in this opinion: "It may be just," he said, "that the owner should answer if the injury arises from the actual or presumed default of his servants." Lord Blackburn, at the close of a comprehensive survey of the legal aspects of the problem, said this: "I am not prepared to say that the words 'damage done by the ship' necessarily involve all expenses occasioned by misfortunes in which the ship was involved in common with the piers. Lord Justice Mellish . . . seems to have thought that these words might bear the more restricted sense of *injuria cum damno* . . . If they can bear that sense we ought to construe them so."

The opinions delivered in the House of Lords differed upon the question whether the liability imposed by the statute is limited to cases where a vessel is in charge of somebody. That is not material here. What is important is that expressions were used by some of their Lordships which support a construction of sect. 74, whereby an owner would be rendered liable for damage due to accident, for which at common law no liability would have fallen upon "the ship"—to use the comprehensive term familiar, as I have already mentioned, in Admiralty practice. Lord O'Hagan said: "There is something comparatively tolerable in the notion that he [the owner] shall be responsible if accident occurs when his captain or someone else employed by him, acting for him, and under his control, has at least the

chance of avoiding it"; and, further, "the Legislature made the owner . . . 'answerable' as owner, and dispensed with the proof of negligence or any other proof, save of the fact of the injury of the vessel—in all the cases contemplated by the Act." Lord O'Hagan also thought that in *Dennis v. Tovell* (*sup.*) the owner may properly have been held liable. Lord Blackburn, in one passage in his judgment, suggests that, having regard to the difficulty which existed at common law in fixing liability upon a particular party, "the remedy proposed was that the owner who was generally really liable (though it was difficult and expensive to prove it), should be liable without proof either that there was negligence or that the person guilty of neglect was the owner's servant, or proving how the mischief happened." If I were sure that a majority of the House of Lords had declared by a concluded opinion that where negligence is disproved, liability for damages nevertheless lies upon an owner whose vessel has damaged a pier, I should, of course, so hold. It is not clear to me that there was such concurrence in *River Wear Commissioners v. Adamson*. Further, upon consideration of the suggested exceptions to the generality of the enactment in sect. 74, which are above mentioned, it seems to me that to give certain effect to them express provisions devised with no little particularity must be incorporated in the Act. Yet nothing is more striking in the language of the section itself than its bare simplicity. So far as the matter is open for my consideration I am unable to see on what principle of construction amendments which involve elaborate modification of the language of a statute can by implication be read into it. I think rather that the dividing line between liability and freedom from liability which is shown by the decision in the case of *The Natalian*, to exist, must be capable of expression in some plain and familiar word or words of limitation.

A plain mode of distinguishing between damage for which an owner is "answerable" under sect. 74, and damage for which the section does not give an action against an owner, is found in the opinion delivered in the case of *The Natalian* by Lord Cairns. The noble and learned Lord used these words: "This section . . . proceeds, as it seems to me, upon the assumption that damage has been done of the kind for which compensation can be recovered at common law against some person—that is to say, damage occasioned by negligence or wilful misconduct, and not by the act of God. . . . It takes the owner, as the person who is always discoverable by means of the register, and it declares that he shall be the person answerable—that is to say, the person who is to answer, or is to be sued for the damage done." After reading and re-reading what was said by each of the noble and learned Lords who delivered their opinions after the Lord Chancellor, I am impressed by the fact that—notwithstanding other observations which I have cited—Lord Hatherley,

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though with extreme doubt and hesitation, concurred in the opinion expressed by the Lord Chancellor; Lord Blackburn, with doubt and hesitation, dissented from the view on which he had acted in *Dennis v. Tovell* (*sup.*), and used the words I have already cited: "Mellish, L.J. . . . seems to have thought these words" (*i.e.*, "damage done by the ship") "might bear the more restricted sense of *injuria cum damno*. . . . If they can bear that sense we ought to construe them so, and though I have had, and have, great doubt whether this is not too violent a construction I am not prepared to reverse the judgment based on it." As I read the case, the judgment proposed by the Lord Chancellor, Lord Cairns, was based upon the same view, namely, that the damage for which, under sect. 74, an owner is liable, is *injuria cum damno*—actionable damage.

For the reasons I have indicated, relying upon what was said by the Lord Chancellor, Lord Cairns, and concurred in, though guardedly by Lord Hatherley and Lord Blackburn, it seems to me that upon the true construction of sect. 74 the defendants are, in the circumstances, entitled to judgment.

The plaintiffs appealed.

Raeburn, K.C. and Wilfrid Lewis.—It is submitted in the first place that the learned President was wrong in holding that there was no negligence, and that in fact the damage was not caused by the negligence of those in charge of the *Mostyn*. It is further contended that in any event the learned President was wrong in law in the construction which he placed upon the decisions in the *River Wear Commissioners v. Adamson* (*sup.*). The statement in the headnote to the effect that *Dennis v. Tovell* (*sup.*) was overruled is erroneous. An analysis of the judgments in *Adamson's* case shows that the Master of the Rolls founded his judgment upon the implied exception of the act of God. He thought that the act of God and the Queen's enemies was excepted. It has always been regarded as doubtful whether the decision in the House of Lords in *River Wear Commissioners v. Adamson* (*sup.*) laid down any rule of general application save that the section does not extend to the act of God. It is submitted that, apart from this exception, the section makes the owners liable for any damage done irrespective of negligence. Such an interpretation would be consistent with the exception of the pilot, of whom the owners have no knowledge and over whom they can exercise no control. In *The Crystal* (7 Asp. Mar. Law Cas. 513; 71 L. T. Rep. 346; (1894) A. C. 508), which was not cited to the President, it was said that no principle can be extracted from the *River Wear Commissioners v. Adamson* (*sup.*) for interpreting other sections of the Act. Similarly the decision was treated as laying down no rule of general application, other than that already indicated, in the cases of *Postmaster-General v. Beck and Pollitzer Limited* (131 L. T. Rep. 750; (1924)

2 A. C. 308) and *British American Tobacco Company Limited v. Jones* (134 L. T. Rep. 105).

Langton, K.C. and Carpmael for the respondents.—It is submitted that the judgment of Lord Cairns in the *River Wear Commissioners v. Adamson* should be followed, notwithstanding that it may be open to the court to put its own construction upon the statute except to say that the owner is not liable for the act of God. In the year 1847 there was no right to proceed *in rem* for damage done by a ship to harbour works. There was no right to proceed *in rem* until 1861. Therefore, since this section gives a right to detain the ship, it conferred a substantial benefit upon the harbour authorities in matters of procedure. The view expressed by Lord Cairns, namely that the statute deals with procedure only, and creates no cause of action where none previously existed, does not therefore restrict the purpose of the statute to negligible limits, having regard to the state of the law at the time when the statute was passed. It is submitted that the section must clearly be interpreted subject to some limitation, since the words in their natural meaning appear to be too wide: a literal interpretation of the statute would include damage done by the crew whilst on shore. It is therefore submitted that a reasonable construction would limit the liability to acts done by persons employed about the ship when about the business of the ship. The decision of the House of Lords in the *River Wear* case is not restricted, as suggested, to damage done by the act of God: see the judgment of Lord Blackburn. Further, it is submitted that an electrical cable is not part of the "works" within the meaning of the section. The matter may be tested by considering the position if the works were offered for sale. The electrical cable would not necessarily pass to the purchaser under a contract for the sale of the works. [Counsel also referred to *Dennis v. Tovell* (*sup.*) and pointed out that in the report in 2 Asp. Mar. Law Cas. at p. 403 Lord Blackburn is reported to have said that the owner of the ship is treated like the owner of a dangerous animal.]

Wilfrid Lewis replied.

BANKES, L.J.—This appeal has been very fully argued, and in the result it leaves my mind in very great doubt as to the course this court ought to take on one branch of the argument.

The action was brought to recover damages by the dock company, the Great Western Railway Company, and the damage which was claimed was damage which was undoubtedly done by the anchor of the *Mostyn* on the 26th Oct. 1923 when she was endeavouring to pass into and through the communication passage from the King's Dock to the Prince of Wales' Dock at Swansea. The claim was founded partly upon the alleged negligence of

those in charge of the *Mostyn* in allowing her anchor to remain on the bottom so as to get foul of the electric cables, and, alternatively, whether there was negligence or not, upon the ground that the owners of the vessel were answerable in damages under sect. 74 of the Harbours, Docks, and Piers Clauses Act of 1847. There is no real dispute about what happened, although it is not quite clear as to what did happen to the anchor immediately before it caused the damage, which it undoubtedly did cause. The damage was done at night, and there was a high wind blowing. The *Mostyn* was endeavouring to pass from the King's Dock into the Prince of Wales' Dock, and she got the necessary orders to do that, and she was manœuvring under the charge of a pilot to get into a proper position to pass through this communication passage. There was a small vessel proceeding in front of her, the *River Dee*, and for some reason or another which is not explained, that little vessel got hung up for a time, and that interrupted the passage of the *Mostyn*. As a result of the high wind, and as a result of being stopped in that way, it was necessary to execute some manœuvre to prevent the *Mostyn* hitting the quay either on one side or the other, and what was done was that the port anchor was dropped at a spot from 200ft. to 300ft. away from the entrance to this communication passage.

It is not suggested that that was an improper thing to do of itself, and it was a necessary and proper manœuvre, as we are advised, in the position in which the vessel then found herself. What happened after that is described by the master in his evidence. He says when the passage was clear they proceeded ahead and at the same time commenced to heave up the anchor, and he says, at question 716: "(Q.) That means, it seems to me, that somehow or other you dragged this anchor of yours at any rate those 200ft. and another 20ft.—some 220ft. altogether. Is that what you did? (A.) We commenced to heave up our anchor as we came ahead, and it could not have been off the bottom the time I thought it would be. We went ahead with our anchor down." Then at question 733 he says: (A.) "We thought to get the anchor up before we got into the passageway: with only thirteen fathoms down it ought to have been off the bottom before we got there. I should have thought it would be."

The charge is that the master was negligent in reaching the chaseway in which the particular cables belonging to the dock company were when his anchor was still on the ground. Of course, that would be an act of negligence if the master had any reason to anticipate that, having started to heave up his anchor at the time he did start, and having regard to the distance which he would have to travel between the time they started to heave the anchor up and the time they reached this chaseway, the anchor would not have been off the ground; but if, on the other hand, he had every reason to believe, taking all the circumstances into

consideration, that doing what was being done, and proceeding as the vessel was proceeding, there was no reason to suppose that the anchor would still be on the ground, you could not charge that man with an act of negligence.

What is said is that the anchor would have been off the ground but for the fact that it must have fouled this post office cable as the vessel was moving forward. There was nothing to suggest to anyone that that had happened, and it was a thing that happened of which the master had no previous warning and had no reason to anticipate, and under those circumstances it cannot be brought home to him as an act of negligence that he did not do something other than he did do, namely, proceed under the belief, and the belief which he was entitled to entertain, that his anchor was off the ground. That is the view that was taken by the President and those who advised him. They came to the conclusion that under those circumstances it was not an act of negligence on the part of the master to proceed as he did proceed, with the anchor on the ground, although he did not know it was on the ground and had no reason to suppose it was still on the ground. The way the President puts it is this: "The order to heave up was given at the right time, and it was promptly obeyed, but the operation was delayed by the fouling of the post office cable. The mate kept observation on the chain, and he in fact saw that the anchor when it came in sight carried with it that and another cable. After discussing the matter with the Elder Brethren I accept the view they hold that neither the master, the pilot, nor the mate, can properly be found guilty of negligence with regard to the use and the lifting of the anchor." In that view those who advise us agree, and having regard to what has lately been said in the House of Lords I definitely express my own considered opinion that the view taken by those advising us is correct, and under those circumstances I think that the appeal does not succeed upon that ground.

The other matter is one about which I feel very great difficulty, but I think with respect to the House of Lords it is for them to settle the difficulty which has been created by the decision to which I will refer in a moment, and I should not be acting with respect to the judgments of those very great lawyers who gave that judgment if I were to express my own opinion in preference to what I think I must say I understand as being their view of the proper construction of this section.

The section itself would at first blush seem to be reasonably plain, and I cannot help thinking that this is one of the cases in which we lawyers should do better to accept the plain language of the statute, and if our view of the plain language seems to the Legislature to work an injustice, let them alter it. However that has not been the course of proceedings here. What the statute says is: "The owner of every vessel or float of timber shall be answerable to the undertakers for any damage

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done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith." With respect to Mr. Carpmal's argument I should have thought "answerable" was used intentionally as covering the widest possible area rather than being a confining expression, but there it is. I need not read the rest of the language of the section because, as I say, if I were left to express my own view I should say there is nothing in the rest of the section which limits the wider language of the earlier part, indeed I think if you critically examine it, it rather goes to support the conclusion at which I should myself have arrived. However, that was the state of things in 1847, and one may imagine that at the time this section was first introduced, as it was introduced much earlier in private Acts of Parliament and it was passed, it was then thought that the persons who invested their capital in docks and harbours and so forth should have a wider and greater protection than the common law afforded them, especially, possibly, in the case of foreign vessels. Be that as it may, what happened was that there is no decision apparently recorded until the year 1872. In Nov. 1872 the case of *Dennis v. Tovell* (2 Asp. Mar. Law Cas. 402; 27 L. T. Rep. 482; L. Rep. 8 Q. B. 10) was decided, and it was decided on a case stated by the Suffolk Justices. The Divisional Court which dealt with the matter was a strong court composed of Cockburn, C.J., Blackburn, J., and Quain, J., and they accepted what seems to me to be the plain meaning of the section. They in terms held that the owner of a vessel was answerable, and answerable in damages, without any fault or neglect on the part of anybody. The Legislature made no move after that decision, and, curiously enough within a month, in Dec. 1872, the *Natalian*, which was the vessel which was the subject-matter of *River Wear Commissioners v. Adamson* (2 Asp. Mar. Law Cas. 521; 37 L. T. Rep. 543; (1877) 2 App. Cas. 743) did the damage that she in fact did to the Sunderland Docks, which was the subject of all the subsequent litigation. That case was tried by Quain, J. at Durham Assizes in 1873, and he being a party to the previous decision to which I have referred, gave judgment for the plaintiffs with leave to move to enter a non-suit, or a verdict for the defendants. There was a large amount of damage, 2825*l.*, and the matter in the Michaelmas Term 1873, came before a Divisional Court, and they, on the authority of *Dennis v. Tovell* (*sup.*) upheld the decision, Blackburn, J. expressing the hope that the Court of Appeal might see their way to a contrary decision. That was in Michaelmas Term 1873, and the case did not come before the Court of Appeal until May 1876, but during all that time the Legislature made no move, although there were these two decisions, the effect of which was to make the owner answerable whether or not an actionable wrong had been committed. Then the matter came before the Court of Appeal

which consisted of Kelly, C.B., Mellish, L.J., and the Master of the Rolls, Sir George Jessel, and they proceeded to put some limitation upon the section. The limitation which they put upon the section, as I read that decision, was that the section could have no operation where the injury was caused, or the damage was caused by an act of God as opposed to some act the result of man's agency, and in that case, the vessel being a derelict and having been abandoned by her crew and bumped about under the force of the wind and waves, bumped into this pier. They held they were justified in putting the limitation upon the language of the statute which excluded a case such as that, where there was no human agency operative but it was a mere act of God, so called, namely, the action of the wind and waves upon a derelict ship.

Then the matter came to the House of Lords, and when you look at the House of Lords report the reporter considered that the decision was this: "That, in a case where the damage to the pier had been occasioned by a vessel through the violence of the winds and waves, at a time when the master and crew had been compelled to escape from the vessel and had, consequently, no control whatever over it, the owners were not liable." Now, of course, if that was all there was in the decision, it is quite easy to distinguish this case from that, because this is a case in which the vessel was proceeding from dock to dock under charge not only of the master, but of a pilot and, therefore, a case clearly distinguishable from the derelict vessel with which this court was dealing. That is what the reporter sets out in his report as the decision. He states that Lord Gordon dissented on the ground that he took a different view of the statute. The reporter states in the headnote his view of Lord Cairns' opinion, but he, perhaps wisely, says nothing about the view of the other Lords who gave other opinions. When you look into this case, as many people have looked into it, they all finish their consideration by being more or less puzzled as to what the view of the learned Lord really was, but, of course, one must, if one can extract from the opinion any *ratio decidendi* upon which the decision of all, or at any rate the majority, or a substantial number of the learned Lords is founded. One must, I think, accept that as being the decision of the House. There is no sort of doubt about Lord Cairns' view. Lord Cairns' view was that the section was a section of procedure merely in the sense that it only applied where an actionable wrong could be proved. I do not think that you can say that a similar view was taken either by Lord Hatherley or by Lord O'Hagan, and it certainly was not by Lord Gordon. When you come to Lord Blackburn it is not easy to see what his opinion exactly was, but he does state definitely that in his opinion, and in his view of the judgment of Mellish, L.J., there must be a case of actionable wrong in order for the statute to apply.

Under those circumstances it seems to me that it would not be respectful for this court

to say that it was open to them to put their own construction upon this statute, and all I say about it is this, that I feel constrained to accept this decision in the House of Lords as a decision that the statute does not apply to the present case, having regard to the fact that we are unable to find that there was any negligence on the part of those in charge of the vessel.

I think, therefore, that this appeal must be dismissed with costs, but I hope that at any rate in this case, or in some other case in the immediate future this matter will be taken to the House of Lords, and an end put to the doubt which undoubtedly exists as to the true construction which ought to be put upon this statute.

ATKIN, L.J.—I agree. On the question of fact as to negligence, I propose to say very little in addition to what was said by the President, and what has been said by my Lord.

It appears to me that on the whole there was evidence to support the view that the fouling of the post office cable by the defendants' anchor was sufficient to delay the eventual raising of the anchor, and thereby cause it to foul the plaintiffs' electric power cables which were the cables which were damaged, and are the subject-matter of this action. I think it follows from that, if that were the right view, that though the defendants in normal circumstances would be guilty of negligence in dragging their anchor along the passage way, yet on the facts of this case they started to heave on the anchor in time to avoid dragging the anchor along the passage way, and it was only as a result of a contretemps, which they could not have contemplated existing, that in fact they dragged the anchor as long as they did, and so caused this particular damage. I think there is evidence to support that view, and I think on the whole that is the right view, and that therefore the defendants are acquitted of negligence causing the damage.

Then that gives rise to what is the really important question as to the construction of sect. 74. Upon that, I am bound to say I have felt very considerable difficulty arising out of the well-known difficulty in exactly ascertaining what the *ratio decidendi* of the House of Lords was in that case. I say well-known difficulty, because the case has, in fact, been discussed in the House of Lords itself in the case of *The Crystal* (7 Asp. Mar. Law Cas. 513, 71 L. T. Rep. 346; (1894) A. C. 508) and when I have the authority of Lord Herschell for saying it was impossible from the decision in that case to extract any principle which is a guide to the construction of any section other than the section in question, I think one is justified in feeling difficulty oneself in ascertaining what the true principle is. I think that one is entitled to explain shortly how the difficulty arises in one's mind in reference to that.

It is plain that in the case of *Dennis v. Tovell* (*sup.*) the Court of Queen's Bench had decided in terms that the owner of a vessel was absolutely liable for any damage done by the vessel whether caused by negligence, or whether caused by inevitable accident, and that case has been followed by Sir Robert Phillimore in *The Merle* (1874, 2 Asp. Mar. Law Cas. 402: 31 L. T. Rep. 44), not expressing any opinion of his own, but following the decision of the Court of Queen's Bench. Then there came the question which arose in the case of the *River Wear Commissioners v. Adamson* (*sup.*). Now in that case the Court of Queen's Bench had followed their decision in *Dennis v. Tovell* (*sup.*), and had held that in a case where there was no suggestion of negligence by the master or crew of the vessel, that the owner of the vessel was liable for damage done to the plaintiffs' pier. In that case, owing to the violence of storm, the vessel had struck the shore and the lives of all on board were put in peril. The crew had been saved by the rocket apparatus and the ship had remained where she struck about 100 yards from the pier. When she struck and the crew left the tide was low; some hours afterwards, when the tide rose the ship was driven by the storm against the pier, and beaten against it so as to cause part of the damage. The rest of the damage was caused in a similar way at several subsequent tides. The storm continued to rage during the whole of the time between the quitting of the ship by her crew and the doing of the damage. At no time after the quitting of the ship was it possible for the crew or any other persons to go on board the ship or in any way obtain control of her. I have no doubt at all that in that case there was no suggestion of negligence on the part of the master or crew, and the Court of Appeal reversed the decision of the Court of Queen's Bench. It appears to me it is plain that in doing that they accepted the view that the owner of a vessel might be answerable for damage done by the vessel even though that damage was not actionable damage, because what they considered was the suggestion that in that case the damage was caused by an act of God. It is plain that damage can be caused to a pier which is neither actionable, nor, on the other hand, caused by an act of God, or you may have the damage caused by an accident without negligence on the part of anybody, and yet in the circumstances which could not possibly be suggested to be an act of God, but the Court of Appeal never apparently thought of putting it upon the footing that the damage referred to in the section was actionable damage, but in terms said that there must be an implied exception in the case of damage, caused by an act of God. That is the view expressed by the Master of the Rolls, Sir George Jessel, and it is the view expressed by Kelly, C.B., who says: "On the general language of this Act of Parliament, though at first sight it seems to provide that the owner of the vessel shall be liable whenever it comes in contact with the pier, yet that we must

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qualify that provision by introducing into it the maxim of the law, that no man is to be answerable for the consequences of the act of God." And then Mellish, L.J. gives his judgment. It does not appear to me that Mellish, L.J. was intending to differ from the other members of the court. On the contrary, he says: "I am of the same opinion," and then he goes on to say: "It clearly was the intention of the Legislature to extend the liability of the owners of vessels, in favour of the owners of piers and harbours, beyond the liability which is imposed upon them by common law." And then he says: "Looking at the pointed language in which negligence or wilful act is brought in, looking to the fact that the section goes on to speak of the master, or the person having the charge of the vessel, it seems to show clearly that the owner is intended to be liable even in the case where neither the master nor the crew had anything to do with it." I think he means by that a case where there was an inevitable accident, and the result was not due to the negligence of the master and crew. I do not think he is looking to the case where there might be damage caused by shipwright's people moving the vessel when the master and crew were not on board, or were not in charge. "But the question arises, because we may decide, on the language used, that the owner may be made liable where it is not proved that he or the master was guilty of negligence, are we bound to hold that in every case whatever, where the vessel physically damages the pier, &c., the owner is so liable? I am of opinion that the statute only contemplates the case where either directly or indirectly, through the act of man, the vessel is caused in some way or other to run against the pier."

I think it is significant that the Lord Justice does not say through the wrongful act of man, which would be quite easy to say if he thought the matter was a question of actionable damage, but he says: "Through the act of man," and then he goes on to say: "But although that is the case with regard to the act of man, the act of God is in view of the law opposed to that which may be said to be act of man, and the act of God does not impose any liability on anybody." Having drawn that contrast between the act of man and the act of God, he goes on to say this: "It looks as though the Legislature considered that somehow or other, through the act of man damage might be done to the pier, and then, in order to get the owner of the pier out of the difficulty of having to prove that it was owing to some particular person's negligence, and that that person was the servant of the owner, they say the owner shall be liable." I understand what the Lord Justice is saying there is this, if the damage is done by the act of man, somehow or other, it does not matter whether with negligence or without negligence, in order to avoid the trouble of proving it was owing to some particular person's negligence, and that person is the servant of the owner, the owner shall be liable: "But if it was the consequence of the negli-

gence of somebody else that person is not discharged, and you may have your remedy over."

Again the conditional "if" there, seems to make it quite plain that the learned Lord Justice is contemplating the liability of the owner even if it was not the consequence of the negligence of somebody else, and if it was the negligence of somebody else, then you are to have the remedy over. Then he says: "Therefore I agree that the judgment should be reversed," and Denman, J. and Pollock, B. give judgment, I think one may say, for similar reasons.

Then the case went to the House of Lords, and in the House of Lords it is significant that Sir John Holker, who was arguing the case, never suggested that the true construction of the Act of Parliament was that the owner was only to be liable if in fact there was damage which was actionable as against somebody or other though not the owner. All that he said was: "The terms of the section showed that the liability was only to be incurred when some degree of control existed"; then the case was decided by five members of the House of Lords, and I think Lord Cairns undoubtedly in terms holds that the section only makes the master liable in cases where it proceeds "upon the assumption that damage has been done of the kind for which compensation can be recovered at common law against some person; that is to say, damage occasioned by negligence or wilful misconduct, and not by the act of God." I think it is rather significant that he should so contrast the two, because, as I have said, there is certainly an intervening set of circumstances, but that one need not attach too much importance to. Then he goes on to deal with the possibility if a claim against the master or crew, I think somewhat extending the precise words of the Act so far as the liability over against the crew is concerned, and then he says this: "The clause appears to me to be a clause of procedure only, dealing with the mode in which a right of action for damages already existing shall be asserted, and not creating a right of action for damages where no right of action for damages against anyone existed before." It is a little difficult to follow this, because it seems to me plain that if the statute creates a liability in someone who was not liable before, it is not a mere matter of procedure but that it does in fact create a right of action against him. Lord Hatherley's judgment I pass over, because I really do not know, after reading it very carefully, what the view was that he formed about the matter. I see many passages in which he seems to me to dissent from the view which had been expressed by the Lord Chancellor, and I think dissented clearly from the decision of the Court of Appeal that the act of God imposed an exception to the operation of the statutory liability. But then he says that "the expression of the late Mellish, L.J. may come nearer to the mind of the Legislature," and then he says: "However, it is the opinion, I believe, of the majority

of your Lordships that, on the whole case being considered, this is not a case that we can regard as struck at by this clause." Then he says: "Whether the ground to be assigned for that is the view which has been expressed by the noble and learned Lord who preceded me, and of whose opinion I speak with the highest respect, or whether any view may be adopted by any of your Lordships similar to that taken in the court below, leading to the conclusion that that damage which here occurred is not brought within the meaning or purview of this Act, I shall not pause to inquire. There being this doubtfulness of opinion, I shall not do what I might probably under other circumstances have thought it my duty to do in this case. I am unwilling to do anything further than to say that I cannot concur in the opinion expressed by my noble and learned friend on the Woolsack otherwise than with extreme doubt and hesitation." Now, whether he really was concurring in the appeal being allowed or the appeal being dismissed, or whether he was concurring in the opinion given by Lord Cairns, I do not know, but if it was the latter he clearly was stating his view with extreme doubt and hesitation. Now so far as Lord O'Hagan is concerned, I think it is quite plain that he did not accept the view that damage meant actionable damage, because he says that he holds with Mellish, L.J. that the section points to something done by the act of man, or to the act of the person in charge, and he eventually says that in the view that he has presented, "*Dennis v. Tovell* (*sup.*) has no application to it. There, the vessel was not derelict, and the owner may have properly been held liable." The result is that it is quite impossible for Lord O'Hagan to have said that that case might still apply and the owner might properly have been held liable, if he concurred in Lord Cairns' view that "damage" only meant actionable damage, because in *Dennis v. Tovell* the damage was not actionable and had been so held. Then there comes the judgment which I think causes the greatest difficulty: that is Lord Blackburn's judgment. After dealing with the rules of construction and stating that the common law requires the liability of the owner to be founded upon the negligence either of himself or of his servants, he says this: "Reading the words of the enactment, and bearing in mind what was the state of the law at the time when it was passed, it seems to me that the object of the Legislature was to give the owners of harbours, docks, and piers more protection than they had.

It seems to have occurred to those who framed the statute, that in most cases where an accident occurs, it is from the fault of those who were managing the ship—and in most cases those are the servants of the owners—but that these were matters which in every case must be proved"—"these," I think, means that it was the fault of those managing the ship, and those in fault were the servants of the owners—"and consequently that there was a

great deal of litigation incurred before the owner, though he really was liable, could be fixed; and with a view to meet this, the remedy proposed was that the owner, who was generally really liable (though it was difficult and expensive to prove it), should be liable without proof either that there was negligence, or that the person guilty of neglect was the owner's servant, or proving how the mischief happened, and this is expressed by saying that the owners shall be 'answerable for any damage done by the vessel or by any person employed about the same' to the harbour." Then he says: "The cases of a common misfortune befalling both ship and pier, without fault of either, seem not to have been thought of. At all events, no exemption or proviso to take these cases out of the general enactment is given in express words. My Lords, on reading the words of the enactments, I am brought to the conclusion that such was the scheme of legislation adopted by Parliament; the mischief being the expense of litigation; the remedy that the owners should be liable without proof of how the accident occurred." If one were to pause there, one would have thought the matter was quite plain, and that the owner was to be liable, whether the accident was caused by the negligence of anybody or whether it was not. Pausing there, one might say: What relief is given to the owner in fact if he still has, when challenged, to prove that the accident happened by the negligence of somebody? He is in exactly the same position so far as expense is concerned, as though that somebody were his servant, and he is saved no expense at all. Nor do I myself see how it could be any relief to the owner to say: Well, you have not got to prove it was the negligence of any particular person, yet you must prove that the damage was caused by negligence. Try and adapt that statement to concrete facts, and you will find it is quite impossible; you never could prove that the accident was caused by negligence without in fact investigating the whole of the facts, and without, in every case saying that it was caused by the negligence either of the master in giving a wrong order, or of the engineer in not carrying out the order, or of the steersman in taking the wrong course, or in many of the different ways in which accidents do happen. Then the learned Lord, having said so much, goes on to deal with the case of *Dennis v. Tovell* (*sup.*), from which he now dissents, and no doubt he would be right in any view in dissenting if the view was right that the owner was only liable where the damage was caused by the act of man. Then the learned Lord goes on to say this: "In the present case, if the object of the statute be, as Pollock, B. says, and as I think it is, with a view to avoid expense and delay, that the owners of the dock are not to be put to the proof of negligence, or to the proof of how the injury was occasioned, that object would be to some extent less effectually carried out by importing such an exception—that is an exception of the act of God. Then he goes on to say this:

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"Still there remains the question whether the hardship produced, and the injustice worked, is so great as to justify the court in putting any meaning on the words which they will bear in order to avoid it. Both the late Mellish, L.J., and, as I understand him, the Lord Chancellor, have thought that the words may be construed so as to make the owner of the ship answerable only for damages occasioned by the act of man; damages for which someone is answerable at common law." That was a view no doubt expressed by Lord Cairns, but, with great respect, it seems to me entirely opposed to everything that was said or intended to be said by Mellish, L.J., who I think was dealing with an accident which happened where the ship was under control and not with a case where the ship was derelict. Then eventually he goes on to say this, and this is the passage which I think we have to give effect to: "My Lords, after much hesitation and doubt, I am not prepared to say that this judgment should be reversed. I am not prepared to say that the words 'damage done by the ship,' as used in this enactment, necessarily include all expenses occasioned by misfortunes in which the ship was involved in common with the piers. Mellish, L.J., for whose judgment I have always had a degree of veneration which his lamented death permits me to express more freely than I should think seemly if he still lived, seems to have thought that these words might bear the more restricted sense of *injuria cum damno*." I have already said that I think Mellish's, L.J., words are completely misunderstood, and this passage I would attribute, as I have said, to a feeling of reverent misunderstanding. "The declared object of the enactment is the protection of the piers, &c., from 'injury,' which renders this construction a little less violent than if the object had been expressed to be to protect the harbour authorities from 'loss.' If they can bear that sense, we ought to construe them so; and though I have had, and have, great doubt whether this is not too violent a construction, I am not prepared to reverse the judgment based on it; and consequently I agree that the appeal should be dismissed with costs."

It puts one in a little difficulty when one reads the judgment, which is said to be affirming a judgment which is said to be based upon a principle, and which so far as I can see is based upon an entirely different principle, but there we have a judgment of the House of Lords dismissing an appeal, in which the Lord Chancellor and Lord Blackburn, after, with great respect, saying the exact contrary, eventually say that they base the judgment upon the principle that damage means *injuria cum damno*: you have Lord Hatherley expressing in his judgment views which do not appear to convey any very decided result; and you have Lord O'Hagan no doubt assenting for a different reason. Lord Gordon differs, and if one were to express one's own opinion, one might say perhaps Lord Gordon's opinion does seem to give a very

plain and natural meaning to the words of the section. Upon the whole, it appears to me that trying to find a *ratio decidendi* for the decision of the House of Lords, it is to be found in the reason given by the only two members of the House of Lords whose views actually concur upon anything, and under those circumstances I think it would be wrong for us not to accept that as binding upon us.

For these reasons I agree that the appeal should be dismissed but I am bound to say that the question being such a very important question as to the position of harbour authorities, I think it is unfortunate that such an important question should be the subject of so much doubt as it undoubtedly must be so long as it is based upon the decisions in the *River Wear Commissioners v. Adamson* (sup.). To my mind there is no question at all but that the harbour and dock authorities were intended to be given some sort of relief in respect of vessels which pass to their dock and may pass out of it and may never be seen again, foreign vessels as well as British vessels; and for these reasons, in view of the fact that it was plainly intended to give them some protection, and in view of the fact that the protection given them by the House of Lords seems to me to be quite elusive, I should have thought it would have been much more satisfactory that the House of Lords, who could survey this decision, should have the opportunity of saying what it really means. At present my view is that this appeal should be dismissed with costs.

SARGANT, L.J.—I agree that the appeal should be dismissed with costs. As regards the question of fact I need say very little. No doubt at first sight it appears to suggest negligence that this anchor should be dragged for any distance through this opening and so be liable to foul anything that might be there, but having regard to the position in which the vessel was placed and the manœuvre that she was executing, and having regard to the advice which we have received from the assessors, though I wish to say I have formed my own opinion on the matter while giving weight to theirs, I do not see my way to differ from the conclusion which was arrived at by the learned judge below and which my brethren have already expressed. It seems to me that the negligence was not merely not proved, but was disproved on the whole balance of the evidence.

Then comes the very difficult question whether there is a greater liability imposed by virtue of the statute, the Harbour Clauses Act of 1847, and here the matter mainly has to be decided on the question of authority, as to whether there is a decision of the House of Lords in which the majority of the House have come to a conclusion which renders the matter unarguable before us in the result. Now for myself, apart from the question of authority, I must say that I have been entirely convinced, contrary to my first impression, by the arguments and the speech of Lord Cairns in the

House of Lords, and in coming, as I am going to do, to the conclusion that we are in fact bound by authority, I should like to add that I feel happy in that decision, and that if I had to express my own view it would be a view entirely in accordance with the reasoning of Lord Cairns. This fact, at any rate, has to be faced in construing this section—I leave out the early case decided by the Chief Justice, Lord Blackburn, and Quain, J.—that with the exception of perhaps of Lord Gordon, every judge has found it necessary to impose some limitation on the liability imposed by sect. 74. In the case of the Court of Appeal, the exception that they introduced was an exception of cases in which the damage was caused by the act of God, in the technical legal sense. In several of the speeches in the House of Lords, at any rate in one or more, this exception was introduced, that it must be damage at any rate due to some human agency, that if the damage was caused merely by some hulk which had been derelict for a long time and which had come from great distances, and which caused damage to the pier without being under any human control at all, a case of that kind must be excluded from the change in the law effected by the exception. If that is so, and some limitation has to be introduced, it does appear to me that the limitation introduced by Lord Cairns is the more reasonable limitation having regard to the language of the section.

The section reads in this way: "The owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock or pier, or the quays or works connected therewith, and the master or person having the charge of such vessel or float of timber through whose wilful act or negligence any such damage is done shall also be liable to make good the same." It does seem to me that the second sentence there, "and the master or person having the charge of such vessel or float," is primarily, in the ordinary reading of the clause, applicable to as wide a range of subject-matter as the first sentence in the clause, and that it therefore assumes that the cases dealt with by the earlier words of the clause are cases in which there has been some person through whose wilful act or negligence the damage has arisen; and although no doubt the clause was inserted for the purpose of putting the owners of docks in a stronger position than they were in before, still it seems to me that it is a sufficient explanation of the clause if the strengthening of their position were a strengthening consisting in this, that when damage had been done to their works it should not be necessary for them to trace back through a chain of agency the responsibility for that negligent act to the owner of the vessel, that in cases where the whole body of persons who might be comprised within the term "the ship," where the entity, the ship, had done damage in fact by negligence to the works, that there the liability should be cast upon the master

and that it should not be necessary, as it would otherwise have been, to show that there was a chain of agency reaching from the owner of the vessel down to the person by whose negligence the damage was caused; and it does seem to me that that would be a very substantial relief to the owners of such works, because I think there would be many cases in which it is clear that damage is caused by some act or neglect on the part of somebody on board, and yet it may very well be difficult to say who precisely that person was and also difficult to show that that person was a person who, either directly or by some intermediate chain of agency, was a person for whose negligence the owner of the ship was responsible.

Having expressed my view to that extent, and quite conscious that the expression of my individual view is of little consequence having regard to the much higher authority which has already been devoted to the elucidation of this section, I want, before coming to the judgments in the House of Lords, to say a word or two about the meaning of the judgment of Mellish, L.J. because that does affect to a considerable extent the meaning of the judgment of Lord Blackburn, and unless the judgment of Lord Blackburn is in accordance with the view of Lord Cairns, it is clear that there is no clear majority of the House of Lords in favour of the doctrine that this section relates to a case where there was *damnum* and *injuria* both. In Mellish, L.J.'s judgment on p. 553, there is this passage: "Looking at the pointed language in which negligence or wilful act is brought in"—I think that is by what I have called the second sentence of the section—"looking to the fact that the section goes on to speak of the master, or the person having the charge of the vessel, it seems to show clearly that the owner is intended to be liable even in the case where neither the master nor the crew had anything to do with it." I think there the learned Lord Justice is speaking of the master and the crew as being the persons who were *primâ facie* the agents of the owner, and therefore he is saying this, that the owner is intended to be rendered liable when the negligence is negligence not attributable to the persons for whose negligence he is *primâ facie* responsible. Then I think when on the next page he deals with the matter again, the same meaning is to be attributed to his remarks. There he says: "It looks as though the Legislature considered that, somehow or other, through the act of man damage might be done to the pier, and then, in order to get the owner of the pier out of the difficulty of having to prove that it was owing to some particular person's negligence, and that that person was the servant of the owner, they say the owner shall be liable." There again, it seems to me that what he is contemplating is this: You may have a case where there is negligence, and yet it may be extremely difficult to say who is the particular person who is guilty of the negligence, and further whether that particular person is in such relation to the owner by virtue

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of a chain of agency that the owner ought to be held liable for the negligence of that person. I think he means that there is here a relief of the owner of the works from the necessity not of having to show that there was negligence, but of having to prove a chain of agency and the negligence of a particular person so as to bring the negligence home to the owner of the vessel.

Turning to the judgment of the House of Lords in that case, I need say nothing more with regard to the judgment of Lord Cairns. With regard to the judgment of Lord Hatherley, I have, as my brethren have, had very great difficulty in appreciating precisely what the actual conclusion of the learned Lord was, but after great difficulty I have, on the whole, come to the same conclusion as the learned President in this case, that is to say, I think the final passage in Lord Hatherley's judgment means that he does concur in the reasoning or in the result of Lord Cairns, although he does it with the greatest possible personal reticence. It seems to me that he is there expressing this view, that he gives way to the personal ability or respect which he feels towards Lord Cairns, and that he does not differ from his conclusion. He says this: "I am unwilling to do anything further than to say that I cannot concur in the opinion expressed by my noble and learned friend on the Woolsack otherwise than with extreme doubt and hesitation." I think that means that he does concur with him in the end, but in ultimately concurring he has gone through a process of extreme doubt and hesitation. If that is so, it means that two at any rate of the court are in favour of the view that *damnum cum injuria* is necessary in order that the owner may be made liable. Then, when we come to the judgment of Lord Blackburn, it seems to me that, if I am right in the view which I form as to the meaning of the judgment of Mellish, L.J., it is easier to come to the conclusion which my Lord has come to, and which I think Atkin, L.J. has come to, that on the whole Lord Blackburn means to concur with the view that *damnum cum injuria* is a necessary ingredient. No doubt Atkin, L.J. thinks that that conclusion, although it was arrived at, was due to a misapprehension of the meaning of the judgment of Mellish, L.J., and on that latter point I cannot quite agree with him. I agree with him in thinking that Lord Blackburn meant to come to the conclusion that *damnum cum injuria* was necessary, but I think, too, that he arrived at that conclusion, not under misapprehension of the meaning of Mellish, L.J., but on a true appreciation of the meaning of that judgment.

Finally, I should like to say this, that the whole question of the meaning of the speeches of the noble Lords in this case in question has been very carefully reviewed by the learned President in his judgment, and that having read and re-read what he has said on that subject, I entirely concur with him in that review and the reasons given for his concurrence or the reasons given for his view as to

the ultimate effect of those judgments; and I may perhaps add this, that the case which was recently decided by Roche, J. as to contributory negligence and as to the owners or undertakers of a dock not being able to succeed where there was contributory negligence on their part—I am referring to the case of *Det Forenede Dampskibs Selskab v. The Barry Railway Company* (1919, 1 Ll. L. L. Rep. 658)—I cannot doubt was correctly decided. That recognises a case where the absolute liability, on one reading of the judgment, could not be concluded by anything of this kind, but recognises, rightly, I think, that there must at any rate be a limitation of that kind imposed upon the liability expressed by the statute.

For these reasons I agree that the appeal should be dismissed.

Solicitors for the appellants, *A. G. Hubbard*.

Solicitors for the respondents, *Ingledeu, Sons, and Brown*, agents for *Ingledeu, Sons, and Crawford, Swansea*.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Friday, May 7, 1926.

(Before Lord MERRIVALE, P.)

THE MASSILIA. (a).

Salvage—Practice—Costs—Expenses of bringing witness to England and sending substitute to take his place abroad—R.S.C. Order LXV., r. 27 (9) (29).

In a salvage action the plaintiffs brought the master of their vessel from the Red Sea, where his vessel was normally stationed, to England for the purpose of giving evidence at the trial and assisting their solicitors in the preparation of their case;

Held, that the expenses of so doing were properly allowed upon taxation.

During the period that the master was in England the plaintiffs sent a substitute from England to perform his duties in the Red Sea;

Held, that the expenses of the substitute were not expenses within the terms of Order LXV., r. 27 (9) (29), and were not properly allowed upon taxation.

SUMMONS (adjourned into Court) upon appeal by the defendants, the owners of the steamship *Massilia*, against a decision of the assistant registrar allowing upon taxation of the plaintiffs' costs a sum of 89l. in respect of bringing to this country the master of the plaintiffs' vessel,

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law

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and a sum of 165*l.* in respect of sending out another master to take his place whilst he was in England.

The facts and arguments of counsel fully appear from the judgment.

Dumas for the plaintiffs.

Balloch for the defendants.

May 7.—Lord MERRIVALE, P. read the following judgment :

This is the defendants' application to review the taxation by the assistant registrar of the plaintiff's costs of the cause.

The plaintiffs, the Eastern Telegraph Company Limited, were awarded at the hearing 6000*l.* in respect of salvage services rendered in the Red Sea by their cable steamship the *Mirror*, to the defendants' steamship, the *Massilia*, and the costs of the action. The *Mirror* was stationed in the Red Sea. For the purposes of the trial, to assist in instructing their solicitors and to give evidence, the plaintiffs brought home the master of the *Mirror*, Captain Gibson, and they replaced him by sending out from England to the Red Sea the master of another of their vessels, Captain Smythe. They were allowed upon the taxation 89*l.* for their expenses in respect of Captain Gibson and about 165*l.* for their expenses in respect of Captain Smythe. The defendants object to both allowances. They say as to Captain Gibson that to bring a witness from the Red Sea in this case was extravagant and unreasonable, that the plaintiffs brought him here precipitately before a defence had been delivered, and without proposing to the defendants that the case should be tried upon the reports made of the occurrence in question by the plaintiffs' officers. It was not so tried. Alternatively they objected that Captain Gibson was brought from the Red Sea unreasonably soon and kept unreasonably long, and that, if he had been brought merely to the hearing and sent back expeditiously, reduced expense would have been incurred, and that no substitute need have been appointed to take his place in the *Mirror*.

The costs as taxed include Captain Gibson's salary and allowances for twenty-seven days in lieu of thirty-nine days claimed. Approximately ten days is the period estimated as necessary for his journey back to his ship. It would appear that if the attendance of the witness at the trial was reasonably necessary his absence from his ship must anyhow have extended over the major part of the time actually allowed.

The rules which govern both the matters in question are contained in Order LXV., r. 27, of the Rules of the Supreme Court, and in particular sub-rules 9 and 29 of rule 27. Rule 27, sub-rule 9, prescribes that "such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed." Rule 27, sub-rule 29, entitles the successful party to "such costs, charges and expenses as shall appear (to the taxing

master) to have been necessary or proper for the attainment of justice. . . ."

The assistant registrar considered that the bringing of Captain Gibson to this country for the purposes of the case was not unreasonable, and that the absence of the witness might well have affected the amount of the award. The action was tried before me, and I take a view not less pronounced than that of the assistant registrar in favour of the plaintiffs on this part of the controversy. What is left as to the expenses incurred in respect of Captain Gibson is matter of quantum only. I have scrutinised the items both as to time, occasion, and extent, and no ground appears to me on which I ought, as to these, to interfere with the discretion which has been exercised.

When the taxation of costs was conducted with a less ample discretion than is now vested in the officers of the court, very large allowances for witnesses were made under circumstances like in some respects to those which arose here with regard to Capt. Gibson. *Calvert v. Scind Railway Co.* (1865, 18 C. B. (N. S.) 306), and *Potter v. Rankin* (1870, L. Rep. 5 C. P. 518), are interesting as instances, though they do not bear directly on the matters here under discussion.

The question of the allowance for Capt. Smythe's expenses is more difficult than that as to Capt. Gibson. For the defendants it was objected that these expenses are not costs of any proceeding in the cause, and therefore are not allowable on taxation. The assistant registrar in his answer to the defendants' objection on these items says that "such expenses are invariably allowed" (*i.e.*, on taxation in the Admiralty Registry) "as matter of course." For the plaintiffs, reference was made also to this statement in the third edition of Roscoe's Admiralty Practice, published in 1903, and at p. 424 in the 4th edit., published in 1920. "The expenses of a substitute to join a vessel from which a witness is necessarily taken can properly be claimed on taxation." The learned Admiralty Registrar, Mr. Roscoe, informs me as follows: "There is not any practice on the point, as the taxing master under Order LXV. r. 27, sub-r. 9, can allow reasonable expenses of procuring evidence, and by Order LXV. r. 27, sub-r. 29, he can allow such expenses as are proper. In every case, therefore the question is whether an expense charged is reasonable and proper. These particular expenses have been regarded as proper, but their allowance does not constitute a practice."

What is allowable on the taxation of costs in a cause within the provisions of Order LXV., r. 27, is "the costs of and incident to the proceedings"; under rule 27, sub-rule 9, "just and reasonable charges and expenses . . . properly incurred in procuring evidence, and the attendance of witnesses"; and under rule 27, sub-rule 29, "such costs charges and expenses" as appear to the taxing officer "to have been necessary or proper for the attainment of justice" are allowable because

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they are "costs of and incident to the proceedings." It is necessary, then, to determine with regard to the outlay incurred by the plaintiffs in respect of Capt. Smythe, whom they placed temporarily in command of the *Mirror* during Capt. Gibson's absence from her, whether this was expense "incident to the proceedings," necessary or proper for the attainment of justice," "a reasonable expense properly incurred in procuring evidence," or "procuring the attendance of witnesses"; i.e., are the expenses "necessary, proper or reasonable" in the cause. Capt. Smythe's presence on board the *Mirror* was not directly an expense of procuring evidence. He could give none. It was not directly an expense of procuring the attendance of Capt. Gibson, whose evidence was reasonably thought necessary. The plaintiffs could command Capt. Gibson's presence in London; he was not, and they were not, with regard to him, in the difficult position which sometimes arises where a foreign witness, not bound by any *subpoena* of an English tribunal must be bargained with in order to ensure his attendance. What would in fact have happened if the plaintiffs had summoned home Capt. Gibson and left the *Mirror* in charge of her first officer for all the necessary time—as they in fact did during part of it—was that in maintaining their claim for an adequate award in respect of the salvage of the *Massilia* in March 1923 they would have incurred a business risk in operating the *Mirror* in December 1925. The plaintiffs spent money in sending a substitute to replace Capt. Gibson because they thought it a necessary or proper precaution with a view to the maintenance of their cable service, a precaution against loss in their business during the absence of a witness. It was an expense which was incurred because their salvage action was contested, but it was incident to the business of the company rather than to the proceedings in the cause. It more nearly approaches damage by litigation than expense of litigation. In my opinion the outlay in question cannot accurately be described in terms which bring it within the ambit of taxable costs, and in this particular the defendants' objection ought to be allowed.

Reference is made in Roscoe's Admiralty Practice, 4th edit., p. 424, to a case cited as *The Elswick Grange*, in which Sir Samuel Evans is stated to have held that "the cost of detaining a ship for a trial . . . is not a personal expense of a witness; it is . . . one of the general inconveniences to which under some circumstances parties are put by litigation." I have examined the record and documents in the case thus cited and do not find that the subject here dealt with was directly raised either at the hearing or on review of the taxation of costs. The dictum, however, seems to have some bearing on the matter now in question, and I am not aware of any other judicial opinion with regard thereto.

The conclusion at which I have arrived with regard to the expenses of Capt. Smythe in the present dispute has no doubt a necessary

relation to a variety of cases in which costs of a substitute for a witness may come in question. I purposely refrain, however, from the expression of any opinion on the general question whether, and in what cases if at all, expenses of such substitutes may be recovered as part of the costs of litigation.

Solicitors: *Parker, Garrett, and Co.*; *Thomas Cooper and Co.*

April 26, May 4, and June 8, 1926.

(Before HILL, J.)

THE FAGERNES. (a)

Collision — Bristol Channel — Waters inter fauces terræ—Action in personam—Tort—Jurisdiction—Leave to serve notice of writ out of the jurisdiction — R.S.C. Order XI., r. 1 (ee).

The waters of the Bristol Channel above a line drawn from Nash Point to the Foreland or the waters above a line drawn from Bull Point to Port Eynon Head are waters inter fauces terræ, within the jurisdiction of the English courts.

Reg. v. Cunningham (1859, Bell's Crown Cases 72) followed.

In an action in personam against foreign ship-owners for negligence causing a collision between vessels belonging respectively to the plaintiffs and the defendants, which took place in the Bristol Channel at a point some miles to the eastward of a line drawn from Bull Point to Port Eynon Head, and some twenty miles to the eastward of Lundy Island, in which the defendants' vessel was sunk,

Held, that leave was properly given to serve the writ upon the defendants outside the jurisdiction.

MOTION to set aside an order of Hill, J. granting leave to the plaintiffs to serve notice of a writ in personam claiming damages for negligence upon the defendants outside the jurisdiction.

In consequence of a collision between the steamship *Cornish Coast* belonging to the plaintiffs, Coast Lines Limited, an English company, and the steamship *Fagernes* belonging to the defendants, the *Société Nazionale di Navigazione*, an Italian company, domiciled in Italy, the *Fagernes* sank in the Bristol Channel. An action in personam was thereupon started by the plaintiffs to recover damages for the injuries sustained by the *Cornish Coast* by reason of the negligent navigation or management of the defendants' vessel.

The collision took place in the Bristol Channel at a point approximately twenty miles to the eastward of Lundy Island, and some miles to the eastward of a line drawn from Bull Point, Devonshire, to Port Eynon Head, Glamorgan-shire. The distance across the Bristol Channel

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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at this point is approximately twenty sea miles, the English coast being distant ten and a half or twelve and a half sea miles, and the Welsh coast nine and a half or seven and a half sea miles. The places of collision alleged by the plaintiffs and the defendants respectively, were not materially different.

Leave was granted by Hill, J. to serve notice of the writ upon the defendants in Italy, and the defendants thereupon moved to set aside the order giving leave.

E. Aylmer Digby for the defendants.—Order XI., r. 1 (e), now gives jurisdiction to grant leave to serve notice of the writ upon a person outside the jurisdiction in respect of a tort committed within the jurisdiction. But the discretion in granting such leave should be examined with very great care: (see the observations of Farwell, L.J. in *The Hagan*, 11 Asp. Mar. Law Cas. 66; 98 L. T. Rep. 891; (1908) P. 189.)

But in any event it is submitted that there was no jurisdiction to grant leave under Order XI., r. 1 (e). Since the defendants contend that the tort alleged, *i.e.*, negligence of their servants in the management of the *Fagernes*, was not committed within the jurisdiction. The place of collision is not for this purpose substantially disputed, and the defendants contend that that place is not within the jurisdiction of the English courts. *Reg. v. Cunningham* (1859, Bell's Crown Cases 72) is relied upon for approval of the test suggested by Lord Hale, *De Jure Maris* (Hargreaves Law Tracts, 1787, 1, c. iv., p. 10), namely, that the jurisdiction extended only to those places where a man may reasonably discern between shore to shore. This test was adopted by the judges in *Reg. v. Bruce* (Leach's Crown Cases, 1093). Lord Hale's opinion was there preferred to that of Lord Coke.

Balloch for the plaintiffs.—There is jurisdiction for the reasons to be mentioned, and therefore the question is solely one of discretion, and it is submitted that the discretion was rightly exercised.

The question of jurisdiction really resolves itself into a question of the extent to which territory said to be within the jurisdiction is distant from the place where the jurisdiction can without doubt be exercised. The question is commonly argued in the case of bays. [Learned counsel referred to Law Quarterly Review, vol. XXXI. (1915), pp. 410–420, and the *Moray Firth* case therein considered.] The matter has been considered by the Permanent Court of Justice at The Hague, without definite conclusions being reached. The effect of *Cunningham's* case (*sup.*) is that the Bristol Channel has been held to be within the jurisdiction of the courts, and the sole question is at what point the jurisdiction can be limited. There is really no authority for drawing arbitrary lines either between the county boundaries or elsewhere. The Pilotage Order, by which compulsory pilotage was formerly enforced in the Bristol Channel, extended to

Lundy Island, and therefore constitutes an illustration, which must not, perhaps, be pressed too far, of the exercise of the territorial jurisdiction in this particular place. The jurisdiction contended for by the plaintiffs is not really inconsistent with the dictum of Lord Hale, since the expression used by that learned judge is “discern,” which might be used with reference to places at such a distance from one another that the expression “see” could hardly be applied.

Digby replied.

June 8.—HILL, J.—The question is whether leave to serve notice of writ out of the jurisdiction was properly granted. Leave was granted on an *ex-parte* application of the plaintiffs. The defendants appeared under protest and now ask that the order and notice be set aside. They contend (1) that leave cannot be granted, and (2) that if it can, it ought not to be granted. The writ is *in personam*. The defendants are the *Société Nationale di Navigazione*, who were the owners of the Italian steamship *Fagernes*. They carry on business in Genoa. On the 17th March 1926 the *Fagernes* was in collision with the plaintiffs' steamship *Cornish Coast*, in the Bristol Channel. The *Cornish Coast* was damaged and the *Fagernes* was sunk. The plaintiffs' alleged cause of action is negligence causing the collision and damage to the *Cornish Coast*. The claim is therefore in tort. It is a claim within the Admiralty jurisdiction of the High Court. It falls within pars. (a) (iii.) and (a) (iv.) of sect. 22 of the Judicature Act 1925. It is a claim for damage received by a ship and also a claim for damage done by a ship. By sect. 33 (2) that jurisdiction may be exercised either in proceedings *in rem* or in proceedings *in personam*. The *Fagernes* lies at the bottom of the Bristol Channel, and no proceedings *in rem* are possible. The plaintiffs' writ is *in personam* against the defendants as owners of the *Fagernes*. They were undoubtedly entitled to issue that writ. But the writ is of no use to the plaintiffs unless they have leave to serve it out of the jurisdiction, that is on the defendants in Italy. Under the Rules of the Supreme Court 1883, until the amendment of Order XI., r. 1, in 1920, no question could have arisen. The court had no power to grant leave for service out of the jurisdiction of notice of writ in an action of tort upon a company domiciled in Italy, unless indeed advantage could be taken of Order XL., r. 1 (g) as in *The Duc d'Aumale* (9 Asp. Mar. Law Cas. 359; 87 L. T. Rep. 674; (1903) P. 18), and *Williams v. Cartwright and others* (71 L. T. Rep. 834; (1895) 1 Q. B. 142). By the amended Order XI., r. 1 (ee) leave can be granted when “the action is founded on a tort committed within the jurisdiction.” This restored the like power which existed under the Rules of the Supreme Court 1875, where the words were “any act or thing for which damages are sought to be recovered was done within the jurisdiction”: (see *Bree v. Marecaux* (44 L. T. Rep. 765; 7 Q. B. Div. 434).

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The first question, therefore, is whether the tort in this case, that is the negligence causing the collision and damage, was "committed within the jurisdiction."

The place of collision is not absolutely agreed, but the difference is immaterial. The defendants place it two miles southerly of the plaintiffs' position. That position is more than twenty miles to the eastward of Lundy Island, and some miles to the eastward of a line drawn from Bull Point in Devonshire to Port Eynon Head in Gower, which is part of Glamorgan-shire. The nearest point on the English coast was a little east of Ilfracombe; the nearest point on the Welsh coast was Oxwich Head. The distance across is about twenty miles. The English coast was distant ten and a half miles or twelve and a half miles, the Welsh coast nine and a half or seven and a half miles. When I speak of miles, I speak of sea miles. If that spot is "within the jurisdiction," it is immaterial whether it is in England or in Wales. It is equally within the jurisdiction of the High Court. I am not faced with a further difficulty which might arise as to the respective limits of two jurisdictions if the collision were, for example, in the Solway Firth. The words "within the jurisdiction" mean "within the territorial jurisdiction of the King": (see per Sir Robert Phillimore in *Re Smith*, 1876, 35 L. T. Rep. 38; 1 Prob. Div. 300) and *Harris v. Hamburg American Line* (1876, 2 C. P. Div. 173). That is the civil action relating to the territory in the Atlantic. The Bristol Channel is at the place in question, and throughout its length is bounded by land which forms part of the King's territory. I have not here to deal with the limits seawards of the King's territory, where the coast is bounded by an external sea. That was the question upon which there was so great a divergence of judicial opinion in *Reg. v. Keyn* (1876, 2 Ex. Div. 63). The decision is thus summarised by Lord Coleridge, C.J., in the succeeding case of *Harris v. Hamburg American Line* (*sup.*): "Except where Parliament has extended it, the territory of England and the Sovereignty of the King stops at low-water mark." Whether that statement is to-day law to the full extent may well be doubted. It has at any rate been decided by the Judicial Committee of the Privy Council that the bed of the sea, at least within the three-mile limit, is the property of the Crown: (see *Secretary of State for India v. Chelikani Rama Rao* (Indian Reports, 1916, 39 Madras Series, 317; 43 Ind. App. 192), citing with approval *Lord Fitzhardinge v. Purcell* (99 L. T. Rep. 154; (1908) 2 Ch., at p. 166), per Mr. Justice Parker; *Lord Advocate v. Clyde Navigation Trustees* (1891, 19 Rettie, 174); and *Lord Advocate v. Weymss and another* (1900) A. C. 48) per Lord Watson). I am indebted for the reference to the Indian case to an article by Sir Cecil Hurst in the British Year Book of International Law, 1922-3, p. 34. In it Lord Shaw said: "It should not be forgotten that the *Franconia* case (*Reg. v. Keyn* (*sup.*)) had reference on its merits solely to the point

as to the limits of Admiralty jurisdiction . . ." and again: "the judgment of the majority of the court was rested on the ground of there having been no jurisdiction in former times in the Admiral to try offences by foreigners on board foreign ships whether within or without the limit of three miles from the shore. But whatever be the true view as to the limits of the King's territory, where the coasts are bounded by the external seas, no one has ever doubted that, within limits, inlets of the seas into the land are part of the territory of the State which owns the land on both sides." Cockburn, C.J., who gave the leading judgment of the majority in *Reg. v. Keyn* (*sup.*), was careful to draw the distinction: "If an offence was committed in a bay, gulf or estuary, *inter fauces terræ*, the common law could deal with it, because the parts of the sea so circumstanced were held to be within the body of the adjacent county or counties; but along the coasts, on the external sea, the jurisdiction of the common law extended no further than to low-water mark" (p. 162). And again, "For centuries before it"—that is the three-mile limit—"was thought of, the great landmarks of our judicial system had been set fast—the jurisdiction of the common law over the land and the inland waters contained within it, forming together the realm of England, that of the Admiral over English vessels on the seas, the common property or highway of mankind" (p. 195). What are the inland waters contained within the land? What are bays, gulfs, or estuaries *inter fauces terræ*? What is the metaphor, the open mouth of a man or of a crocodile? There is very little authority relevant to such a sea as the Bristol Channel where it is twenty miles wide, or to other bays and inlets with a wide bell mouth. One set of cases relates to bays with a narrow opening, like Plymouth Sound, where no doubt can be entertained. Such cases are illustrated by the passage in the judgment in *Forty-nine Casks of Brandy* (3 Hagg., at p. 275) relating to Spithead and the Solent Sea and *Reg. v. Bruce* (Leach's Crown Cases, 1092) (Milford Haven). In another set of cases, the decision was based either upon a statutory recognition of a particular bay as within the territory or an international recognition of the fact. Both grounds were relied on by the Judicial Committee in *Direct United States Cable Company v. Anglo-American Telegraph Company* (1877, 36 L. T. Rep. 265; 2 App. Cas. 394) where the question was as to the territorial dominion over Conception Bay in Newfoundland. In *Mortensen v. Peters* (14 Scots Law Times Reports, 227) and summarised in vol. 1 of Oppenheimer) which related to Moray Firth, there was a statutory order. In *Norval v. McFee* (5 Supreme Court. Canada, 66) which related to the Bay of Chaleurs, there was a statute. I believe we are left, as counsel told me, with the passage from Lord Hale, and *Cunningham's* case (1859, Bell's Crown Cases, 72), and the discussion, but not the decision, in the *Conception Bay* case.

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The passage in Lord Hale, it must be remembered, is concerned with the boundaries of counties. He shared with Lord Selden, Sir Leoline Jenkins, in this court, and others of the seventeenth century, and of earlier times, a view as to the King's dominion over the seas which has long since been abandoned or at most contracted to the limit of three miles. To one who held that the whole of St. George's Channel was in the King's dominions, it would never have occurred to doubt that the same was true of the whole of the Bristol Channel. Lord Blackburn points out (2 App. Cas., at p. 416) that: "The question as to where the boundary of counties ends, and the exclusive jurisdiction at common law of the Court of Admiralty begins is not precisely the same question as that under consideration" in the *Conception Bay* case. In *Reg. v. Keyn* (sup.), Cockburn, C.J. says: "The law of England knows but of one territory—that which is within the body of a county." I should have supposed that the Bristol Channel either was or was not part of the King's territory before even the Welsh counties were created. At any rate it seems to me that the question of jurisdiction must depend upon whether the place in question is within the territory of England (including therein Wales). If it is it may follow that it is in a county. No doubt, if it is in a county, it is within the territory. What Lord Hale says in his treatise, *De Jure Maris et Brachiorum Ejusdem* (Hargreaves Law Tracts, 1, c. iv., p. 10), is: "That arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore is, or at least may be, within the body of a county and therefore within the jurisdiction of the sheriff or coroner." Lord Blackburn (10 App. Cas., at p. 417) cites Lord Coke and Lord Hale and the passage from Fitzherbert cited by them and says: "Neither of these great authorities had occasion to apply this doctrine to any particular place, nor to define what was meant by seeing or discerning." I would add, do they mean see from the beach or from a cliff and what degree of visibility is assumed in the atmosphere? There can be no doubt that on a clear day you can see Worms Head from Bull Point and from Ilfracombe. There remained *Cunningham's* case, and the discussion in the *Conception Bay* case. In *Cunningham's* case the question was whether a crime committed on board an American ship in Penarth Roads was committed within the county of Glamorgan, and it was held that it was; and it was said that "the whole of this inland sea between the counties of Glamorgan and Somerset is to be considered as within the counties by the shores of which its several parts are respectively bounded." The facts are summarised by Lord Blackburn in *Direct United States Cable Company v. Anglo-American Telegraph Company*, at pp. 417 and 418. I will quote them when I have stated the comparative distances in the *Conception Bay* case and in this case. *Conception*

Bay is described at p. 416; it is in depth forty miles from one headland and fifty miles from the other—the average width is fifteen miles—the width between the two headlands rather more than twenty miles. The width of the Bristol Channel at various points is as follows: I give the distances in sea miles, and they are approximately correct. Lavernock Point to Brean Down about seven and a half miles (this is below the place in question in *Cunningham's* case where the width is greater), Nash Point to Hurlestone Point about ten miles; Nash Point and the western limit of Somerset about twelve miles. Passing into Devon but still keeping in Glamorgan, Nash Point and the Foreland, about twelve and a half miles; Porthcawl and the Foreland, about fourteen miles; Mumbles and Highwear Point, about twenty miles; Oxwich Head and Ilfracombe, about twenty miles; Bull Point to Port Eynon Head, just over twenty miles; Bull Point to Worms Head, about twenty-three miles; Hartland Point to Worms Head, about thirty-three miles; Hartland Point to St. Goven's Head in Pembrokeshire, about thirty-seven and a half miles. I may add that ninety miles from Penarth Roads, a distance referred to in *Cunningham's* case, cuts a line drawn from the extreme west of Pembrokeshire to a point well down the coast of Cornwall, and not, as Lord Blackburn seems to say, a line from the west of Pembrokeshire to Hartland Point.

Lord Blackburn, delivering the judgment of the Judicial Committee, says this: "The Bristol Channel, it is to be remembered, is an arm of the sea dividing England from Wales. Into the upper end of this arm of the sea the River Severn flows. Then the arm of the sea lies between Somersetshire and Glamorganshire, and afterwards between Devonshire and the counties of Glamorgan, Carmarthen, and Pembrokeshire. It widens as it descends, and between Port Eynon Head, the lowest point of Glamorganshire, and the opposite shore of Devon it is wider than *Conception Bay*; between Hartland Point, in Devonshire, and Pembrokeshire it is much wider. The case reserved was carefully prepared. It describes the spot where the crime was committed as being in the Bristol Channel, between the Glamorganshire and Somersetshire coasts, and about ten miles or more from that of Somerset. It negatived the spot being in the River Severn, the mouth of which, it is stated, was proved to be at King's Road, higher up the Channel, and was to be taken as the finding of the jury. It also showed that the spot in question was outside Penarth Head, and could not therefore be treated as within the smaller bay formed by Penarth Road and Lavernock Point. And it set out what evidence was given to prove that the spot had been treated as part of the county of Glamorgan, and the question was stated to be whether the prisoners were properly convicted of an offence within the county of Glamorgan.

The case was much considered, being twice argued, and Cockburn, C.J. delivered judgment,

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saying: "The only question with which it becomes necessary for us to deal is whether the part of the sea on which the vessel was at the time when the offence was committed, forms part of the body of the county of Glamorgan, and we are of opinion that it does. The sea in question is part of the Bristol Channel, both shores of which form part of England and Wales, of the county of Somerset on the one side and the county of Glamorgan on the other. We are of opinion that looking at the local situation of this sea it must be taken to belong to the counties respectively by the shores of which it is bounded; and the fact of the Holms between which and the shore of the county of Glamorgan the place in question is situated, having always been treated as part of the parish of Cardiff, and as part of the county of Glamorgan, is a strong illustration of the principle on which we proceed, namely, that the whole of this inland sea between the counties of Somerset and Glamorgan, is to be considered as within the counties by the shores of which its several parts are respectively bounded. We are therefore of opinion that the place in question is within the body of the county of Glamorgan." The case reserved in *Cunningham's* case incidentally states that it was about ninety miles from Penarth Roads "where the crime was committed" to the mouth of the Channel, which points to the headlands in Pembroke and Hartland Point in Devonshire, as being the *faucēs* of that arm of the sea. It was not, however, necessary for the decision of *Cunningham's* case to determine what was the entrance of the Bristol Channel, further than that it was below the place where the crime was committed, and though the language used in the judgment is such as to show that the impression of the court was that at least the whole of that part of the Channel between the counties of Somerset and Glamorgan was within those counties perhaps that was not determined. But this much was determined, that a place in the sea, out of any river, and where the sea was more than ten miles wide, was within the county of Glamorgan, and consequently, in every sense of the words within the territory of Great Britain. It also shows that usage and the manner in which that portion of the sea had been treated as being part of the county was material, and this was clearly Lord Hale's opinion, as he says, not that a bay is part of the county, but only that it may be." Lord Blackburn continues: "Passing from the common law of England to the general law of nations, as indicated by the text-writers on international jurisprudence, we find a universal agreement that harbours, estuaries, and bays landlocked belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is a 'bay' for this purpose. It seems generally agreed that where the configuration and dimensions of the bay are such as to show that the nation occupying the adjoining coasts also occupies the bay it is

part of the territory; and with this idea most of the writers on the subject refer to defensibility from the shore as the test of occupation; some suggesting therefore a width of one cannon shot from shore to shore, or three miles; some a cannon shot from each shore, or six miles; some an arbitrary distance of ten miles. All of these are rules which, if adopted, would exclude Conception Bay from the territory of Newfoundland, but also would have excluded from the territory of Great Britain that part of the Bristol Channel which in *Reg. v. Cunningham (sup.)* was decided to be in the county of Glamorgan. On the other hand, the diplomatists of the United States in 1793 claimed a territorial jurisdiction over much more extensive bays, and Chancellor Kent, in his Commentaries, though by no means giving the weight of his authority to this claim, gives some reasons for not considering it altogether unreasonable. "It does not appear to their Lordships that jurists and text-writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the State possessing the adjoining coasts; and it has never, that they can find, been made the ground of any judicial determination."

As were the opinions of jurists and text-writers in 1877, so are they now. There is no agreement. There is perhaps a tendency in recent years to regard ten miles as the minimum width at which internal waters should begin. But this is mainly based on a number of conventions chiefly relating to fishing, wherein by international agreement ten miles has been taken as the limit. Hall, 8th edit., p. 196 says: "In the North Atlantic Coast Fisheries Arbitration 1910, The Hague Tribunal rejected the argument of the United States of America that the alleged three-mile limit was, as a rule of international law, applicable to bays, and that a bay ceased to be territorial if it exceeded six miles *inter fauces terræ* . . . But having regard to the fact that Great Britain had adopted in several treaties the rule that only bays ten miles in width should be considered as those reserved for fishing by nationals the tribunal, while recognising that these circumstances were insufficient to constitute this a principle of international law, recommended for the acceptance of the disputants the rule that in every bay which was the subject-matter of the case, and for which the award made no specific provision, the limits of exclusion should be drawn three miles seaward from a straight line across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles." The award from which this is taken is printed in the American Journal of International Law for 1910 at p. 977 *et seq.* The award made specific provision for a number of bays "where the configuration of the coast and the local climatic conditions are such that foreign fishermen when within the geographic headlands might reasonably and *bonā fide* believe themselves on the

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high seas." These bays so specifically defined include Chaleurs Bay and Miramichi Bay where the line drawn is much more than ten miles long. Sir Cecil Hurst in an article on the Territoriality of Bays in the British Year Book of International Law thus states the rule of international law to be deduced from the North Sea Fisheries Convention 1882: "The belt of territorial waters is measured from a line which in general is the line of low-water mark. When this line reaches a port, it will pass across from point to point of the outermost works forming the port. When the line reaches a bay it will pass across from shore to shore. A bay for this purpose means a defined inlet, penetrating into the land, moderate in size and with both shores subject to the same sovereign. An inlet at the mouth of which one can see clearly from shore to shore may be presumed to have been appropriated as part of the national territory and will, therefore, constitute a bay; for working purposes this distance may be taken as ten miles and the line will then pass from headland to headland. In the case of a larger inlet it lies on the territorial State to establish that it has been appropriated as part of the national territory. When this is proved, the line from which the territorial waters are measured will not pass from headland to headland but will cross the inlet at the spot where it first narrows to such an extent as to be obviously a bay; in practice this may be taken as the place where it first narrows to ten miles. All the waters lying inwards from this base line are national waters and form part of the national territory. They stand in all respects on precisely the same footing as the national territory. Waters within the three-mile limit to seaward of this base line are territorial waters." Ten miles is based on art. 2 of the North Sea Fisheries Convention 1882: "Such right of fishing within three miles from low-water mark." As regards bays the distance of three miles shall be measured from a straight line drawn across the bay in the part nearest the entrance at the first part where the width does not exceed ten miles. In territorial waters foreign States are entitled, to the extent recognised by international law, to the exercise of the right of passage. In national waters, there is no such right. There is, however, apart from conventions, no authority for fixing the limit at ten miles. The Institute of International Law has recommended a limit not of ten miles but of twelve miles unless established usage has sanctioned a greater breadth (Oppenheimer, vol. 3 (1920), p. 343). The result is that international law and lawyers are no more agreed now than they were in 1877, and to which Lord Blackburn referred. I return to the common law with a regret that the Judicial Committee was not obliged to decide the point in the *Conception Bay* case. My guide is *Cunningham's* case. What did the court mean by "the whole of this inland sea between the counties of Somerset and Glamorgan." The place in question was, it is true above Lavernock Point, but the words used do not limit the inland sea to parts above Lavernock Point.

And if the waters above Lavernock Point are *inter fauces terre*, I see no reason why the same is not true of the waters above a line drawn from Nash Point to the Foreland or the waters above a line drawn from Bull Point to Port Eynon Head. For the purposes of this case I need go no further.

I have had to decide this case on common law alone. The only statute suggested as affecting the Bristol Channel was a pilotage Act. But a provision that a ship entering a port must take a pilot at such and such a place does not, in my view, throw any light on the question whether that place is within the territory of the State which owns the port.

The result is that I hold that the tort was committed within the jurisdiction, and the court has power to order service of notice of the writ out of the jurisdiction.

The second question is whether the court ought to give leave. No doubt the discretion ought to be exercised with care and so as not to be oppressive to the foreigner. See *The Hagen* (11 Asp. Mar. Law Cas. 66; 98 L. T. Rep. 891; (1908) P. 189). There is probably no greater inconvenience, so far as witnesses go, in trying here than in Italy. If the *Fagernes* had remained afloat and put into a port of refuge there, a writ *in rem* would have compelled a trial here. No doubt it is of the very greatest importance to the defendants that the plaintiffs should be left to an action in Italy. If the *Fagernes* was to blame it will make all the difference between a liability limited by English law to 8*l.* per ton and a liability limited by Italian law to the ship which lies in some eighteen fathoms of water. But I should be pushing a tender regard for the defendants to an extreme limit if on that account I refused to allow the plaintiffs to bring them before this court. I must exercise my discretion. Therefore I dismiss the motion to set aside the order in this case, with costs.

Solicitors for the plaintiffs, *Godfrey Warr and Co.*, agents for *Batesons and Co.*, Liverpool.

Solicitors for the defendants, *Stokes and Stokes*.

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House of Lords.

April 20, 22, 23, and July 8, 1926.

(Before Lords DUNEDIN, SUMNER, PHILLIMORE, CARSON, and BLANESBURGH.)

THE PALUDINA. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision — Consequential damage — Second collision—Whether a consequence of the first—Proof.

Vessels *A.*, *B.*, and *C.* were moored inside a harbour. *A.* broke from her moorings and came into collision with *B.* In trying to get clear of *B.* with the assistance of a tug, *A.* fouled the anchor cables of *B.*, thereby releasing her from her moorings and causing her to collide with *C.*, whose moorings were also cut as the result of the collision. *B.* and *C.* then got up steam in order to proceed into positions of safety, but *C.*, not having enough steam to get clear, was struck by *B.* with the result that she sank.

Held (by Lords Sumner, Carson, and Blanesburgh; Lords Dunedin and Phillimore dissenting), that the conduct of *C.* in relation to the second collision with *B.* constituted a novus actus interveniens, and that *A.*, not having directly caused the injury was not liable for the loss of *C.* by reason of her second collision with *B.*

Decision of the Court of Appeal (132 L. T. Rep. 724; (1925) P. 40; 16 Asp. Mar. Law Cas. 453) affirmed.

Per Lord Sumner: The proposition laid down in *Adams v. Lancashire and Yorkshire Railway* (20 L. T. Rep., at p. 851; L. Rep. 4 P. C., at p. 742) that if a person is put by the negligence of another party in a situation of alternative danger, that is to say, that he will be in danger by remaining still and in danger if he attempts to escape, then, if he attempts to escape, any injury that he may sustain in so doing is a consequence of the other party's negligence, refers to personal danger; it has not been extended to danger to property.

APPEAL from the decision of the Court of Appeal (Banks, Scrutton and Atkin, L.JJ.) (reported 16 Asp. Mar. Law Cas. 453; 132 L. T. Rep. 724; (1925) P. 40), in an action for damage by collision.

The plaintiffs were the owners of the steamship *Singleton Abbey*, 2324 tons gross, and 1429 tons net register, 303ft. in length and the defendants were the owners of the steamship *Paludina*, 5818 tons gross and 341 tons net register, 425 feet in length.

The vessels, the *Paludina*, the *Singleton Abbey* and the *Sara* were moored side by side in Valetta harbour. The *Paludina* broke from her moorings; in doing so she fouled the anchor cables of the *Singleton Abbey*, and finally collided with and sank the *Sara*.

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

The facts appear fully from Lord Dunedin's opinion.

The Court of Appeal held, reversing the decision of Sir Henry Duke, P., that there was no presumption of law or fact that any damage arising to a ship subsequent to a collision must be deemed to be the result of that collision, unless the defendant proved the contrary; the observations in *The Mellona* (1847, 3 W. Rob. 7, 13) and *The Pensher* (1857, Swa. 211), in which the contrary was suggested by Dr. Lushington, must be taken to be confined to cases where the damage that followed the collision was of such a kind, and followed so immediately—e.g., stranding—that unless it was proved that there was some other cause, it was to be assumed that the damage was directly caused by the negligence. In the result the court held that the *Singleton Abbey* was liable for the loss of the *Sara*. The owners of the *Singleton Abbey* appealed.

Sir John Simon, K.C., Dunlop, K.C., and Lewis Noad for the appellants.

Butler Aspinall, K.C., Stephens, K.C., and Langton, K.C. for the respondents, the owners of the *Paludina*.

The House took time for consideration.

LORD DUNEDIN.—There is only one question in this appeal, but in order to make that question intelligible it is necessary to tell the story of the circumstances antecedent to the incident which raises the question. As to these preliminary circumstances there were at one time controversies, but these controversies have been quieted by the decision in which the learned President and the Court of Appeal have agreed. The question that remains is alone the point of difference.

On the evening of 21st Nov. 1922 the following vessels took up their position on the quay in the harbour of Valetta, Malta. Their sterns were secured by moorings attached to bollards on the quay; their stems were secured by anchors. Beginning from left to right as a person standing on the quay would see them, they were: the *Paludina*, the respondents' steamship; the *Singleton Abbey*, the appellants', the *Sara*, and then other vessels which do not come into the story. During the night the wind freshened and became very strong—not exactly what by seamen would be called a gale but causing a commotion of waves and what is termed a "scend" in the harbour. The direction of the wind was such as would blow the vessels, supposing them to be free, along the quay and on to a lee shore. At 8 a.m. something went wrong with the moorings of the *Paludina*. Her anchors dragged and her moorings to the stern paid out, and she fell with her starboard beam on the port beam of the *Singleton Abbey*. The effect of the actual collision was not serious; the *Singleton Abbey* had been securely moored, and she was able not only to maintain her own position but to support the weight of the *Paludina* leaning against her. At 11 a.m., or

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thereby, the *Paludina* was minded to get out. For that purpose she secured the services of two tugs and got up steam to proceed to go forward. Unfortunately she and the tugs between them made a very bad job of the proceeding; one of the tugs fouled her own propeller with a rope and probably became inefficient; at any rate, the result was that the *Paludina* scraped along the port side of the *Singleton Abbey* without doing much damage, and then getting past her stern trod on the ropes which secured the *Singleton Abbey* to her anchors, shortened them and tore the *Singleton Abbey* away from her shore moorings. The *Paludina* then lumbered out of the way, but remained immediately in proximity to the *Singleton Abbey*, and did not finally get off for some time, in the course of her eventual progress fouling another ship. The effect of the tearing away of the shore moorings of the *Singleton Abbey* was that she fell down on her next neighbour, the *Sara*. The *Sara* was a small boat, and the impact of the *Singleton Abbey* tore her from her moorings. The actual collision did not do much damage. About twenty minutes passed, and then the *Sara*, which had got up steam and was struggling to get out, fell down from her anchors alongside the *Singleton Abbey*. The *Singleton Abbey* all this time was using her engines to prevent herself being driven on the lee shore. The *Sara* scraped along her side, and as she passed came into contact with the propeller of the *Singleton Abbey*, damaging it by breaking off the points. The propeller avenged itself, for it cut such a hole in the *Sara* that she shortly thereafter sank.

The present action was raised by the *Singleton Abbey* against the *Paludina*. The *Paludina* made several defences, such as that the *Singleton Abbey*, having come in after her, had given her a foul berth, and also by denying that she had committed any fault in herself breaking away. All these defences were repelled by the learned President, and the Court of Appeal agreed with him. It is therefore no longer in dispute that the *Paludina* was in fault in breaking away from her moorings and causing the first collision with the *Singleton Abbey*, that she was also in fault in treading on the moorings of the *Singleton Abbey* and tearing her from her shore moorings and sending her down on the *Sara*, thus causing the second collision. The whole trouble is as to the third collision and the damage to the crew.

The learned President held this was the direct consequence of the act of the *Paludina* and held her liable. The Court of Appeal disagreed and held that that collision was not due to the original fault of the *Paludina* but was due to a *novus actus interveniens*. This is the question, and the only question, before your Lordships.

Banks, L.J. states the question very clearly and distinctly: "Here the case for the plaintiff is this, the chain of causation is quite complete. The *Singleton Abbey* and the *Sara* were both turned adrift by the negligence of those in charge of the *Paludina*. There is no *novus actus interveniens*; the chain is quite complete, and, therefore, the view taken by the President

is right. The suggestion for the defendants upon the evidence given by the plaintiffs, is this: On your own showing there are two links wanting, and the links are these. True, the *Sara* was turned adrift by the negligence of the *Paludina*, our vessel, but, being turned adrift she was a free agent. That the inference to be drawn from the evidence is that her steam was up and she could have gone to any part of the harbour she liked, and have been quite safe, and altogether out of the way of the *Singleton Abbey*, and you cannot say that the chain of causation is complete when you find the *Sara* having this opportunity which, through a want of proper skill and proper seamanship, she did not avail herself of. That, I understand, is the case of the appellants with regard to the *Sara*. Then they say: There is another link in the chain missing, and the missing link is to be found—or the place where the link ought to be but is missing from—is found in the action of the master of the *Singleton Abbey*; because, again, after this interval he was in the position which I have indicated, and he had steam up; he saw, and had an opportunity for twenty minutes of realising, the position in which the *Sara* was. He realised that the *Sara* was coming down upon him; he was told by the second officer that the engines ought to be stopped. I had better use his own words about it; he was very frank about it. He was asked this question in cross-examination: 'The suggestion is made, as I understand it, that you ought to have stopped your engines, or rung them to stop, before you did, so as to avoid hitting the *Sara* with your propeller—what do you say with regard to that?—A. Well, I had to keep my engines going as long as I could because I did not want the wind to take control of my ship. I wanted to have that in my own hands if I could, so I was going to hang on as long as I could. When I thought she was getting dangerously near I stopped the engines, but it apparently must have been a little too late.' That is his own version of what happened. "The appellants say that upon that there is a clear break in this chain. They say: The damage of which you complain, was not the result of the original negligence of our vessel, it was due to your captain's own fault. The respondents answer that by saying: It ought not to be attributed to him as a fault; he was in a position of danger; it was a position in which you had placed him, and it ought not to be attributed to him as a fault or as an act of negligence, and, under those circumstances, the chain is complete. Now, on both these points upon which it is said the chain is not complete, of course the matter is one very largely of the right and proper thing to do under the particular circumstances; and that is a matter upon which we should naturally take the advice of our assessors. I have asked them the question as to whether, assuming that the *Sara* had steam up—and I assume that for the purposes of the question—were those in charge of the *Sara* guilty of a want of reasonable care and good seamanship

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in not keeping the *Sara* clear of the *Singleton Abbey*? They give a reasoned answer, and the result of their reasoning is that they say 'No' to that. So whether the issue is upon the plaintiffs or the defendants is immaterial. It seems to me that the suggested break in the chain does not exist."

That is perfectly distinct, and Scrutton, L.J. as to this agrees with him. It is true that Atkin, L.J. scarcely takes the same view. He states that he cannot see why the *Sara* should have come into contact with the propeller blades of the *Singleton Abbey* at all. It seems to me that it is absolutely necessary to make up one's mind as to the first question before one considers the second, and one's mind must be made up yea or nay; it cannot be left as a question in abeyance. Now, I take it that the reason why the President, Bankes and Scrutton, L.J.J., and both sets of assessors agreed that the action of the *Sara* was not *novus actus interveniens* was this: she was set adrift by the wrongful action of the *Paludina*, who knocked the *Singleton Abbey* against her. The argument for the *Sara* was that she was after that a free agent, but that is not so. She was free in the sense of being unmoored, but she was still struggling to extricate herself from the position—a very dangerous one—in which the *Paludina* had put her, and as soon as you come to the conclusion, as all these learned persons did, that there was no fault on the part of the *Sara* in doing as she did, the result is inevitably that the chain of causation from the original fault remains unbroken.

Having fixed that, and, as I say, being bound to fix it yea or nay, immediately we come to the last question. Here I quote again from Bankes, L.J., and Scrutton, L.J., with doubts, and Atkin, L.J., without doubts, agree with him. The assessors also agree with the learned Lords Justices: "The other question is one, again, upon which we asked their opinion. It was this: Under the circumstances in which he was placed, was the master of the *Singleton Abbey* guilty of a want of reasonable care and good seamanship in not stopping his engines in time to prevent the damage by the *Sara* striking the propeller? And their answer is Yes. After having heard the arguments of Mr. Dunlop and Mr. Noad upon the point, in that opinion, so far as I am able to give an opinion, I entirely concur."

As regards the assessors, who in this matter differed from the assessors of the President, your Lordships have agreed with me that it was not a question for assessors at all, and consequently we did not consult our assessors on the subject. My Lords, it seems to me that once you have fixed that the action of the *Sara* in coming down on the *Singleton Abbey* was not due to fault of her own but was therefore necessarily the sequel of the original wrongful action of the *Paludina*, the question which arises on the action of the *Singleton Abbey* is rather shifted from the domain of *novus actus interveniens* to that of contributory negligence. It is just the same as if the *Paludina*

herself had come down along the side of the *Singleton Abbey*. Now here there is ample authority. I will take one of the latest and most authoritative, the judgment of Lord Birkenhead, L.C., in *The Admiralty Commissioners v. Owners of Steamship Volute; The Volute* (15 Asp. Mar. Law Cas. 530; 126 L. T. Rep. 425; (1922) 1 A. C. 129). In 15 Asp. Mar. Law Cas., at p. 535; 126 L. T. Rep., at p. 429; (1922) 1 A. C., at p. 136, the learned Lord says this: "At the other end of the chain A.'s negligence makes the collision so threatening that though by the appropriate measure B. could avoid it, B. has not really time to think, and by mistake takes the wrong measure. B. is not held guilty of any negligence and A. wholly fails."

Here, if I am right so far, the position of danger occasioned by the *Sara* coming down by the side of the *Singleton Abbey* has been directly occasioned by the *Paludina*. Is it to be held a fault on the part of the *Singleton Abbey* that the captain did not stop his engines five seconds sooner? I do not think we should so hold. I think he was put in a position of extraordinary difficulty; he acted for the best. I should like to add that even supposing he had stopped his engines, doubtless the injury to the *Sara* would have been less grievous—that damage is not in question in this case—yet the end of his propeller, especially if it was a four-blade propeller, would probably have been injured all the same. That, however, is only a remark. As it is, I think the master of the *Singleton Abbey* committed no fault, and consequently I agree with the result reached by the learned President, and think that the appeal should be allowed.

LORD SUMNER.—In order to succeed as to the fourth collision—i.e., the second with the *Sara* when she was holed by the revolving propeller of the *Singleton Abbey*—the plaintiffs must prove that the *Paludina's* negligence was the cause of it. The injury must have been caused directly, though not necessarily solely, by that negligence. If the *Paludina* merely created the occasion, upon which this injury was inflicted, they fail.

I take the clear and candid evidence of the master of the *Singleton Abbey*. He says, in effect, that he miscalculated by a few seconds the time when the *Sara* moving along his ship's side and in contact with it would be drawn under his counter by the revolutions of his propeller, and that he kept it revolving those few seconds too long. He clearly means, and he is right, that, if he had signalled his engines to stop that much earlier, the accident would not have happened. There would have been no contact or at any rate no injurious contact of the *Sara* with his screw. Neither would any misfortune have happened to his own ship.

The situation was one of some difficulty, in the sense that it required nice judgment, prompt decision, and rapid action, but it was in no way analogous to what is called the "agony of the collision"—that is, of the first three collisions

or any of them—it was in no way analogous to cases where, as the direct result of a collision with one vessel, a ship is forced into contact with another or has perforce to let herself drive into such contact. The situation was in no respect uncommon; the weather was not such as to tie a captain's hands, and he was at his post, in broad daylight, with steam up and in charge of an undamaged ship. He could do as he chose and he did so, none the less that he had to decide and act quickly. If ever a captain was a free agent, Captain Hughes was. If it is to be said that he was not, it must simply be because the presence and actions of neighbouring ships had set him a nice problem to solve. If so, few ships moving in harbours are ever free agents.

The *Paludina* is not liable for mere negligence, but only for negligence causing damage. The *Singleton Abbey* herself is the cause of the damage she has suffered, not merely if her captain's action brought it about negligently. She will be the cause of that damage, if her captain, freely and as the direct consequence of his own decision, brought it about at all. This aspect of the matter does not seem to have been called to the attention of the learned President, such was the complexity of the whole case, and so subordinate was this particular collision. Now that it is the only remaining matter in issue, the question becomes crucial.

Two answers have been attempted to this obvious proposition. It is said, first of all, that the captain's action, though free and voluntary, was not the sole cause of this collision, because the *Singleton Abbey* was then dragging her anchors. It is said that they were dragging because the negligence of the *Paludina*, some twenty minutes before, had loosened them in the ground or torn them from their hold, and that accordingly the *Singleton Abbey* was *pro tanto* a crippled ship, which could only be kept from further disaster by such handling as was possible to her in that condition, namely, by steady use of her engines. If this were so, *The City of Lincoln* (6 Asp. Mar. Law Cas. 475; 62 L. T. Rep. 49; 15 Prob. Div. 15) would apply. In that case the captain, it is true, steered his own course, as every navigator must, but he steered it wrong because his means of observation, the log, &c., had been carried away in the collision. The hand of the original wrongdoer was still heavy on his ship and his own navigation was not the sole human agency determining her fortunes. But for this the decision must have been otherwise: (see also *British Columbia Electric Railway Company v. Loach* (113 L. T. Rep. 946; (1916) A. C. 719).

I ask, then, have the plaintiffs made out that the *Paludina's* negligence was still operating, as a legal cause of injury, when Captain Hughes made his miscalculation, or, in other words, was it proved that the anchors of the *Singleton Abbey* were dragging then? I think this has not been proved. We hear of this dragging of her anchors at the time, when the *Paludina* fell down on the *Singleton Abbey's* cable and

also burst her moorings, but Captain Hughes describes the satisfactory position into which his ship had got before the *Sara* subsequently bore down upon him, in language which is quite inconsistent with the anchors dragging then. Naturally, lying as near to a shoaling shore as he did and in such a wind as there was, with his stern moorings gone and with other vessels in like difficulties near him, he kept using his engines as required to keep control, but, as he says, "I was all right, once I got her head to wind—quite satisfied then." The subsequent action of the *Sara* forced him to port and brought him nearer to the shore and with the wind more on his broadside. He then had to put his engines full ahead to try to get up to windward again, but all this and all his account of it is inconsistent with his anchors continuing to drag still, or causing him any apprehension or compelling him to any particular action. I do not mean that Captain Hughes was negligent, but that he miscalculated his action. Still his action was his own. No part of it was a "natural" consequence of the *Paludina's* action, except in a sense that would make negligence on his part also a "natural" consequence. His action was wilful, and, though rapid, was deliberate. The *Paludina's* negligence did not make him take it. Cause and consequence in such a matter do not depend on the question, whether the first action, which intervenes, is excusable or not, but on the question whether it is new and independent or not.

With the greatest respect I am not able to accept either the proposition, that the *Paludina* put the *Singleton Abbey* in such a position of alternative danger, that her captain's "not unnatural" action does not break the chain of causation between the *Paludina's* bad management and the *Singleton Abbey's* revolving propeller, or the proposition that "when a man by his wrongful act has caused impending damage to the property of another and that other can only save himself by passing on the injury to a third, this third person can recover his damage from the original wrongdoer."

As to the first, "alternative danger," as used in *Adams v. Lancashire and Yorkshire Railway Company* (20 L. T. Rep. 850; 1 L. Rep. 4 C. P. 739), refers to personal danger. It has not been extended to danger to property. Adams's case was one in which it was held that no situation of alternative personal danger had arisen and that expression referred to *Scott v. Shepherd* (3 Wilson, 403) and *Jones v. Boyce* (1 Stark. 493), cases where, in a situation of imminent peril caused by the wilful or negligent act of the defendants, the plaintiff has taken instant action on the first alarm. Jones was presented of a sudden with the choice "to jump or not to jump"—he chose automatically and without reflection. *Scott v. Shepherd* (*sup.*) was the same. I cannot but think that, if it had been suggested to Captain Hughes that he acted like Mr. Jones, his repudiation would have been emphatic. If anything put him in danger, it was the action

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of the *Sara*, taken not because she was a helpless instrument in the *Paludina's* careless hands, but because she got up her anchor before she had enough steam on her main engines.

The relevancy of the second proposition would arise, if the *Sara* sued the *Paludina* for the damage by the *Singleton Abbey's* propeller, which sank her, but it leaves untouched the question whether the *Sara* might not equally recover from the *Singleton Abbey*, nor does it solve the problem how the *Singleton Abbey* can recover from the *Paludina* for injury to her own propeller, which her captain, and not the *Paludina's*, kept revolving a little too long. The case of *Collins v. The Middle Level Commissioners* (20 L. T. Rep. 442; L. Rep. 4 C. P. 279) I have long doubted and should, when it becomes material, desire to reconsider with much care. The report shows that it was a somewhat summary decision. It is at any rate difficult to reconcile with *Whalley v. Lancashire and Yorkshire Railway Company* (50 L. T. Rep. 472; 13 Q. B. Div. 131), nor do I think that the principle of *Greyvensteyn v. Haltingh and others* (104 L. T. Rep. 360; (1911) A. C. 355) can be applied to support it, but it may be that it can be justified by treating the commissioners' flood-water as a cause of danger, operating by their negligence simultaneously and concurrently with the action of the parties who turned it off their own land on to that of Collins, in which case the commissioners would not escape liability for their continuing wrong merely because third parties had given a particular direction to the dangerous element which they had let loose and had kept unrestrained in the neighbourhood. In any case it is remote from the present issue.

The second answer connects the action of the *Singleton Abbey* with the *Paludina* by way of the compelling effect which the negligent action of the *Paludina* is supposed to have had upon the behaviour of the *Sara*. It puts the innocence or fault of the *Sara* in the forefront. It first asks "was the action of the *Sara novus actus interveniens*?" And having answered this in the negative, it goes on to the action of the *Singleton Abbey*, and asks: "Was that action contributory negligence?" In this view, if the *Sara* was not to blame, it is said to follow inevitably that the chain of causation from the *Paludina's* original fault to the *Sara's* contact with the *Singleton Abbey* remains unbroken. Her action was necessarily the signal of the original wrongful action of the *Paludina*, and the *Singleton Abbey*, finding herself suddenly in a difficult place, cannot be convicted of contributory negligence. Her captain committed no fault and, if he committed none, all the fault must be the *Paludina's*.

In view of these considerations it becomes necessary to come to a decision as to the *Sara*, but the true issue is "Aye or no, has the *Singleton Abbey* proved the *Sara* to have been free from blame, and therefore a mere link in the chain of causation between the *Paludina's* blunder at 11 a.m. and the error in judgment of the captain of the *Singleton Abbey* at 11.20?"

The evidence is practically all given by Capt. Hughes, and in any view of the matter he certainly does not prove that the *Sara* was free from blame. Obviously he thought that she was in fault, though he spoke of her ironically, and there is much to be said for that view. The *Sara* first of all cut her stern moorings; then she steamed up to her bow anchors; then she got them out of the ground, and then she went astern. What for? If she had steam on her main engines, why did she not steam ahead, as soon as her anchor was up, and get out of the *Singleton Abbey's* neighbourhood? If she had not steam on her main engines, why did she get her anchors out of the ground and so go adrift at all? In spite of the *Paludina* and her sins, the *Sara*, as long as she let her bow anchors alone, was safely riding on the starboard bow of the *Singleton Abbey*, and the *Singleton Abbey* was safely anchored clear of the *Sara* relieving any strain on her own anchors by suitable engine action. Capt. Hughes was not in any extraordinary difficulty; he could see all the risks to which he was exposed; he had time enough, though short, in which to decide, and without saying he was to blame, he was, on his own showing, just a little too sanguine. There was nothing merely instinctive about his action. It was deliberate and it was almost right.

I certainly cannot say that the *Singleton Abbey* proved the *Sara* to have been free from blame; or to have been a mere instrument in the hands of the *Paludina*, and this conclusion prevents me from finding for the *Singleton Abbey* on the second view. Accordingly, I think the appeal fails.

LORD PHILLIMORE. — I agree with Lord Dunedin who has spoken before me that the *Sara* cannot be deemed to have been negligent in the matter of the fourth collision in this case, and that the judgment of the learned President (confirmed as it was on this point by the judgment of the Court of Appeal) should stand.

I agree also that in respect of the charge of negligence against the master of the *Singleton Abbey*, the judgment of the President was right, and that the Court of Appeal was too severe in finding negligence on his part. I find support for this conclusion in the case of *The Bywell Castle* (4 Asp. Mar. Law Cas. 207; 41 L. T. Rep. 747; 4 Prob. Div. 219).

As the learned Lords Justices based their judgment in favour of the *Paludina* upon this finding of negligence, it might seem that there was nothing further to be said, and that their judgment must be reversed forthwith.

But in my view there is still a serious question to be considered. The act of the master of the *Singleton Abbey* in keeping his engines going as the *Sara* was passing down his side, and keeping them going a little too long so that the propeller was still moving when the *Sara* got under his counter, was an act of volition—not automatic, reflex, or without consciousness of what he was doing. And it is a nice question whether this interposition of human agency

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breaks the chain of causation which connects the original wrongdoing of the *Paludina* with this fourth collision, or as may be otherwise expressed the second and last collision with the *Sara*.

I address myself, therefore, to this point. In the case of a tort or quasi-delict, the wrongdoer is certainly liable for damages not directly produced by his own act but supervening in direct and natural consequence.

Since this case was heard, I have looked into a number of the reported authorities and have also perused the speeches of the noble and learned Lords who sat in the case of *Weld-Blundell v. Stevens* (123 L. T. Rep. 593; (1920) A. C. 956), and I do not think it necessary to re-state many of the conclusions to which those cases point. Two propositions and two only should, I think, govern our present decision.

(a) If the action which brings the injury for which the damage is sought to be recovered is human action, either of the injured person himself or of some third person, this *novus actus interveniens* will break the chain of causation unless (b) the act of the original wrongdoer has put the injured person, or it may be a third party, into such a situation of alternative danger, that it is uncertain whether it would be better for him to act or not to act. His not unnatural action in such circumstances does not break the chain of causation.

As Lord Ellenborough says in the case of *Jones v. Boyce* (sup.): "It is sufficient if he was placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap or to remain at certain peril"; and as Montague Smith, J. says in *Adams v. Lancashire and Yorkshire Railway Company* (sup.): "If the negligence of a railway company puts a passenger in a situation of alternative danger, that is to say, if he will be in danger by remaining still and in danger if he attempts to escape, then, if he attempts to escape, any injury he may sustain in so doing is a consequence of the company's neglect."

In *The City of Lincoln* (sup.) the master of a ship seriously injured by a collision and reasonably and properly making for the Thames, being deprived of the ordinary helps to navigation, made a mistake in his course and ran the ship aground, and it was held by the Court of Appeal that this grounding might be deemed a natural consequence of the collision or, as it is sometimes expressed a direct and natural consequence. It is true that Lord Esher, M.R. in that case expressed himself as not intending to carry the principle so far, but if the details of the case be looked into, it would be seen that he only arrived at his conclusion of fact by accepting this very principle.

Lindley, L.J., in the same case, says: "We have then to consider what is the meaning of 'the ordinary course of things.' Counsel has asked us to exclude from it all human conduct. I can do nothing of the kind. I take it that reasonable human conduct is part of the ordinary course of things. So far as I can see my

way to any definite proposition I should say that the ordinary course of things does not exclude all human conduct, but includes at least the reasonable conduct of those who have sustained the damage, and who are seeking to save further loss." Then he, too, quotes *Jones v. Boyce* (sup.).

And Lopes, L.J. thinks he has done enough when he has decided that there was no want of skill on the part of those on board the injured ship.

The second proposition (b) is that where a man by wrongful act has caused damage or impending damage either to the person or to the property of another, and that other can only save himself or his property by passing on the injury to a third, this third person can recover his damage from the original wrongdoer. *Scott v. Shepherd* (sup.) is the case of danger to person, and *Collins v. The Middle Level Commissioners* (sup.) is a case of danger to property.

Applying these principles to the present case, it would seem that the master of the *Singleton Abbey* took the action which is now complained of, or which is now said to break the chain of causation, when he was in a situation of alternative danger, and that he took a reasonable though as it happened in the end an unfortunate step, and that if he thereby injured his propeller and damaged his neighbour the *Sara*, he did so in a legitimate attempt to transfer the risk from his own ship to another.

After all, I cannot put the point more simply than by saying that I ask myself whether it was a natural thing for the master of the *Singleton Abbey* to do to keep his engines going; and as I think it was, and that the *Sara* was not negligent, the consequence was a natural consequence of the first mismanagement of the *Paludina*. Therefore, I think that the conclusion which the Court of Appeal arrived at was wrong, and that the judgment of the President should be restored.

Lord CARSON (read by Lord Blanesburgh).—I agree with Lord Dunedin that in considering the question as to whether the third collision which led to the sinking of the *Sara* was due to the original fault of the *Paludina* or to a *novus actus interveniens*, one must first make up one's mind as to whether the *Sara* in doing what she did, was, or was not, guilty of any fault upon her part. Upon this point, Atkin, L.J. puts the case very clearly. He says, "Here are two ships set loose in harbour by the admitted negligence of the defendants, but twenty minutes afterwards one of the ships comes into collision with the other ship and the mere collision itself practically causes hardly any damage at all. The material question is whether on the second contact, it was the result of the collision that the *Sara* was sunk by coming into contact with the moving propeller of the *Singleton Abbey*. In this case I am bound to say that, speaking for myself, I can see no evidence, first of all, that the collision caused the *Sara* to drop down upon the *Singleton Abbey*. Indeed, I think that that

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is the result of the learned President's finding, so far as I can see, because he says he has consulted the Elder Brethren and they tell him that in the state of things he has described they cannot say the *Sara* was to blame for this collision, but they cannot tell him why it probably was the *Sara* was not able to avoid the propeller blades of the *Singleton Abbey*." I cannot agree with the noble Viscount that there was no fault on the part of the *Sara* in doing as she did and that the chain of causation for the original fault remains unbroken. As Lord Sumner points out, the evidence on this point is practically all given by Captain Hughes, the master of the *Singleton Abbey*, and shortly amounts to this, that if she had made proper use of her steam power she ought not to have fallen down upon the *Singleton Abbey*, as after the first impact with the *Sara*, when she shifted ahead, she was clear of the *Singleton Abbey* for fully a quarter of an hour. I may add that no evidence was called for the *Sara*, and I find it impossible to come to the conclusion, as Lord Sumner has said, "that the *Singleton Abbey* proved the *Sara* to be free from blame or to have been a mere instrument in the hands of the *Paludina*, and I cannot therefore hold that the chain of causation for the original fault remains unbroken.

Under these circumstances I am of opinion that this appeal fails. I think, however, it is right that I should state that as regards the action of Captain Hughes in keeping his engines going and thereby causing the propellers to revolve for a few seconds too long, I am in agreement with the opinion expressed by Lord Dunedin.

LORD BLANESBURGH.—I am in entire agreement in this case with my noble and learned friend Lord Sumner, whose opinion I have had the advantage of reading and considering.

It may be that when he entered the witness box in this suit the influence of the proceedings at Malta between the *Sara* and the *Singleton Abbey*, in which the captain of the *Singleton Abbey* gave evidence, remained strong upon him. Whether so or not, however, it was here his task to prove, if he truthfully could, that the *Sara* was free from blame for her second collision with the *Singleton Abbey*. He made no effort to prove anything of the kind. His view of the conduct of the *Sara*, in relation to that collision, quite plainly was that it could not be rationally explained. Having the whole harbour to manœuvre in, she, twenty minutes after the first of the two collisions, raised her anchors, either without having steam up at all, or with steam up, having enough, not using it. If she had steam available—as either was or should have been the case—there was no reason why she should have fallen upon the *Singleton Abbey*. On this Captain Hughes is quite express, and, as to the conduct of the *Sara*, his is the only evidence adduced. In these circumstances, my Lords, so far from the *Singleton Abbey* proving that the *Sara* was free from blame in relation to this second collision, and the damage to

the *Singleton Abbey* resulting therefrom, all the *Singleton Abbey* has succeeded in suggesting, as my noble friend has so clearly shown, is that this damage is due to her own direct action in the working of her engines, coupled with the action or want of it on the part of the *Sara*, which, whether or not grossly negligent, was at any rate something for which the *Paludina* was in no way responsible, except in the sense that her original fault may have created the occasion.

As this clearly is not enough for the *Singleton Abbey* it follows that, in my judgment, this appeal of hers fails.

Appeal dismissed.

Solicitors for the appellants, *Downing, Middleton, and Lewis*, agents for *Downing and Handcock*, Cardiff.

Solicitors for the respondents, *Waltons and Co.*

April 26, 27, 29, 30, and July 20, 1926.

(Before LORDS DUNEDIN, SUMNER, PHILLIMORE, CARSON, and BLANESBURGH.)

OWNERS OF STEAMSHIP HONTESTROOM v. OWNERS OF STEAMSHIP SAGAPORACK; OWNERS OF STEAMSHIP HONTESTROOM v. OWNERS OF STEAMSHIP DURHAM CASTLE. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision—River Thames—"Vessel navigating against the tide"—Port of London River Bye-laws, r. 36—Whether Court of Appeal entitled to review the evidence so as to form their own opinion.

By rule 36 of the Port of London River Bye-laws 1914: "Every steam vessel navigating against the tide shall, on approaching points or sharp bends in the river, ease her speed and if necessary stop and wait before rounding so as to allow any vessel navigating with the tide to round and pass clear of her."

Held, that the application of the rule depended on the existence of a tide against which one could navigate, and that the expressions "navigating against the tide" and "navigating with the tide" referred to an actual tidal stream operative at the time and place sufficiently to differentiate for the purposes of practical navigation between with it and against it, and not only to the state of the tide, that is ebb or flow, which at that place or time should be expected, according to the published anticipations of the local time tables applicable.

A Court of Appeal will not overrule the decision of the court below on a question of fact in which the judge had the advantage of seeing the witnesses and observing their demeanour, except in cases of extreme and overwhelming

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

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pressure or in a case in which the trial judge proceeded on inferences which the Court of Appeal could draw as well as he could. It ought not to take the responsibility of reversing conclusions arrived at by the judge in the court below merely on the result of its own comparisons and criticisms of the witnesses and of its own view of the probabilities of the case.

Decision of the Court of Appeal reversed upon the facts (Lords Phillimore and Blanesburgh dissenting).

APPEAL from a decision of the Court of Appeal (Bankes, Scrutton, and Atkin, L.JJ.) in an action arising out of a collision between the Dutch steamship *Hontestroom* and the American steamship *Sagaporack*, and a subsequent collision between the *Sagaporack* and the English steamship *Durham Castle* in the River Thames on the 3rd Dec. 1924. Lord Merrivale, P. found that the collision was solely due to the negligence of those in charge of the *Sagaporack*. The Court of Appeal did not accept the findings of fact of the President and found that the *Hontestroom* was solely to blame for the collision. The owners of the *Hontestroom* appealed.

Sir John Simon, K.C., Daniel Stephens, K.C., and H. Stranger for the appellants.

Buller Aspinall, K.C., G. P. Langton, K.C., and B. B. Stenham for the first respondents, the owners of the *Sagaporack*.

Dunlop, K.C. and H. C. S. Dumas for the second respondents, the owners of the *Durham Castle*.

The House took time for consideration.

LORD SUMNER.—This collision took place in the Thames between the plaintiffs' steamer *Hontestroom*, outward bound and light, and the defendants' steamer *Sagaporack*, inward bound for Millwall Dock and laden, on a December evening after dark at a point fixed by the learned President as about 100ft. south of mid-channel, and agreed to have been slightly to the east of a line drawn between the lower entrance to the East India Dock Basin and Blackwall Point. The wind's direction was uncertain; its force was very light. The tide was neap and near high water.

The ships collided not far from end on. The *Hontestroom's* stem and port bow and the port bow of the *Sagaporack* came into contact and the latter vessel was cut into and went to starboard. The angle between them, as measured on an examination of the damage, was some 30 deg.; as marked in the witness box by the master of the *Hontestroom* it was considerably finer. The *Sagaporack* immediately afterwards came into violent contact with the starboard quarter of the *Durham Castle*, doing damage. Lord Merrivale, P., after a protracted trial, held the *Sagaporack* solely to blame. The Court of Appeal puts all the blame for both collisions on the *Hontestroom*. Hence these appeals by the *Hontestroom* and the *Sagaporack*

being respondent in the first and the *Durham Castle* in the second. If the *Hontestroom* is exonerated from blame both appeals succeed.

I think that the crucial matters in the case must be admitted to be the position and manœuvres of the two vessels during the short time between their first being visible to one another and the collision, and especially when somehow such a change took place at last as brought them together, instead of passing port to port. Their prior courses and speeds, whistle signals and helm and engine actions are no doubt questions which go to test the credit of the witnesses, but are otherwise only matters introductory to the crucial incidents which may possibly throw some light upon them. Accepting, as both parties now do, the position fixed for the collision, it is clear that one pilot or the other (if not both) starboarded at the wrong time, and too much; otherwise, the ships would not have come into collision.

The answers to the questions put on the one side and on the other make this the plain issue. The two Thames pilots, who were respectively in charge, must therefore between them have known quite well who it was that starboarded into the other. I will not say that it was a case of hard swearing, for I think that the crowded condition of the river at the moment may have led the *Sagaporack's* pilot to be rather confused, but in proportion as this relieves him from the imputation of false swearing it tends to discredit his navigation. There was on the other hand no particular reason why the *Hontestroom's* pilot should have been hustled. He admitted a certain amount of starboarding and explained it, I think, quite plausibly. If he is believed, this starboarding did not affect the collision. He also said that at the last moment the *Sagaporack* appeared to be acting under a port helm, as if trying to correct the consequences of her excessive starboarding, and this manœuvre appears to be an essential part of the *Hontestroom's* case, if the position in which the two ships came together is to be reconciled with her claim to be free from blame.

The learned President, after seeing both pilots, accepted the story of the *Hontestroom's*. Though he does not expressly say so, it is evident that he regarded the *Hontestroom's* pilot as an honest and a credible witness and, conversely, that he did not accept the story of the pilot of the *Sagaporack*, thinking that his memory could not be trusted. He also accepted the evidence of the *Hontestroom* that the *Sagaporack* was beginning to port back again, just before the collision occurred, and he did so in spite of the fact that the *Hontestroom's* preliminary act made no mention of this porting. I therefore think, for my own part, that the real issue in this case is, whether the Court of Appeal was justified in laying aside the learned President's view as to the relative credibility of the witnesses, and the conclusions of fact which he rested thereon, and in reviewing afresh the whole of the evidence, so as to form their own opinion

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without regard to these appreciations which he had formed.

The Court of Appeal was, of course, fully alive to the consideration that he had had the advantage of seeing the witnesses, and Bankes, L.J. says that the members of the court "hesitated" accordingly before arriving at a different conclusion, though he alone gives his ground for doing so in general terms. He says: "It is, put briefly, that the case is not one in which the learned judge selects one witness, and says 'here is a man who is not only honest but is entirely reliable on all points,' and then selects another, and says 'this man has not tried to tell the truth, or he is so inaccurate a witness that his evidence is of no importance.'" Now it is true that the learned President does not use these formulæ, but he speaks of the two pilots in a way which differs from them only in form. He says: "I have come back to the human factor, and I consider what is the extent to which I ought to accept the evidence on one side and on the other. . . . I have considered whether I ought to have been minded, as I was minded, to believe the pilot of the *Hontetroom*, and I have come to the conclusion that, believing him as I did when I heard him, I was warranted in believing him that he was proceeding at the speed which he states." He dwells on this pilot's frankness and honesty in another matter, and he nowhere gives as his reason for not accepting some of the details of his evidence, that he thought him in this respect an unsatisfactory witness. Contrast this with his observations on the evidence of the master of the *Sagaporack*, "if I could accept it at its face value," and "if there is anything which is clear upon the case with regard to the place of the collision," it is that it was not where this witness "insisted" that it was. He says again of the *Sagaporack*'s witnesses generally: "The real question is whether effective continuous port helm action was interposed after his (the *Hontetroom* pilot's) starboard helm action for the sailing barge. If effective continuous helm action was interposed, then the account given me by the *Sagaporack* is not the correct account, because what is required for their case is starboard helm action of a relatively violent kind, which threw the *Hontetroom* off her course. . . . I attended to the several witnesses and the conclusion at which I arrived, and of which I am convinced, is that, after the slight starboarding action for the sailing barge, the pilot of the *Hontetroom* did take steady and continuous port helm action for what, in the circumstances of the case, is a substantial period of time." It seems to me that the difference between what the learned President said and what Bankes, L.J. dwells on his not having said is only one of words.

The Lord Justice then goes on to say that there is a point, not touched by the learned President, which in his own opinion is the turning point in the case against the *Hontetroom*, and is what leads him to his conclusion that all the blame was hers. After setting out

her case at length he says: "The one significant fact about the story, to my mind, is that according to that story the collision could not have happened but for the porting of the American vessel within a vessel's length of the Dutch vessel, and that last act of porting, which alone made the collision possible, is no part of the pleaded case. Not only is it no part of the pleaded case, but it seems to me to come out of the evidence of the pilot and master almost incidentally, because, when the pilot is asked at question 156 what the cause of the collision was, he says the excessive speed of the *Sagaporack* navigating in the south of the channel and overstarboarding. Now it is quite true that later on, and also before he had mentioned, as it were incidentally, this last act of porting, when he was asked specifically by his own counsel the question what was the cause of the collision, he made no mention at all of this last act of porting and he gave an account, which read in conjunction with the rest of his evidence, appears to me to show that the collision was an impossible one."

This matter is doubly important. It is on it that the Lord Justice principally founds his own conclusion, and it is on the supposed failure of the learned President to pay attention to it that he largely relies as justifying him in reopening the whole controversy. It has also much impressed some of your Lordships and has been elaborated considerably beyond even the presentation of it, which I have quoted. I think the view is taken and concurred in, that the true effect of the judgment of the Court of Appeal is to say that evidence of a manœuvre not disclosed in the preliminary act is evidence which ought *ipso facto* to be disbelieved. It seems to me that such a summary mode of dealing with such evidence goes much too far.

In reality, this matter did not escape the notice of the President, for he refers to it as one which he regards as established by the evidence. In my judgment, for whatever it may be worth, he correctly appreciates its significance, which is not intrinsically considerable, in the sequence of the manœuvres of the two ships, and he was well warranted in passing it over without more discussion when once he had formed and expressed his conviction that the *Hontetroom*'s story of the cause of the collision was true.

Of course, the preliminary act of the *Hontetroom* ought to have mentioned that, at the last moment, the *Sagaporack* acted apparently under a port helm, but so late and so little that the collision was not averted. No one disputes this, nor can anyone fail to appreciate the risk of general discredit that this omission justly brought on her whole case. The evidence was, however, given by two witnesses who were in an excellent position for observation. It was admitted without objection. It was given, in its natural place in the story and without any leading, by the first witness, Smith, the pilot. His meaning

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was elucidated in cross-examination, and the subsequent cross-examination of the master made the point still clearer. The question is what was to be done with it.

It is quite impossible to my mind, that the President, whether he said much or little about it in his judgment, could have failed to appreciate the weight of the *Sagaporack's* criticisms on this evidence. He dwells on the length and fullness of the arguments with which counsel had assisted him, on the attention that he paid to them, and on his regret that time failed him to deal with those arguments in detail, and it may well be that he was constrained to leave much unsaid at the end which under other circumstances he would fully have elaborated. How could he fail to appreciate the weight of the contention, that witnesses, who spoke to a manœuvre, on which their preliminary act was silent, could not be trustworthy? Consider who the counsel were, who opposed the *Hontetroom*; consider how the witnesses had been cross-examined, obviously in the hope that they would improve upon their evidence till they had palpably overdone it. Could there be any issue more specially fit than this for the determination of a trial judge? If he thought this story was false, he must at once have said that the *Hontetroom's* witnesses were exceptionally brazen and that her whole claim to innocence was gone. Her case was that she was proceeding under continuous and effective port helm, when the *Sagaporack* starboarded into her from the N. and E. How then could the *Hontetroom* run into the *Sagaporack's* port bow? Only in one way. Deliberation must have satisfied the learned President that the *Hontetroom's* story of a last moment port helm action on the part of the *Sagaporack* was true, and if so, who could so well decide such an issue as the judge who alone had under his eye the men who told him this belated tale?

One must not overlook the difference in the procedure of the court of trial in an Admiralty case and of the Court of Appeal. If you begin by scrutinising the *Hontetroom's* story on the shorthand note after the case against her has been made not once but thrice, and if it then impresses you unfavourably, if thereafter you follow her up to her starboarding for the sailing barge with growing doubt, and if you come finally upon a manœuvre of the *Sagaporack*, which is requisite to save the *Hontetroom* from blame but is not to be found in her preliminary act, I can well understand that you would cry, "What need have we of further testimony? Let there be judgment for the defendant." But suppose the sequence is otherwise, as at the trial it was. Watching the witnesses in the box and not merely perusing the shorthand notes, listening to what they say without any previous preparation of an adverse kind, free from the prepossessions, which an opening by counsel occasions, a judge in the Admiralty Court watches the case as it is built up by the witnesses themselves. He reads their faces, not a shorthand note. He weighs their value as he goes along. Suppose, as the learned

President's judgment shows his own process to have been, that he forms the conviction that they are honest and accurate witnesses and, this conviction, being confirmed rather than the reverse by the *Sagaporack's* witnesses, he concludes that the starboarding for the barge formed no part of the collision, and that the *Hontetroom's* port helm action was "substantial, continuous and effective at the material time." In such a process why should he debate or doubt this ultimate incident in their story? Why should he make a mountain out of what, apart from the question of credibility, already settled in his mind, is really a molehill? Such late porting was likely enough. In fact, if it failed, it could do no harm; it might, peradventure, recall the effect of overstarboarding just enough to bring the ships once more port side to port side. If the *Hontetroom's* witnesses had been silent about it, I think it would properly have been inferred from the position in which the ships came into contact, when once the *Hontetroom's* version of her manœuvres had been accepted.

In addition to refusal to believe the evidence, two other suggested modes of getting rid of this point must be dealt with. One is to say that it was really given up; the other that it really never arose. When the *Sagaporack's* witnesses were called they denied that any porting at the last moment had taken place. It was put to them in chief, one by one, for denial as a statement made by the *Hontetroom's* witnesses, and one by one they gave that denial. They were then not cross-examined on it. I do not see why they should have been. The issue was by that time clear. One side affirmed and the other denied. To give further opportunity for a bare repetition of these denials would have been idle. To abstain from futile cross-examination was not an abandonment of the *Hontetroom's* affirmative case. Is Mr. Stephens to be supposed by taking this course to have admitted that his pilot and captain were false witnesses? He might as well have thrown up his brief. The suggestion seems to me impracticable. On the other hand, is his course to be construed as an indication confirmatory of the "casual introduction" above mentioned, a proof that this point about late porting never was seriously meant, never was "part of her official case," but simply vanished as casually as it had appeared? I do not think that experienced counsel hamper themselves by letting such an awkward issue arise for no purpose. I am sure that no one could suppose that Mr. Bateson would in any case allow it casually to disappear. It had to be met, and met in this way: "In spite of all that has been said about the defective state of the preliminary act, this fact is part of my case and is part of my witnesses' story. . . . If that story is believed as a whole, so will this part be, for it is consistent and is not improbable in itself." I am greatly encouraged in the view I take of this late porting incident, by the fact that, with all his unrivalled experience in the Admiralty Court, my noble and learned friend Lord Phillimore

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accepts it, gravely as he reprehends the omission to state it in the preliminary act.

Criticism is brought copiously to bear on the learned President's judgment, sometimes for omissions, sometimes for mistaken statements, as indications that he either did not depend for his decision on his personal estimate of individual witnesses or that he did so in such a confused way as to throw away his advantage as the trial judge. Bankes, L.J. says it is curious that the President did not refer to the evidence that the *Sagaporack* answered with one short blast the one short blast heard from the *Hontetroom*, when she was, according to her story, following the barge round. I think this is explained by what the President says about the practice of pilots in these Thames reaches of talking to one another on the whistle in order to indicate intended courses rather than present helm action. He thought it needless to go into detail. Scrutton, L.J., says that the President never found the position of the collision up and down river. There was no conflict about that at your Lordships' bar. It appeared to have been common ground, and I think it is reasonable to explain his silence by that fact and not by some remissness on his part. He is said to have been in error in supposing there was confirmation of the *Hontetroom's* story in the *Durham Castle's* evidence, which there was not, and inconsistent in paying compliments to the *Durham Castle's* captain and then not accepting as gospel all that he said. I do not quite know what the evidence from the *Durham Castle* is, which the President is supposed to have misunderstood. The evidence from the *Durham Castle* which he refers to, does support the *Hontetroom's* story as the President says. As to his complimentary reference to the captain of the *Durham Castle*, it is made in order to explain how his evidence has resolved the doubt at first felt with regard to the prudence of quitting the dock entrance just when the reach was so much occupied with other ships. It does not in any case set him up as the only honest witness in the case, or as an infallible observer, and between one honest witness and another honest witness the learned President himself was much the best judge. For a similar reason, I proposed to resist the temptation to examine the evidence of the *Hontetroom* in detail. It is true that the President does not, as it were, cross-examine these witnesses in his judgment or pick their evidence to pieces, but then Mr. Bateson had done all that for him. I cannot understand how it can be said that a critical examination first took place judicially in the Court of Appeal. It had all been through the President's mind, even if it did not come out again at his mouth. In truth, apart from the point that arises on rule 36, everything is really preliminary or else goes to credit till you get to the time, when the *Hontetroom* starboards for the sailing barge. She and the *Sagaporack* were then safe, but were approaching one another: a blunder followed and the real question is who blundered? The only object in going over this ground again

is to see if the *Hontetroom's* witnesses can be convicted of falsehood as to her action after they saw the barge and that operation is out of place, till it has been shown, that the President's own handling of this matter ought to be set aside.

What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to re-try the case on the shorthand note, including in such re-trial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute; Order LXVIII., r. 1. It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone. In *The Julia*; *Bland v. Ross* (14 Moore P.C., at p. 235) Lord Kingsdown says: "They, who require the Board under such circumstances to reverse a decision of the court below upon a point of this description, undertake a task of almost insuperable difficulty . . . We must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong." Wood, L.J., in *The Alice and the Princess Alice* (3 Mar. Law Cas. (O.S.) 180; L. Rep. 2 P. C., at pp. 248, 252), says: "The principle established by *The Julia* (sup.) is most singularly applicable. . . . We should require evidence that would be overpowering in its effect on our judgment with reference to the incredibility of the statements made." James, L.J. thus laid down the practice in *The Sir Robert Peel* (4 Asp. Mar. Law Cas. 321; 43 L. T. Rep. 364): "The court will not depart from the rule it has laid down, that it will not overrule the decision of the court below on a question of fact, in which the judge has had the advantage of seeing the witnesses and observing their demeanour, unless they find some governing fact, which, in relation to others, has created a wrong impression."

Again, in *The Transt* (3 Asp. Mar. Law Cas. 233; 34 L. T. Rep. 934; 1 Prob. Div. 287) the Court of Appeal, after referring to *The*

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Julia and *The Alice*, say that they would not be disposed to reverse, "except in cases of extreme and overwhelming pressure," but being of opinion that the trial judge (contrary to what is the fact here) did not proceed at all on manner or demeanour, but proceeded on inferences, which the Court of Appeal could draw as well as he could, they formed their own view of the facts and decided accordingly. I am not aware that this rule has ever been disowned and, if it has too often been neglected, still the current of authority on the subject runs all the other way.

This appeal illustrates in two ways the unsatisfactory results, which follow from disregard of this settled practice. On the question of seamanship the learned President finds the *Sagaporack* alone to blame; the Court of Appeal (Bankes, L.J., on one ground, Scrutton, L.J. on another, Atkin, L.J. generally) find the *Hontetroom* alone to blame. One of your Lordships finds that they were both to blame, and another is of opinion that the facts condemn the *Hontetroom* much more conclusively than the Court of Appeal did. On a further review of the facts, had that been possible, I do not see why other opinions should not have held the *Durham Castle* to blame, solely or jointly with one or other of the two first culprits. What else can you expect? These questions must always be very difficult, when the data can only be ascertained from evidence tainted by the frailty and fallibility of human nature, in the person of a pilot whose navigation is impugned. At least we should not make further difficulties for ourselves by assuming that the trial judge has not understood the case, if his views do not agree with our own, or by overruling his estimate of the witnesses on a paper review of their words, stripped of the material colour, which hesitation or promptitude, shiftiness or candour may well have given them. It is, of course, true that the trial judge may have been imposed upon, but I think it is more useful, that we should be on our guard against imposing on ourselves.

Again, a good deal of fun has been poked at what is called "Admiralty arithmetic," but the scoffer always has to fall back on the use of it himself. What else can he do? As tests of the credibility of a nautical tale these calculations are invaluable, but they cannot be infallible. They sometimes prove logically that there was no collision at all. In this present case, for example, I am quite unable to see what material is furnished by the evidence to enable anyone to vary the President's express finding of port helm action by the *Hontetroom* for a substantial time after she starboarded for the barge, which he obviously believed to have been effective action. The collision is there, and to explain it one may say that the *Hontetroom* had not time in which to correct her starboard helm. This, however, is pure hypothesis. We may review the whole case by conjectures of our own, but as all calculation rests on some assumed position, course, observation or speed, which itself has

to be taken from one witness or another, it is eventually not the arithmetic nor the conjecture, but the trial judge's impression that should prevail. The only alternative is boldly to ask oneself, which story is the more probable, and, speaking for myself, I am a poor hand at answering that kind of question.

For these reasons I do not propose to retry this case, nor do I think that the Court of Appeal should have done so. I particularly refrain, and for this reason only, from examining and criticising the judgment of Scrutton, L.J. in detail. The material questions to my mind are: (1) Does it appear from the President's judgment that he made full judicial use of the opportunity given him by hearing the *viva voce* evidence? (2) Was there evidence before him, affecting the relative credibility of the witnesses, which would make the exercise of his critical faculties in judging the demeanour of the witnesses a useful and necessary operation? (3) Is there any glaring improbability about the story accepted, sufficient in itself to constitute "a governing fact, which in relation to others has created a wrong impression," or any specific misunderstanding or disregard of a material fact, or any "extreme and overwhelming pressure," that has had the same effect?

I think that the passages I have already quoted justify the answer "No" to the first question. As to the second, there are, no doubt, the following facts, among others, which are prejudicial to the personal credit of the witnesses of the *Hontetroom*. Not only did they make the *Sagaporack* port at the last moment, without having caused this manœuvre to be mentioned in their preliminary act, but one of them—de Vries—whose proof was, by consent, put in as his evidence, did not mention the manœuvre at all. Furthermore, they denied having ever seen the *Sagaporack's* green light. As a matter of inference against her it is also said, that her engines were going astern for two to three minutes after she observed that the *Sagaporack* was starboarding towards her, and were making her begin to go astern almost immediately after passing the Ordnance Wharf. Accordingly, instead of running into a collision, she should with engines reversed have successfully backed out of it. Finally, a criticism is offered on the *Hontetroom's* log entry and her vice-consular declaration or protest as to this collision, the gist of which is apparently that they are expressed indefinitely of set purpose, so as to avoid committing her in writing to any precise account of what happened. As to this last point, it is fair to remember, that the practice as to keeping logs in greater or less detail varies between country and country and between ship and ship, and that the point was but little developed in cross-examination.

I could have dealt better with these matters, if they had been put to the witnesses in such a way as to elicit from them such explanation as they might have been able to give. They were not asked when it was that they first told this tale, or how it came about that the preliminary

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act was silent about it. I am not surprised that these questions were not asked. Obviously, before judgment was given, the preliminary act itself was the most effective way, in which to make the point, but, after a judgment setting up this evidence as credible, I think it is a strong thing to treat it as an impudent invention without having asked the witnesses about it. At the first stage the burden is on those who put forward the story. At the second, the onus has changed, and those who now impugn a case which the judge has believed, must suffer if they have not previously laid an adequate foundation for doing so. These witnesses are not the people who drew the preliminary Act, and some explanation may be possible consistently with their evidence being right. As for de Vries, he was at the wheel; his business was to steer, not to act as a look-out or to qualify himself for the witness box. We do not know, who took his proof or when, or what he would have said if this matter had been put to him. He may have seen, as his captain did that the *Sagaporack's* masthead lights were opening at the last moment under the action of her port helm. I cannot draw the inference that, because this proof was put in, the porting, which it did not mention, could not have been any part of the plaintiff's case at the trial, nor do I recollect that this contention was ever suggested at your Lordships' bar. As for the green light, it would have made things easier for the *Hontestroom's* witnesses, if they had seen it, and their denial of having seen it is—I should have thought—rather in favour of their credibility and candour. As it does not appear to be impossible that when the *Hontestroom's* engines were going astern and so tending to cant her head to starboard, over-starboarding by the *Sagaporack* followed by very late porting back again, might have brought about a collision, such as occurred, without her green light being ever actually shown; I say no more.

In the written opinion of one of your Lordships, which I have had the advantage of reading, the view above-mentioned is expressed that if the *Hontestroom's* engines really were astern from two to three minutes, this action would have kept her clear of the *Sagaporack* altogether. I have not been able to find that the pilot gave this precise time, but undoubtedly it is given in the proof of the chief engineer. I would not presume to set up any opinion of my own against that of any of your Lordships on any nautical point, for I never practised in collision cases and I have not taken my pleasures so sadly as to seek them on the sea, but I have always heard that it was not fair to hold a witness to an estimate of time measured by a few minutes and made on a ship moving in the dark. The learned President seems at any rate to have taken this view. If he had thought that the *Hontestroom* was bound by an expression such as this, he could not have concluded his account of her manœuvres, as he does. On such a point he was much the best judge, and I can only leave this matter, like sundry others, where he left them.

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There is then the effect on the credibility of the *Hontestroom's* witnesses, which results from the fact that the *Durham Castle's* witnesses gave evidence, which is in conflict with that of the *Hontestroom's*. I have already explained what, as I think, the learned President was referring to when he paid Capt. Lang an undoubted compliment, but, whether he meant it to be limited or not, what is more important is to see how far this witness was accepted by the learned President. He was positive that the *Sagaporack* was "as near as anything" in mid-channel at the time of the collision. The learned President finds that she was 100 feet south of mid-channel, and this the respondents no longer dispute. The *Durham Castle*, whose captain made this mistake, was himself only 100 feet north of mid-channel at the time, and was in a good position to judge, but his judgment is not accepted. The difference is small, and in itself excusable, but I think it is enough to make an end of the contention that the learned President took Capt. Lang to be an exceptionally accurate witness. There is nothing here to make him in Lord Merrivale's eyes either a starting point for calculations, such as Scrutton, L.J. made, or a canon, by which to measure the veracity or the lack of it of the pilot of the *Hontestroom*. As for the conflict between Capt. Lang and the *Hontestroom* on the subject of the time when she first appeared on the scene, Capt. Lang did not observe her till he heard her give one short blast as she was rounding Blackwall Point and then she was on his starboard quarter. This merely means that he was properly occupied with what was in front of him. Till she had straightened up, the *Durham Castle* was not concerned with getting across the river to the south side or with ships proceeding along the Kentish shore. Her captain had had no occasion to look for the *Hontestroom*, but, when he noticed her sound signal, he looked and saw her. So far from accepting the speed he gives for her, viz., eight knots, the learned President expressly accepts that given by her pilot.

Against the accuracy of the *Sagaporack's* story, on the other hand, and the credit of her pilot and master, there are three things in particular to be noted. In the first place her pilot vowed that he never starboarded and that the collision took place north of mid-channel. The President found it was south of mid-channel and the *Sagaporack's* counsel now accepts this finding. In itself the difference between 100 feet north and 100 feet south of an invisible line at night time may not seem important, but the point is that the *Sagaporack* would not admit any starboarding at all, yet, without some starboarding, there is nothing that reasonably accounts for her getting over the mid-channel line.

Next comes the question of her speed as she came up Bugsby's Reach. The learned President puts it at little, if anything, short of seven knots. Her witnesses would own to no more than an engine speed of one and a half. Her "bell book" and her deck log were

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examined. As to the former, a very speculative insinuation was made that the entries had been tampered with. The learned President examined the book and could not see any signs of foul play; so did your Lordships and with no more result. The suggestion never ought to have been made, and still more clearly never should have been persisted in. A jury might have been tempted to turn this error in advocacy against the *Hontestroom* and to requite her accusation by accepting the *Sagaporack's* evidence. This, however, would not be judicial. The error is an error in the navigation of the *Hontestroom's* case, but the navigation of the *Sagaporack* depends on what she did or failed to do with her helm and engines. It stands or falls by the evidence, and is not set on its feet again by the dissipation of this particular charge.

Now, between the bell book on the one hand and the protest, evidence and deck log on the other, there is a marked discrepancy. The former was kept in the engine room by a lad who was not called. The deck log was entered up by the captain himself, who gave evidence. While the bell book entries indicate a very moderate speed at the material times before the collision, the master's entries taken with the protest and the evidence of himself and the pilot, fix a time and a place, from which to the place of collision the time occupied is only consistent with excessive speed at the material time. The act described was making two tugs fast ahead; the place is described in general terms in the protest as "on entering Woolwich Reach," and by the pilot as "halfway up Woolwich Reach," and more particularly, as about Spencer Chapman's wharf. Making every possible allowance for the indefiniteness of these descriptions of the place, the conclusion cannot be avoided that either this evidence is seriously wrong or the figure given for the ship's speed and the witnesses' credit suffers accordingly. No one was called from either tug, nor is this omission accounted for, yet these tugs accompanied the *Sagaporack* to the place of collision, and no doubt, on seeing that a collision was imminent, slipped their tow ropes and got out of the way. The tugmasters must have seen at close quarters the manœuvres of the two ships, which concerned them so nearly, and their evidence would have strongly corroborated the pilot of the *Sagaporack*, unless his story was beyond corroboration. I will add that, although the absence of these witnesses may not be a cardinal factor in the case, it was a usual and legitimate matter of observation throughout, and it is most unlikely that full use was not made of it at the trial. How it can be taken for a last resort of counsel, when other help failed him, I cannot conceive.

These chains of reasoning cannot be said to arise, unless the impressions which the learned President formed of the veracity of the two pilots are to be regarded as unimportant. This I cannot do. As to my third question above mentioned, I see no glaring improbability about the story which he accepted, nor indeed

any more than must attach to any controversial account of something which cannot have happened so as to comply with all the evidence and ought not to have happened at all. Accepting, as I think we must, the data which he ascertained for us under circumstances so much more favourable to a correct estimate than ours can be, I do not find in the inconsistencies, which no doubt can be pointed out here and there, sufficient ground on which to hold that in the manœuvres in question blame rests with the *Hontestroom*.

It is not just to the learned President to suppose that he could have failed to observe the significance of any of these matters, on which criticism is now founded. Under pressure of his other duties he was obliged to deliver his judgment orally and without further consideration, and in such circumstances imperfections in form and expression are inevitable, but his reiteration of the care, with which he had weighed the evidence and the arguments, would be insincere, if it did not mean, as I think it means, that among other things he had made full and careful use of his opportunity of judging the evidence by the light of the demeanour of those who gave it.

There remains a specific and totally independent point relating to rule 36 of the Port of London River Bye-laws. It raises two questions. The first is whether, as a matter of construction, the expressions in this rule "navigating against the tide" and "navigating with the tide," refer to an actual tidal stream, operating at the time and place sufficiently to differentiate for the purposes of practical navigation between with it and against it, or only to the state of the tide, that is ebb or flow, which at that place and time should be expected, according to the published anticipations of the local time tables applicable. In the latter case the rule applied to the *Hontestroom*, for on paper the tide was making and had not reached high water; in the former, the second question—what in fact was the strength of the tide there and then—has to be dealt with. The point is crucial, for it is surely plain that, if the *Hontestroom* was bound to comply with the rule and had fully done so, there would have been no collision, for she would have been waiting above the point well clear of the *Sagaporack* at the material time.

On the night in question the time of high water at London Bridge was 7.18 p.m. and, accordingly, when the *Hontestroom* approached Blackwall Point, high water time had not yet arrived by twenty minutes. Her case, however, is that on her side of the channel the actual movement of the water upstream was almost imperceptible and certainly negligible. Was she nevertheless bound to comply with art. 36? Counsel assured your Lordships that they had found no authority on this point, nor have I. The cases decided on this rule or on the older rule, art. 23, which contained the same words, are all cases, in which the tide had actual force affecting navigation, and it may be inferred that in practice no others were

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regarded as coming within the rule. I notice that in *Cayzer, Irvine, and Co. v. The Carron Company* (5 Asp. Mar. Law Cas. 371; 52 L. T. Rep. 361; 9 App. Cas. 873) Lord Blackburn at p. 879 and Lord Watson at p. 885, and again in *The Ovingdean Grange* (9 Asp. Mar. Law Cas. 295; 87 L. T. Rep. 15; (1902) P. 208) Collins, M.R., at p. 212, speaks of ships "coming up with the tide," "approaching with the tide" and "coming down against the tide," all of which expressions were pleonastic, if the true meaning of the words is coming up or down before the time of high water. Although all the Lords Justices considered that the *Hontetroom* had broken rule 36, I am not sure from their expressions that they all read the rule quite in the same way. Bankes, L.J. says "if the vessel is navigating against the tide, however slowly it may be running, that vessel comes within the rule," which seems to make the test "is there any tide which is running there at all?" Scrutton, L.J. puts it that vessels navigating against the tide shall, on approaching Blackwall Point, ease speed, and if necessary stop and wait. That," he adds, "seems to me to make the vessel coming against the tide the 'give way' ship." He does not, however, deal with the possibility of there being no tide there at all to navigate against. The object, or one object, may be to diminish the risk of two ships trying to pass the point at the same time, and to impose on one of them the duty of giving way. Still the rule is so worded as to introduce, as a conditioning factor, a tide with or against the ship, not a mere relation of the one ship to the other as in the sea rule. The give-way ship is one navigating against the tide, and she does not navigate against a tide, which is not there merely because there may be enough tide on the other side of the river to make another ship a vessel which is navigating with the tide. Nor does the rule say "navigating against the tide so as to involve risk of collision." Its application depends on the existence of a tide, against which one can navigate, and further adapts the action (if action there is to be) to the circumstances of the moment by distinguishing between obligatory easing of speed and stopping only if there is also necessity. One must, therefore, construe the rule as it stands. It is meant, no doubt, as a practical guide for seamen, to tell them their duty in circumstances to be observed from the bridge. It virtually states the reason for itself, namely, that the ship with a working tide with her has the right of way as against the ship coming the other way, because then the ship more likely to go large and less easy to control will be left free, and the other, with little way to take off, can be pulled up without delay or inconvenience, and leave her free water, in which to round the point. The give-way ship can then come on and if, on entering the tide stream from the slack on rounding the point, she takes a slight sheer, it will not matter. This is how I read it. The ship is navigating against the tide, not against the tide table. The pilot, instead of

having to keep one eye on the clock and the other on the tide table, can ascertain his duty by a glance from time to time over the ship's side. If there is, so to speak, a blind spot between the time when the tide runs up and the tide runs down, a period of really slack water, then at such time there is no need for any special regulation for navigating round the point, and the ordinary rule for ships meeting one another will suffice. One knows that in certain states of the wind, if they prevail for a considerable time together, the rise of the tide to high water may be substantially accelerated or retarded. If the rule were interpreted, so as to pay no regard to these occasions when navigation is in fact affected, it would be a rule confusing the conduct of ships rather than elucidating it.

Your Lordships having taken the opinion of your assessors on the question, were advised that even on the north side of the channel there would have been very little tide on the occasion in question, and on the south side, where the *Hontetroom* was, none at all. The Elder Brethren had already advised the learned President to the like effect. The configuration of this bend of the river appears to be a sufficient explanation of the differences in the conditions near the north and near the south bank. Under these circumstances I think the *Hontetroom* was not a vessel navigating against the tide and that rule 36 did not apply to her. No case has been made apart from this rule for holding her to blame for not waiting above the point till the *Sagaporack* had passed, for there was certainly room enough for both vessels to pass clear without difficulty port to port, if the *Sagaporack* had not misused her starboard helm. In my opinion the appeals should be allowed and the judgments of the learned President should be restored.

I am requested to say that my noble friends Lord Dunedin and Lord Carson agree with the opinion I have just read.

LORD PHILLIMORE.—I can state briefly my reasons for supporting the judgment of the Court of Appeal, in so far as it decides that the *Hontetroom* was to blame. When the *Hontetroom* was approaching Blackwall Point, the river just below the point was encumbered by shipping. There was the *Durham Castle*, which had come out of the East India Dock on the north side of the river and was preparing to go down river, having already got some distance from the N. shore but still being in the N. water and waiting for an opportunity to get across to the S. water.

There was the *Sagaporack*, a large vessel with two tugs, coming up the river, and there was a sailing barge which had come out from Bow Creek and was trying to work her way up river on the starboard tack, using a light breeze from a westerly direction and such upward drain of the flood tide as still existed, not of course making directly across the river, as then she would never have got up at all, but making an angle across and upward.

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In these circumstances the *Hontetroom* elected not to remain on her own side of the Point till some of these impediments had been cleared away and thought she had made sufficient compliance with No. 36 of the Thames rules by easing before she got to the Point and proceeding at slow speed thereafter.

Thereupon she got the green light of the sailing barge fine on her port bow, recognised that she could not go ahead of the barge, and having the choice between stopping till the barge had drawn across her bows or of altering her course and passing under the barge's stern, elected the latter.

For this purpose she starboarded her helm and starboarded at a period when if she were to keep her course down the river at an even distance from the S. bank she should have been under port helm.

The natural result of this was that she got away from the S. shore, not indeed into the N. water but to about 100ft. off mid-channel, and this notwithstanding that as soon as she had got the barge across her bows, she did her best to counteract her starboarding by the use of a port helm.

As it happened for reasons which I will mention later on, that at that moment the *Sagaporack* had gone into the S. water, the collision happened at a comparatively slight angle between the two headings.

Under the Thames Rule No. 36 a vessel proceeding against the tide and approaching a point in the river should ease her speed. That the *Hontetroom* did. She should also, if necessary stop and wait before rounding so as to allow any vessel navigating with the tide, which it was said the *Sagaporack* was doing, to pass clear. This the *Hontetroom* did not do, and the collision happened.

It is said that the rule did not apply because the water was nearly slack; and the assessors who advised your Lordships agree with the Trinity Masters in the Admiralty Division so far that upon this side of the river, which is the important side, the tide was almost slack.

Having been long familiar with this rule, I have thought that its object was to prevent the simultaneous passing of a point by vessels, one bound up and the other down, if such simultaneous passing be dangerous, and that the expressions in the rule about navigating against or with the tide, were only inserted because, to prevent this simultaneous passing, one has to give way and the other to come on, and it was obvious which should be the one to give way.

I have thought that the rule was intended to apply almost continuously during the twenty-four hours. There may be a few minutes between tides when it is not possible to say that one is going more with the tide or more against the tide than the other; but the time of uncertainty must take a very short space, and it is true as was observed by counsel in the course of the argument that the greater the force of the tide, the more danger there is that a vessel making it will be deflected as her

bow opens the point, and therefore the less the force of the tide, the less need for a rule.

In this case, I do not think that I am prevented by the opinion of the assessors from saying that there was still left sufficient tide (I agree with Lord Sumner that there must be some tide) to indicate which of the two vessels, one bound down and the other up, should, if there were necessity, wait for the other, and that the *Hontetroom* recognised this when she eased her speed, and that she was the one which, if it were necessary, had to stop and wait.

A witness in the course of the case tried to throw some ridicule upon the application of the rule by saying that if he accepted that application, he would never get down the river. There is, of course, no such meaning in the rule. Vessels may constantly pass each other at a point. If the curve is gradual, if the channel is wide, if it is not encumbered by any navigation except the two vessels which are meeting each other, if the vessels are not of great size, perhaps with any one of these conditions, there is no danger of collision. Each vessel can keep in her proper water, and there is no necessity to stop and wait.

But Blackwall Point is, as I know the river, the point where there is the sharpest turn, one approaching to a hairpin turn. The channel is not wide, and there is that which is the greatest danger of all, the crossing traffic coming out of the East India Docks or out of Bow Creek; and it was night.

The pilot of the *Hontetroom*, if he saw and appreciated the position of the *Durham Castle* and the approach of the *Sagaporack*, and if he did not see the light of the sailing barge, remembered that it was very likely that there would be a sailing barge there, took a serious responsibility when he came on.

But I do not invite your Lordships to find the *Hontetroom* to blame for this reason, because I do not think that it was the cause of the collision, though the facts of this case afford an excellent illustration of the value of the rule.

The cause of the collision, as far as the *Hontetroom* is concerned, was the starboarding for the barge instead of stopping to let it pass across. It is for this that I think the *Hontetroom* to blame.

It is said on her behalf that to hold this would be to reject the conclusions of the President, who saw and believed the pilot of the *Hontetroom*.

I accept the position in the river where the collision happened. I accept all the statements of the pilot as to his action with the engines, as to his action with his helm, as to the sequence of the lights which he saw; and I make no point against him on his statements as to the whistles which he heard and which he gave. Only I pack the orders more closely. I believe that when he starboarded for the barge, the *Sagaporack* was near him, and that he had not time to correct the starboard helm; and in this connection I would observe that it is agreed that the *Hontetroom* had not got

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down river as far as the barge when the collision happened. It was this starboarding with insufficient allowance for the difficulties of the approach of the *Sagaporack* for which I would hold the *Hontetroom* to blame, and in so doing I think that I follow the line of argument of Bankes, L.J., and I intend to be in full concurrence with Scrutton, L.J., who seems to have had the same picture of the scene before his mind that I have.

It is perhaps unfortunate that Bankes, L.J. should have rested so much of his decision upon the apparent untruthfulness of the story of the *Hontetroom*. I agree entirely with him—and so, I think, do your Lordships—that the collision could not have been brought about on the story of the *Hontetroom* without a final porting by the *Sagaporack*; while the angle of the blow can be easily accounted for on the story of the *Sagaporack*.

But this final porting, though it did not appear in any of the plaintiffs' documents (and here I specially dwell upon the "preliminary act") was spoken to by the witnesses and was not criticised as a complete change of story, and was accepted as a truthful statement by the President.

As I have said, I rest my judgment rather upon the admitted action of the *Hontetroom*, only believing that the critical act of starboarding took place when the vessels were nearer together than the *Hontetroom* says.

As regards the *Sagaporack*, I have more doubt. It was strongly urged that her speed was excessive. We have asked our assessors what would be an excessive speed for her, and on the answer which they gave, and the facts as they appear to me, and I think to all of your Lordships, her speed was not excessive. But her people overstated her case. They would have it that the collision occurred in the N. water. The President has found—and it is now accepted—that it was 100ft. south of mid-channel. Her pilot said that she never starboarded. This can hardly be correct. She was, it is true, still below the Point; but, apart from anything else, if she were to keep her place in the river, she would have begun to starboard slightly, and to reach a position 100ft. S. of mid-channel she must starboard somewhat more.

It was quite a natural and reasonable thing to do, so as to give the *Durham Castle* a fair berth, just as it was natural for the *Hontetroom* to starboard to go under the stern of the barge. But there was room for the *Sagaporack* to pass starboard to starboard with the *Durham Castle* without coming so much over to the south water. It may even be that she could have scraped through without crossing the mid-channel line; and, if so, she would not have hampered the *Hontetroom*, and the starboarding by the latter, which was being corrected, would have been corrected in time. Though I think the *Hontetroom* most to blame, I think that the *Sagaporack* was also to blame, and on the whole I should vary the judgment of the Court of Appeal in this respect.

LORD BLANESBURGH.—The outstanding questions discussed in this appeal have been three in number—the speed of the *Sagaporack*; the true course and speed of the *Hontetroom*; and the effect upon the position of that vessel of rule 36 of the Thames Regulations. On the first of these questions we have a finding of the learned President with which the Court of Appeal has disagreed; on the third, we have no finding by the learned President at all. The second, now the overshadowing issue in the dispute, was not conspicuous at the trial. It held there a relatively subordinate place. True, we have upon it a deliverance by the learned President; but it is summary in form, amounting as it does to a general acceptance of the greater part of the story of the *Hontetroom's* Thames pilot—an acceptance apparently induced so far at least as an important incident in the story is concerned by the belief entertained by the learned President—mistaken, as it now seems—that that part of the story had been corroborated in his evidence by the reliable pilot of the *Durham Castle*. The learned President does not further test the story of the *Hontetroom* by the evidence from the *Durham Castle*. It was only in the Court of Appeal that that story was for the first time judicially subjected to the acid test of ascertaining how far it was consistent with itself and in correspondence with other authenticated facts including those proved by the *Durham Castle* witnesses. The story, in the judgment of the Lords Justices, did not survive that test. They were unanimously of opinion that the *Hontetroom* was alone to blame for the collision. It is now for your Lordships to determine whether that conclusion was justified or not.

I have said so much, because I am concerned to emphasise that the House is not in the usual sense of the words dealing here with an appeal on questions of fact. Passing by the issue under the Thames Regulations, which is primarily one of construction, and not forgetting that your Lordships have undoubtedly to form an opinion upon the excess or otherwise of the American vessel's speed, a question of fact upon which the learned President has certainly pronounced, it remains true that the principal inquiry which the House has here to make is concerned with aspects of the questions at issue to which, as appears from the learned President's judgment, his mind was not directed and upon which he has not pronounced at all.

My main purpose in the observations which follow is, in the circumstances above stated, to deal faithfully with the case of the *Hontetroom*. I desire, however, in the first place, to say something about the speed of the *Sagaporack* and her position generally on the occasion in debate.

Upon this question of speed, counsel for the *Hontetroom* concentrated with intensity. An argument was on her behalf presented to the House which amounted to a circumstantial and sustained attack not only upon the credulity of the witnesses called by the *Sagaporack*, but,

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much more serious, an attack upon the genuineness of an important document put forward by him in support of his case.

I think it only fair to the *Sagaporack* and her witnesses to say at once that in my judgment that attack entirely failed. It is true that the view strongly taken by these witnesses as to the place of the collision was not accepted by the President. But it is also true that that same view was sworn to by the pilot, the third officer, and, above all, the captain of the *Durham Castle*, witnesses who retained the confidence of the learned judge to the last. I am accordingly not diverted from the conclusion to which by a close study of all the evidence both documentary and oral I am irresistibly led, that the whole case of the *Sagaporack*—mistaken as it must now be taken to have been on one point and highly coloured in expression as it may have been on others—was an honest case, confirmed in nearly every material particular not only by the witnesses from the *Durham Castle* but by a series of documents independently prepared on that vessel at the time.

And on the question of speed the evidence that that was well below a speed which your Lordships are advised was in the circumstances moderate is, I think overwhelming. The statement of the *Sagaporack's* pilot that his vessel was going slow and stop all the way from the Albert Dock is literally accurate, if the authority of the Bell Book, in the keeping of which the pilot had no part, is accepted; while in substance the statement is confirmed by all three witnesses from the *Durham Castle*. Indeed, on this issue, apart from a somewhat casual story from an uninterested bystander to which no importance has been attached in any quarter, the only evidence to the contrary—if evidence it can be termed—results from some Admiralty arithmetic of Mr. Stephens based upon a statement in the *Sagaporack's* log as to the times when her tugs were made fast to her. The reliability of Mr. Stephens' calculations may perhaps be gauged by the fact that they bring out a speed for the vessel of eleven knots—a result which the most convinced partisan of the *Hontetroom* has not ventured to endorse.

Learned counsel for the *Hontetroom* obviously felt this issue to be a very important one for them, as indeed it was. In view of the judgments of the Court of Appeal, Mr. Stephens' arithmetic was a prop scarcely substantial enough to support their case upon it. Hence the attack to which I have referred. The charge was that the evidence as to the leisurely movements of the *Sagaporack* adduced from that vessel was deliberately false. The *Sagaporack* had to enter Millwall Docks before the ebb tide set in there; she was much pressed for time; she could not afford to dawdle in her course; her evidence that she did was incredible. As it happens this reasoning is destroyed by the event. Notwithstanding the collision and the inevitable delay thereby occasioned, the *Sagaporack*, after a course

which from the Bell Book is indistinguishable in point of speed from that which preceded the collision, cleared the Millwall Docks, and was safely docked there at 7.55 p.m.

Even more complete was the failure of the attack upon the Bell Book. At the trial a faint suggestion had been made to the second engineer, who himself had dictated the entries that some from 6.30 to 6.31 had been rubbed. The suggestion was not accepted and counsel "took the book as it was." Before your Lordships the attack was renewed, but, so far as appearances were concerned, was concentrated on two entries at 6.9 and 6.14, where the pencil is blacker than it is elsewhere on the page. Complaint was made also that the man who kept the book had not been called to prove it. As to this last I can find no suggestion made at the trial that the book was suspect on that ground. Although he was said to be absent no demand for the presence of the man was made, and the officer who actually dictated the entries was, as I have said, a witness. And there this serious imputation was left for your Lordships to deal with.

It is not by such vague suggestions as these that a charge of such gravity is to be made good. Like the Court of Appeal, I refuse to entertain it. The only effect it has had upon my mind has been to lead me to scrutinise with greater care the case of those on whose behalf it was made. In the result I am of the same mind as the Court of Appeal on this question of the speed and position of the *Sagaporack*. It is, I think, established that the vessel was proceeding upstream on the occasion in question at a speed which did not exceed five knots, and may have been considerably less, and that in view of the congested state of the northern half of the river opposite the East India Dock, her position of 100 feet to the south of mid stream, as found by the President, was, even apart from any question of tide, not improper—and not more so because those on board of her neither believed that it was, nor intended that it should be, so far to the southward. In that position there was, the evidence shows, ample room for the *Hontetroom* to pass to the south, if, in the circumstances, she was justified in attempting to pass at all.

The *Sagaporack* was attended by two tugs prior to the collision, and it appears from her log that one of them at all events accompanied her to Millwall. Comment was made by the appellants at your Lordships' Bar that no witnesses from either tug were called at the trial. The weight to be attached to such a comment when, as apparently is the case here, it is made for the first time in this House, depends largely upon what one may call the course of the trial. And when I look at the transcript of the evidence, I find that Mr. Bateson, counsel for the *Sagaporack*, when examining his last witness, Mr. Agnew, intimated to the judge that he would not again take him through circumstances which had been so fully dealt with by his previous witnesses. No demur was made by the judge, and I can see no trace that any

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of the parties or that the judge himself treated the case of the *Sagaporack* as having been otherwise than adequately presented under circumstances of some pressure as to time. I regret as much as any of your Lordships can that there is in this case no evidence from any tug—there were apparently four in the neighbourhood at the time more or less interested in what was going on—but the absence of that evidence does not, as it seems to me, justify any adverse inference against the *Sagaporack*. It had not previously occurred to those who represented the *Hontestroom* at the trial and who were familiar with the atmosphere in which the case there was conducted.

I come now to the *Hontestroom's* case.

At almost every point it is in violent contradiction with the evidence from every other quarter—and notably with the evidence from the *Durham Castle* the credibility of whose witnesses was assumed by the President. Take as a commencement the circumstantial account given by the pilot of the *Hontestroom* as to her leisurely passage down the river to Ordnance Wharf and her stopping there until the *Durham Castle*, coming out of dock, had straightened in the stream.

If the evidence of the pilot and captain of the *Durham Castle* is to be accepted, all this story is pure invention. Dean, the pilot of the *Durham Castle*—upon his evidence it was that the President relied for supposed corroboration of a later part of the *Hontestroom's* story—who was keenly watching for any traffic both up and down stream in connection with the movement of his own vessel, swears positively that when the *Durham Castle* came out of dock, even when she straightened to the stream, the *Hontestroom* was nowhere in sight. Neither she nor her lights were seen at all until the *Durham Castle* had reached on her downward course the lower entrance to the East India Docks. Then it was that for the first time Dean saw the *Hontestroom*. He saw her at Ordnance Wharf on her way round Blackwall Point, on a port helm and at a high speed. And with only less circumstance Dean's story is also that of the *Durham Castle's* captain. And it receives support from an unlikely quarter—from the *Hontestroom* herself. It is not the least strange feature of her case, that of the four sets of double blasts which in the previous four minutes or so had been exchanged between the *Sagaporack* and the *Durham Castle*—only one is said to have been heard by the *Hontestroom*. That is easily understood if during the earlier signals he was not in the Reach at all—as pilot Dean asserts was the case.

But I proceed. Let the *Hontestroom's* passage after her alleged stoppage at the Ordnance Wharf commence as she says it did. She fixes its commencement by reference to the then position of the *Durham Castle*, straightened in the river for her passage down. The point of time can be fixed by the *Durham Castle* Bridge Note Book. It must have been, at the most, three minutes before the collision. If the *Durham Castle's* account of the matter be

correct, the *Hontestroom* was not at Ordnance Wharf until perhaps a minute or a minute and a half later. But it will be found useful to test her further movements on her own statement as to their commencement. How on her own account did she occupy these minutes?

Your Lordships recall her story as to her sighting the barge fine on her port bow 300 yards away; her two short blasts and her starboarding for the barge until she had her fine on the starboard bow, so that she was presumably in a position to pass the barge starboard to starboard. You recall her statement that she then ported her helm; blew one short blast to the barge. You remember how her helm is said to have continued apart right up to the collision; and how the learned President, treating the pilot of the *Durham Castle* as confirming him in that view, came to the conclusion that the *Hontestroom* after starboarding took continuous port helm action for what in the circumstances was a substantial period of time; until indeed, as I take it, she rectified the effect of her alleged starboarding for the barge by finding herself again in her proper place in the river.

I have already given the statement of the *Durham Castle's* pilot to which the learned President here presumably referred. I fear it does not supply the corroboration which he supposed. I propose, therefore, now to inquire how far this statement of the *Hontestroom* is congruous either with itself or with the other evidence in the case.

And first of all no one—neither the watchers on the *Durham Castle* nor the witnesses from the *Sagaporack*—heard any two blasts from the *Hontestroom* at the time she says she made them. These blasts rest exclusively on her own testimony. That at a much later stage by common agreement she gave two short blasts at a time when, as the *Durham Castle* says, she was really seeking to avoid the barge, is true. But why any such blasts at the time she says she made these first two blasts? Why any helm action at all for the barge at that moment? The learned President says he was struck by the honesty of the *Hontestroom's* pilot in admitting that if he had not starboarded for the barge there would have been no collision. But if his actual starboarding for the barge had been that to which he deposed, it could have had no influence on the collision. On his story, the starboarding took place at least four and a half minutes before the collision; he had after it reached his proper side and for from two to three minutes before the collision he was, as he says, reversing at full speed. Then as to the single blast, which again no one else heard. Why blow that to the barge at the time he says he did? If such a blast to the barge meant anything at all at that moment, it meant, if he was not to run her down, that he was going to pass her port to port, and that at a time when his purpose—the purpose which under his two-blast signal he had manœuvred to effect—was to pass her starboard to starboard. Of themselves

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these statements are difficult to accept; contradicted they must be rejected. But I continue. The *Hontestroom* having got on to a port helm continued, so she says, on that helm until the actual collision. Thus is raised the difficulty in which the *Hontestroom* remains involved to the end. How, if she continued on that tack, could her port bow have struck a starboarding *Sagaporack* on his port quarter? But of this later. To proceed. We now, according to her story, have the *Hontestroom* on her port helm proceeding slowly ahead. She sees the *Sagaporack*. She blows to her one short blast. The *Sagaporack*, after an interval, long or short—the *Hontestroom's* witnesses are not agreed on this—answers with two short blasts, and then, although the *Sagaporack* was, according to the story, half a mile away when the *Hontestroom* signalled to her, she sounds three short blasts, puts her engines full speed astern and so they remain—this is the truly remarkable part of the story—“for about two to three minutes” up to the collision.

There is no mistake about these two or three minutes. Not only do they emerge from the evidence of the pilot, but they are to be found in the proof of the chief engineers put in by counsel as a statement of what he would have said had he been called. The engines of the *Hontestroom* also, we are told, were in perfect order. See then what this means. First of all this interval exhausts nearly the whole of the time on the *Hontestroom's* own story available for the entire transit from Ordnance Wharf to the place of collision. Secondly, if this statement were even approximately true, not only would the *Hontestroom* at the moment of collision not have been advancing rapidly, as is the evidence both of the *Durham Castle* and the *Sagaporack*; she must by that time have been going astern, and rapidly, with no tide against her, for, amongst all the statements as to the tide at this place at this time, no one has said that it was an ebb tide half an hour before high water.

With all these difficulties in mind concerning the *Hontestroom's* story at this point, it is convenient to recall that by the concurrent testimony both of the *Durham Castle* and the *Sagaporack*, the *Hontestroom* blew one short blast—once only—and that one short blast, the *Sagaporack* treating it as a starboard signal to her, answered with one and not with two. The story of the *Hontestroom* at this stage, therefore, is not only, I suggest, again impossible, it is in direct conflict with all other available evidence.

But let us proceed. Continuing on a port helm with the *Sagaporack* approaching, the *Hontestroom* sounds—and all witnesses from both the other ships agree that she sounds—two short blasts. But why? For no intelligible reason, according to the *Hontestroom*, because both pilot and captain are eager to say that the signal was not followed by any helm action. But, according to the watchers on the *Durham Castle*, and to the witnesses on the *Sagaporack*,

these blasts were followed by helm action to avoid the barge, of whose presence the *Hontestroom*, coming on quickly, had then apparently for the first time become aware. According to the witnesses on the *Sagaporack* the signal was followed by an immediate alteration in her course of—to take it at the lowest statement—one to two points to starboard. And so the collision happened; and so it was that the *Hontestroom*, starboarding her helm and coming on, struck with her port bow the port quarter of the *Sagaporack* coming up stream, as in fact she did strike her.

And here is the *Hontestroom's* final difficulty. On the story as originally told by her, in her preliminary act, and in the statement of claim, the collision could not have happened as it did and it was also impossible that there had not been opened to her—her pilot continues to assert that he never saw it—the green light of the *Sagaporack*. In the course of the case, however, a suggestion was made in evidence, first by the pilot and next by the captain of the *Hontestroom*, that the *Sagaporack*, immediately before the collision, ported; and thus, so it is said, the collision is, on the *Hontestroom's* story, made possible. Even so, not entirely possible, for the assertion of the *Hontestroom* that the *Sagaporack* never exposed her green light is still maintained.

It is said, however, that the learned President has accepted the statements of these witnesses of the *Hontestroom*, to the effect that the *Sagaporack* did port immediately before the collision, and that the Court of Appeal (who did not believe that she did and who intimated very clearly that in any case, such an assertion made at such a stage, vital to the *Hontestroom's* case, inconsistent with other statements previously made or still adhered to and not pleaded, ought not to be entertained at all) acted without warrant in rejecting the evidence.

I agree with the Court of Appeal, but the case for the rejection of this evidence is, I think, much stronger than is stated by the Lords Justices.

First of all the fact is said to have been so found by the learned President. But in what connection? In the connection in which the incident was first presented to your Lordships by the appellants' counsel, namely, as a manœuvre by the *Sagaporack* to avoid the collision and was successful up to the point of lessening its effect. View the manœuvre from this point of view and no one is concerned to consider narrowly whether it took place or not. But see in it the touchstone of *Hontestroom's* case—a manœuvre which must be proved by her, if that case is to hold water at all—then how different. It is in that light that the manœuvre must be regarded. What then is the evidence to prove that it took place?

The only evidence to that effect is the almost casual statement of the pilot of the *Hontestroom* and the even more casual statement of the master—neither of them statements, I should think, that would displace, for a vital purpose, a pleaded case, and the more certainly not so

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in view of the fact that the inconsistent statement that the *Sagaporack's* green light was never opened is still adhered to.

But the matter does not rest there. The fact that the statements referred to were casual and treated as unimportant is demonstrated by this, that the *Hontetroom*, as in the case of her chief engineer, put in by consent the proof of one of her sailors, Gjaite de Vries, to be accepted as the evidence he would have given had he been in court to be called. That proof contains this passage: "The *Sagaporack* came on at high speed and when she was about a ship's length away from us, the barge then being a little on our starboard bow and about 100 feet away, the *Sagaporack* blew two short blasts again, and I saw she was rapidly paying off under a starboard helm. I then heard our pilot blow two short blasts on our whistle, but he gave me no orders to the helm and I kept the helm apart. At this time our vessel had very little way on her, if any. The *Sagaporack* continued on and struck us on our port bow and her port bow."

No porting here. Nor does the matter even remain there. Each of the three witnesses from the *Sagaporack* is subsequently asked whether there was any porting of his helm—the pilot; the master; the third officer, Mr. Agnew; the suggestion is categorically denied by each of them, and there is not addressed to anyone of the three by learned counsel for the *Hontetroom* a single word of cross-examination on the point.

It is doubtful at what stage of the proceedings the vital importance of this matter to the *Hontetroom* was first appreciated by her advisers; it was certainly never at the trial part of her official case and it was equally certainly, as I think, never proved. I cannot myself doubt that the views of the Court of Appeal on this matter were more than amply justified, and that here, too, the *Hontetroom's* story breaks down.

It would be prolonging a judgment already too long, to set against this case of the *Hontetroom* the clear and connected and consistent account of the two reliable observers—the captain and pilot of the *Durham Castle*—as to how this collision happened and by whose fault. It is set forth in the statement of claim of that vessel and in complete detail is deposed to in the evidence of these witnesses. It shows, if accepted as, after the examination I have made of the *Hontetroom's* case, it should I think be accepted, that the *Hontetroom*, as the Court of Appeal thought, is alone to blame for this collision.

It may be asked, how, if half of these observations be well founded, was it that the learned President decided this case as he did? I think the answer is not difficult. The learned President was, by the course of the trial, diverted from the duty of criticising narrowly the case of the *Hontetroom*. The overshadowing issue put before him, one of the "issues of fact decisive of the case," was the place of

collision. Did it take place to the north or south of the middle line of the stream? This was, to her own undoing, put forward by the *Sagaporack* as a decisive issue. So it would have been had she proved that the collision did take place in the northern half of the stream. That fact would, indeed, in the circumstances have been fatal to the *Hontetroom*. It was, however, not sufficiently appreciated at the trial as I think that while, if the collision took place to the north of the line, the *Hontetroom's* case was gone, if it took place 100ft. to the south of it, the case against the *Sagaporack* had hardly commenced. The critical examination of the *Hontetroom's* movements, superfluous on the first hypothesis, was vital on the second. But so far as appears it was never made. I cannot myself doubt that if the learned President had been led to contrast the story told by the pilot of the *Hontetroom*, not as he did with the story of the *Sagaporack's* pilot—no real contrast—but with that told by the master and pilot of the *Durham Castle* on which he placed such reliance, the learned President's good opinion of the *Hontetroom's* pilot, shaken even as it was by a proved inaccuracy, could not have survived.

I reach the same conclusion as the Court of Appeal without invoking the aid of rule 36. With the assistance of that rule the case against the *Hontetroom* is, in my opinion, so much the stronger, for I am in entire accord on that subject with my noble and learned friend, Lord Phillimore, whose judgment I have had the privilege of reading.

I conclude with two observations. It is an outstanding circumstance in this case that those on board the *Durham Castle*, eye-witnesses of all that happened before the collision between the *Sagaporack* and that vessel, should have been satisfied that the responsibility for it rested not upon the vessel which collided with the *Durham Castle* but upon the *Hontetroom*, which did not, and that the record of what happened made by those on board the *Sagaporack* and the *Durham Castle* at the time and independently should have been, in every material respect, in accord, and should have been borne out in evidence at the trial by witnesses who, so far at least as those from the *Durham Castle* were concerned, commanded the confidence of the learned President.

Contrast this with the record of the *Hontetroom*. There is from her no contemporaneous account at all of what happened. All that is forthcoming is a log entry composed after an interview with her owners' solicitors and in terms identical with the protest made at the same time, both documents being a travesty of the duty of disclosure laid on a vessel in such circumstances. There is no record of the case of the *Hontetroom* at any time before the preliminary act by which date the nature of the blow stood established by the survey made of both vessels; and that preliminary act, faced as it thus had to be by a port blow beyond controversy, succeeds only in being entirely inconsistent with itself.

At the conclusion of the arguments the inclination of my mind was that both vessels should here be held to blame.

The study which I have since made of the entire record has convinced me that the views of the Lords Justices are most fully justified; and while I necessarily express that opinion with diffidence in the face of the contrary view taken by some of your Lordships and by reason of my own comparative inexperience in such matters, still, for what it is worth, my conclusion is—and it is only due to the *Sagaporack* that, having reached it, I should express it—that the *Hontestroom* should alone be held to blame for both collisions, and that her two appeals should be dismissed.

Appeals allowed.

Solicitors for the appellants, *Downing, Middleton, and Lewis.*

Solicitors for the respondents, the owners of the steamship *Sagaporack*, *Godfrey, Warr, and Co.*

Solicitors for the respondents, the owners of the steamship *Durham Castle*, *Parker, Garrett, and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, July 14, 1926.

(Before BANKES, ATKIN and SARGANT, L.JJ.)
THE RUAPEHU. (a)

Limitation of Liability—Dock owner—Ship repairer also owner of dry dock—Damage caused to vessel whilst undergoing repair in dry dock by negligence in conduct of repairs—Right of repairer dock owner to limit liability—Merchant Shipping (Liability of Shipowners and others) Act 1900 (63 & 64 Vict. c. 32) s. 2.

The plaintiffs claimed to limit their liability in respect of damage sustained by the defendants' vessel whilst undergoing repairs in the plaintiffs' dry dock. The damage was caused by fire due to the negligence of the plaintiffs' servants whilst performing the repairs. The plaintiffs carried on business as ship repairers, and were also the owners of dry docks used in conjunction with their repairing business. By the Merchant Shipping (Liability of Shipowners and others) Act 1900 "the owners of any dock are not, where without their actual fault or privity any loss or damage is caused to any vessel or vessels, liable to damages beyond an aggregate amount not exceeding 8l. for each ton of the tonnage of the largest registered British ship which at the time of such loss or damage occurring,

was, or within the period of five years previous thereto had been within the area over which such dock owners exercise any power." The plaintiffs claimed to limit their liability in respect of the damage sustained by the defendants' vessel to a sum calculated upon the tonnage of the largest vessel which had been within the previous five years in their dry dock.

Held, reversing Hill, J., that the above section should not be read subject to a limitation in respect of the nature of the act done. The proper limitation was in respect of the area in which the act was done. Thus, notwithstanding that the negligent act of the plaintiffs had been done in their capacity as ship repairers, they were entitled to limit their liability, since the act was done within the area of their dock.

ACTION for limitation of liability.

The plaintiffs, Messrs. R. and H. Green and Silley Weir Limited claimed under sect. 2 of the Merchant Shipping (Liability of Shipowners and others) Act 1900 to limit their liability in respect of damage caused to the defendants' steamship *Ruapehu* by fire whilst the plaintiffs' were carrying out repairs to the *Ruapehu* in their dry dock at Blackwall in May 1923. The plaintiffs had been held liable for the damage sustained by the *Ruapehu*, but it was conceded that the damage was done without the actual fault or privity of the plaintiffs.

The plaintiffs claimed to limit their liability to the sum of 69,067l., being 8l. per ton of the tonnage of the largest vessel using their dry-dock in the preceding five years.

Sect. 2 of the Merchant Shipping (Liability of Shipowners and others) Act 1900, provides as follows:

(1) The owners of any dock or canal, or a harbour authority, or a conservancy authority, as defined by the Merchant Shipping Act, 1894, shall not, where without their actual fault or privity, any loss or damage is caused to any vessel or vessels . . . be liable to damages beyond an aggregate amount not exceeding eight pounds for each ton of the tonnage of the largest registered British ship which, at the time of such loss or damage occurring, is, or within the period of five years previous thereto has been, within the area over which such dock . . . owner . . . performs any duty or exercises any power.

(4) For the purpose of this section the term "dock" shall include wet docks and basins, tidal docks and basins, locks, cuts, entrances, dry docks, graving docks. . . .

Langton, K.C. and Carpmael appeared for the plaintiffs.

Jowitt, K.C. and Pilcher appeared for the defendants.

The action was heard on the 25th Feb., and on the 29th March

HILL, J. gave the following judgment: The plaintiffs have been held liable for damage by fire to the *Ruapehu*. The *Ruapehu* at the time

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law

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of the fire was within plaintiffs' dry dock. The plaintiffs' dry dock forms part of the plaintiffs' works at Blackwall. The *Ruapehu* was undergoing repairs. The fire was caused by the negligence of the plaintiffs' servants in and about the repair. The negligent servants were at work in the stokehold, and No. 3 hold of the *Ruapehu*. The fire broke out in No. 3 hold.

The plaintiffs claim that they are entitled to limit their liability by virtue of sect. 2 of the Merchant Shipping Act 1900. The plaintiffs, being owners of a dry dock, are "owners of a dock" within the meaning of the section. It was conceded at the hearing that the damage was caused without the actual fault or privity of the plaintiffs. The *Ruapehu* was at the time of the damage within the area of the plaintiffs' dry dock. The negligence for which they had been held liable had nothing to do with docking or the undocking of the ship, or the arrangement of the shores or blocks, or the pumping out or letting in the water, or other matters necessary to the proper management of a dry dock, or of a ship in relation to a dry dock. It is true that the repairs, which included the removal of some floor plates, would hardly have been done afloat, but the work in the course of which the plaintiffs' servants were negligent was the work of repair to the ship. There is no direct decision applicable to the present case. The decision in *The City of Edinburgh* (15 Asp. Mar. Law Cas. 234; 125 L. T. Rep. 375; (1921) P., p. 70, 274) was that a ship repairer could not limit liability on the sole grounds that he owned a dry dock at a place remote from the spot where the ship lay during the repairs. But the judgments of the Court of Appeal give me no guidance as to the principles to be applied in construing a loosely drawn section. The section pre-supposes a liability, and limits it. The Court of Appeal says that the liability is a liability of a dock owner as dock owner, a liability incurred in the capacity of dock owner, and does not include a liability for anything a dock owner chooses to do in any other capacity. Applying that principle to the facts of this case, it is apparent that the work in which the negligence arose was work of the plaintiffs done in the capacity of ship-repairers, and not in the capacity of dry dock owners. Suppose ship owners hired a dry dock belonging to a public authority, as for example the Mersey Docks and Harbour Board, and employed a firm of ship repairers to do repairs to the ship while she lay in that dry dock, and the repairers incurred liability by negligence while at work in the holds of the ship, it would be clear that the repairers did not incur the liability in the capacity of dock owners. And when the liability is incurred in exactly the same way, the fact that the ship is in a dry dock belonging to the repairers does not turn the work into work done in the capacity of dock owners. The mere fact that the ship is in the repairers' dry dock cannot have that effect. Suppose the negligence set on fire the sheds belonging to the plaintiff's yard and the fire spread to

the ship, no one could say that that was negligence of the plaintiffs in the capacity of dry dock owners or that the liability was incurred in that capacity. Suppose the owner of a wharf, within the meaning of the section, also owned a factory or a warehouse adjoining the wharf, and by his negligence the factory or warehouse was set on fire, and the fire spread to a ship lying at the wharf, no one could say that the negligence arose, or the liability was incurred in the capacity of wharf owner. Suppose a railway company owns a pier, within the meaning of the section, and also steamships. The railway company for reward permits another ship to be at the pier within the area over which it has control or management. One of the railway company's steamships, by negligence of the master or crew, collides with that ship. The negligence arises, and the liability is incurred, in the capacity not of pier owner, but of ship owner, and the limitation is not that provided by sect. 2, but by the Merchant Shipping Act 1900. In these illustrations I am assuming a wharf owner or pier owner which comes within sect. 2.

I have given these illustrations, and thought of others, because they assist me to decide whether the liability of the plaintiffs in the present case arose from negligence in work done by them in their capacity of dock owners. I hold that it did not. Sect. 2 does not apply, and there must be judgment for the defendants with costs.

The plaintiffs appealed.

Langton, K.C. and *Carpmael* for the appellants.—The learned judge was wrong in holding that the plaintiffs were not entitled to limitation. The statute expressly grants the right of limitation to "dock owners." The plaintiffs are dock owners, and they are therefore entitled to the right which the plain meaning of the words of the statute confers upon them. *The City of Edinburgh* (15 Asp. Mar. Law Cas. 234; 125 L. T. Rep. 375; (1921) P. 274) imposes a limitation upon the meaning of the statute in respect only of the area in which the damage for which limitation of liability is claimed takes place.

G. St. C. Pilcher (Jowitt, K.C. with him) for the respondents.—The words of the section cannot be applied in their natural meaning, and therefore it is conceded that they must be interpreted subject to some limitation. See *The City of Edinburgh (sup.)*. There are two possible limitations: (1) the quality of the act; i.e., in the present case the question is whether the act was that of a dock owner or a ship repairer. (2) the area where the damage is done. Hill, J. has adopted the first qualification and it is submitted that this is right. It is submitted that this qualification was placed upon the statute in *The City of Edinburgh (sup.)*. [SARGANT, L.J.—It was said by Lord Macnaghten in *Vacher and Sons Limited v. London Society of Compositors* (107 L. T. Rep. 722; (1913) A. C. 107) quoting the opinion of Lord Wensleydale in *Grey v. Pearson* (1857,

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6 H. L. C. 61, at p. 106) that in construing statutes, the grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity. In *The City of Edinburgh* the case was really absurd.] Nevertheless it is submitted that Scrutton, L.J. decided *The City of Edinburgh* upon the ground that the proper limitation to be placed upon the meaning of the plain words of the statute is a limitation according to the quality of the act in respect of which limitation of liability is claimed. (Reference was also made to *River Wear Commissioners v. Adamson* (37 L. T. Rep. 543; (1876) 2 App. Cas. 743) *Ex parte O'Brien* (1923) 2 K. B. 361).

No reply was called for.

BANKES, L.J.—This is an appeal in the second stage of this litigation, in which a very large sum of money is involved. An action was brought by the owners of this vessel against the owners of the dry dock, in which she was, to recover damages for the damage to the vessel, the result of a most serious fire which took place upon the vessel whilst she was in the dry dock, and in that action a great deal turned upon the evidence in reference to questions of fact. That decision ultimately went in favour of the owners of the vessel and against the dry dock, and in this litigation the dry dock are seeking to obtain the benefit of sect. 2 of the Merchant Shipping Act of 1900, and on this occasion there is no dispute upon any question of fact, and the only question is as to the proper construction to be put upon the language of that section.

The section is obviously a section introduced in the year 1900 in the interests of and for the protection of the owners of docks and canals. On reading the section it is obvious that it is expressed in the most general language, and when attention is called to the facts which were proved in evidence in *The City of Edinburgh* (15 Asp. Mar. Law Cas. 234; 125 L. T. Rep. 375; (1920) P. 70, 274), it seems obvious that some limitation must be put upon the very general words of the section, otherwise there may be many cases in which the application of the section in its strict literal meaning would lead to absurdity.

The question which is raised in this appeal is, whether the limitation which must be put upon the general language of the statute is a limitation to acts done by a dock owner or canal owner in the capacity of a dock owner, or whether it is a limitation in respect of acts done on their premises as owners of a dock or canal; in other words, whether the limitation is to be a limitation in reference to area, or a limitation in reference to the nature of the act done. Apart from authority altogether, I should have said that the natural limitation to be put upon these words, having regard to the object of the section and the language of the section, would naturally be a limitation in reference to area, and apart from any authority, if I had been asked to construe this section, I think I should have read the words

in this way: "The owners of any dock or canal, or a harbour authority, or a conservancy authority, as defined by the Merchant Shipping Act 1894, shall not, where without their actual fault or privity any loss or damage is caused to any vessel or vessels, or to any goods, merchandise, or other things whatsoever on board any vessel or vessels"—then I interpolate there "whilst being at or upon the dock or canal"—"be liable to damages beyond an aggregate amount not exceeding" so much. I should have done that, I think, as a matter of first impression, feeling that it was obviously necessary to put some limitation on the general language, and as I say, as a matter of first impression, I should have put upon the language a limitation in reference to area.

There has been one decision upon the language of the statute. It was a decision in the first instance of Hill, J., and afterwards a decision of the Court of Appeal, consisting of Lord Sterndale, Scrutton and Younger, L.JJ. The facts there were such that it was obvious that some limitation must be placed upon the language of the section, otherwise it would result in an absurdity. But the facts there were essentially different from the facts in this case. The facts there were that a ship repairing company owned a dock at Garston, and they were employed to repair a vessel in one of the Liverpool docks, which belonged to the Mersey Docks and Harbour authority. Damage was done to the vessel, whilst being repaired by them for which they were liable, and an action was brought against them, and they sought to limit their liability under the general words of this section by saying: "Oh yes, it is true we are liable for the damage done to the vessel whilst we were repairing her in the dock at Liverpool, but although we do not own this dock or any docks at Liverpool, we do in fact own a dock at Garston, and because we own a dock at Garston the section applies, and we are entitled to the benefit of the limitation imposed by the section." The claim only needs to be stated to show its absurdity, because it would apply not only to a case where the two places were as near together as Garston and Liverpool, but it would apply to cases where the two places were as far apart, we will say, as the Tyne and Bristol. It is obviously absurd. The court proceeded to say, and this was the decision, that that section had no application to the facts of that case, and anything that may have been said in reference to the ground upon which the decision rested was not necessarily part of that decision. The argument in the court of first instance on behalf of the defendants there claimed that both classes of limitation should be placed upon the language of the section. Mr. Miller contended that the section did not give relief where the damage was occasioned outside the area over which the dock owners exercised control, and he also argued that it did not give relief where the negligence was not that of a servant of the dock owners *qua* dock owners. Neither Hill, J. nor any of the Lords Justices, I think, expressed any decided

opinion upon that point; that is to say, they did not distinguish between the one qualification and the other, but they proceeded to decide, speaking in general terms, that the section had no application. But if you look into the judgments, speaking for myself, I think that the indication from the judgment of the Master of the Rolls, Lord Sterndale, is that he was proceeding on the footing that the limitation that he would adopt was the limitation in regard to area. It is quite true that Scrutton, L.J. uses an expression which I think Hill, J. in this case has construed as an expression of opinion that the Lord Justice's view was in favour of the limitation in reference to the nature of the act done, and he has gone further, I think, and has held that that was the decision of the Court of Appeal.

In neither point, with respect to the learned judge, am I able to agree with him. I certainly think that the decision of the Court of Appeal was not to that effect, and I do not think reading Scrutton, L.J.'s judgment as a whole that his language was directed to that particular point. It is just as applicable to a restriction in respect of area as it is to a restriction in respect of the nature of the act, and I think, therefore, that I am not bound by authority or guided by authority in the direction taken by the learned judge. So far as that decision is a guide, I think it is a guide in favour of taking the view which I have already expressed I should have taken if I dealt with the matter as a question of first impression and without any authority at all; but having heard the arguments, I think myself that the qualification in respect of area is a necessary qualification, the more natural qualification, and a qualification which would lead to less difficulty than the qualification in respect of the nature of the act, and I do not myself see that it is at all necessary, in order to read this language and give a reasonable meaning to the section, to read it without reference to the nature of the act done.

The facts of this case and the facts of many similar cases are these, that the damage done to the vessel is damage done whilst she is in a dry dock which is owned by a firm who are not only dry dock owners but ship repairers. As Hill, J. very properly says, the section which we are considering presupposes the liability and limits it; therefore, whilst the vessel is in that position something happens in respect of which the owners of the dry dock are in fact liable. In this particular case the act was the causing or permitting this ship to get on fire, or, at any rate, the vessel getting on fire, whilst she was in the charge of the defendants as dock owners, and they not being in the position to show that it was not their fault. It seems to me that when a vessel is under those circumstances in a dry dock and in charge of the dry dock company, who are doing work upon her as ship repairers, it is really not possible to distinguish with any accuracy between the acts done *qua* ship repairer and the acts done *qua* dock owner in very many of the necessary acts which have to be done in the course of repairing

the vessel whilst she is in dry dock. It seems to me only introducing unnecessary confusion and difficulty into this section if you seek to create a limitation which has reference to the nature of the act done. It seems to me much simpler to apply the section with a limitation in respect of the area, and it seems to me much more probable from the language used that that was the intention of the Legislature than that they intended to place any qualification on the language by reference to the act done.

I think for these reasons, therefore, that the appeal should be allowed, and I am not able to agree with the judgment of the learned judge, which seems to me to proceed entirely upon the view that the Court of Appeal in the case to which I have referred had laid down the proposition, or adopted the view, that the limitation to be placed upon the section was one which has reference to the nature of the act done.

I think for these reasons the appeal must be allowed with costs here and below.

ATKIN, L.J.—I agree. We have here to construe the words of sect. 2 of the Merchant Shipping (Liability of Shipowners and others) Act 1900, and if you merely look to the words of the section it appears to me that the plaintiffs in this limitation of liability suit fall quite clearly within the plain words of the section, "The owners of any dock shall not, where without their actual fault or privity any loss or damage is caused to any vessel, be liable to damages beyond an aggregate amount," which is specified, and "dock" includes "dry dock."

The plaintiffs are the owners of a dock, and loss or damage was caused to the present vessel, the *Ruapehu*. On the other hand, it is plain that there has to be some limitation of the words of the section because, as was pointed out in the *The City of Edinburgh* (*sup.*), if you applied the plain words of the section you might be drawn into an absurdity. In that case the ship repairers owned a dock at Garston, but they executed their repairs on a vessel which was lying in the Hornby Dock at Liverpool, and they said that because they were the owners of a dock at Garston and damage had been caused to the *City of Edinburgh* they were entitled to limit their liability. That was said to be not within the plain meaning of the statute, and in fact there was no relation between the ownership of the dock and the damage of any kind, either causal or geographical. It was quite sufficient, I think, to point that out to indicate that the Act of Parliament did not intend the absurdity which would be created by adopting the widest possible meaning of the words used; but on the other hand, you are not to cut down the plain meaning of the words further than is necessary in order to avoid an absurdity. There is no question here of repugnancy to be considered. What is said is, that you ought to put a further restriction on the meaning of these words by limiting the words to words such as these: "Where damage

is done by a dock owner in his capacity as dock owner," and for that the case of *The City of Edinburgh* is cited. It appears to me that the learned judge, with great respect, was going beyond the actual decision when he said that the Court of Appeal had laid down that proposition, because if I look at Lord Sterndale's judgment he says: "I should have said, without the assistance I am going to refer to in a moment, that the section must refer to a limitation of liability of the dock owner as such, *i.e.*, in respect of something in some way connected with his dock"; and the help that he had been given is the suggestion that the dock owner was to be in the same position as the shipowner, who gets a decree of limitation in respect of some injury or damage caused by other persons in some way relating to his ship, and eventually Lord Sterndale says: "I think a dock owner should only get a decree in respect of damage in some way connected with his dock." Then Scrutton L.J. used the words to which the learned judge imputes the burden of supporting the whole decision of the Court of Appeal, but I think myself that that is attaching too much weight to the words used by the Lord Justice in the connection in which he used them. He says: "It appears to me to read these words as limiting the liability of a man who owns a dock for anything which he chooses to do in any other capacity is to lead to an absurdity. In this case the repairs in the Hornby Dock had nothing to do with the ownership of a dock at Garston, and for that reason the Garston dock owners cannot limit their liability for what their boy did in the Hornby Dock ten miles off." I think what I should read by that is that the learned judge is saying that the ship repairers who own a dock at Garston, while they might be responsible for ship repairing damage done at Garston, are not responsible for ship repairing damage which they did in Hornby, which is in no way related to their dock. But if you go rather narrowly into the words, I prefer the language used by the Master of the Rolls, Lord Sterndale—that is to say, that you must show that the damage is in some way connected with the dock. If it is restricted to damage done by the owner's servants in their capacity as dock owners I still think that the plaintiffs would be entitled to succeed, because what is the capacity of the dock owner? One has to remember that dock owners, both the owners of wet docks and the owners of dry docks, may very well perform, and in fact do perform, different functions in their different capacities varying with the dock. One has only to refer to the very interesting summary of the practice as to loading and discharging in different docks which used to be attached to Scrutton, L.J.'s work on charter-parties, which now, I think, unfortunately has disappeared, to see that there is and always has been in various wet docks a very considerable difference of practice, as far as loading and discharging is concerned. I suppose it may well be said that in nearly every dock the dock owner, talking now of an ordinary dock, provides

certain apparatus for loading and discharging, though that would not be true everywhere: but there are a great many cases where, at any rate, the cranes and the hoists are the cranes and the hoists of the dock company, and worked by the dock company's servants.

In other docks the dock company by their servants load and discharge, or discharge, sometimes at the request of the shipowner. In some cases the dockowner does not perform any of the operations of either loading or discharging, and it is left to the stevedores employed by the shipowner or by the shippers, as the case may be. How are you to judge in those cases what is the capacity in which the loading is done? Is there a different capacity from that of dock owner, namely, that of loading or discharging vessels? It seems to me that that would be a very narrow view, and it seems to me that in the case of a dock owner who does in fact as part of the business of dock owning also include the duty of loading or discharging, he is loading or discharging in his capacity as dock owner. I apply the same reasoning to dry docks. There are dry docks where the dock owner does not execute any repairs at all, and where all that he does is to provide accommodation for a vessel, which is then repaired by an independent firm of ship repairers; but there are other cases and numerous cases, and cases undoubtedly in existence at the time of the passing of the 1900 Act, where the owner of the dry dock only became owner and is owner for the purpose of carrying on the business of a dry dock owner, which in his case includes the repairing of ships in the dock, and it appears to me that when he is carrying on that business he is in fact acting in the capacity of dry dock owner when he is doing that which the dry dock owner usually does, namely, repairing a ship. Therefore, applying the test which the learned judge applied, it appears to me that the plaintiffs are entitled to their limitation of liability, and I should say in passing that I am by no means prepared to accept the illustrations that the learned judge suggests as being plain indications of cases where the dry dock owner or the wet dock owner would not be liable for damage occurring in the dock. I do not wish to decide anything about them, because they may arise, but I am by no means prepared to assent to those being plain illustrations of exemption from the operation of this Act.

It may be and it is true that this construction is attached by some anomalous results, for to some extent it no doubt is anomalous that the ship repairer should be able to limit his liability for the negligence of his servants, when the negligence is exercised in his own dock, and is not entitled to limit his liability for the negligence of his servants when the negligence takes place in some other dock, though it may be close at hand; and it is anomalous that the shipowner, who sends his ship to be repaired in a dry dock which is owned by the ship repairer and has his ship damaged, may only be entitled to recover a small

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proportion of his damage, whereas if he sends it to a dry dock which is not owned by the ship repairer and engages the services of a ship repairer to go to that dock, he can recover the full damage. But the question is, whether those anomalies are so great as to amount to an absurdity and to prevent us from giving the fullest effect that we can to the words used by the Act of Parliament. I for my part am not satisfied that they are. It may be that the Legislature had considered this matter fully. It may be, on the other hand, which sometimes happens, that they had not got these particular developments in mind, but if they had it is quite possible that they might, on the one hand, have said: "No, we do not intend this; we think that it should be limited to some words which are not defined, but which more closely connect the damage with the actual ownership or physical ownership of the dock," or they might have said: "Considering this, we think that it is not unreasonable to encourage the ownership of dry docks and the carrying on of repairing businesses therein, and therefore in so far as a man carries on his repairing business in a dry dock which he has provided, we will give him the benefit of the limitation, whereas if he carries on his business in a dry dock which he has not provided for the public benefit we will not give him the benefit of the prohibition." I cannot say that that is unreasonable, and I certainly do not think that it is absurd. Therefore, it appears to me that, construing this Act of Parliament as we ought to construe it, the plaintiffs are entitled to the benefit of the restriction of liability for which they ask, and therefore I think this appeal should be allowed, and the appropriate decree should be made. I will wait until the judgment has been completed before actually determining what the decree should be and what the incidence of costs should be.

SARGANT, L.J.—I am of the same opinion. It is clear here that the plaintiffs are within the actual terms of sect. 2 of the Act of 1900. They are owners of a dock; damage has been caused without their actual fault or privity to a vessel in their dock; and it seems, therefore, that the words of this statute are completely satisfied, taken in their ordinary literal grammatical meaning. I refer to the universal rule which Lord Wensleydale referred to in *Gray v. Pearson* (1857, 6 H. L. C. 61, at p. 106), that the grammatical and ordinary sense of the words is to be regarded unless they lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency, but no further.

In the case that has been referred to of *The City of Edinburgh* (*sup.*), if the words of the statute had been read without any limitation which would have excluded that case, there would have been a manifest absurdity, because

the persons who sought to limit the liability there, because they were owners of a dock, had caused damage by something they had done ten miles off in another dock, and something that was absolutely and entirely unconnected with any ownership of the dock for which they sought to claim exemption. Therefore in that case the court, Hill, J. and afterwards the Court of Appeal, held that the words of the statute must be so limited as to prevent their being entitled to claim any continuity of ownership which was entirely disconnected with anything which had caused the damage, and in my judgment the reasons used by Scrutton, L.J. have not the meaning that has been suggested on behalf of the respondents when he says: "In this case it appears to me that to read these words as limiting the liability of a man who owns a dock for anything which he chooses to do in any other capacity is to lead to an absurdity." What he means clearly by "in any other capacity" is in a capacity altogether unconnected with his ownership of the dock. It seems to me that there was there a perfectly clear absurdity created by merely looking at the absolute grammatical meaning of the words, and the court accordingly rejected that construction and imposed a limitation on the words, but for the purpose of dealing with the present case it does not seem to me that the language used there is of very much assistance, because we have got to deal with a more difficult case, and a case where there is not such an absolute and entire disconnection by breach of continuity between the ownership of the dock and the damage which has occurred. Therefore, one has to look more narrowly at the language of the section. Looking at sect. 2 the words are these: "The owners of any dock shall not, where without their actual fault or privity any loss or damage is caused to any vessel or vessels"—those words must, I think, mean "any vessel or vessels in their dock." They cannot possibly apply to a vessel or vessels in a totally disconnected dock, or to a vessel or vessels on the high seas. Therefore, from the language of the section itself it is easy to impose such a limitation as that which was imposed by the Court of Appeal in *The City of Edinburgh* (*sup.*) case, although that case was excluded on the ground of the manifest absurdity. In the case of a ship-repairer who in the course of and for the purpose of his ship-repairing owns a dry dock and takes vessels into that dry dock and does repairs on them, is there any absurdity in holding that the exoneration of the section could apply to loss or damage occurring to that vessel in the dry dock in the course of the dry dock being used for the very purpose for which it was opened? It seems to me that, so far from there being any absurdity, there is not even an improbability that an exemption might be granted in such a case.

I agree with what Atkin, L.J. has just said, that although there may be anomalies created as between ship-repairers who own the dock in which the repair is done and ship-repairers who

are working in other persons' docks in the sense that the former class of ship owners will be in a more favourable position than the latter class, that does not constitute an absurdity which renders it necessary to limit the Act of Parliament further than was done in the case of *The City of Edinburgh* (*sup.*), and to limit it so far as to exclude from the right of claim limitation an owner of a dock who is repairing a vessel in his own dock.

I agree, therefore, that the appeal should be allowed.

Appeal allowed.

Solicitors for the appellants, *Pritchard and Sons*.

Solicitors for the respondents, *Wm. A. Crump and Son*.

July 1 and 22, 1926.

(Before BANKS, ATKIN, and SARGANT, L.JJ.)

AKTIESELSKABET REIDAR v. ARCOS LIMITED. (a)

Charter-party—Full and complete cargo—Failure to provide full cargo due to delay in loading—Claim for dead-freight and demurrage—Liability of charterers.

A charter-party provided that a ship should load a "full and complete cargo" of timber, and the contract provided for loading at a stipulated rate and for demurrage. The charterers failed to load at the stipulated rate with the result that the ship could only sail for the contracted port of destination (a British port) with a "winter cargo" in order that she might lawfully enter the port. If loading had been carried out at the stipulated rate she would have been able to arrive at the port of destination with a full "summer cargo" which was considerably larger. The plaintiffs claimed dead-freight for the difference in cargo which might have been carried but was not carried and for demurrage. The defendants pleaded that a "full and complete cargo" had been loaded, and alternatively that the claim for dead-freight was covered by the amount claimed on account of demurrage.

Held, that at the termination of the fixed lay days the charterers were in breach, and that the loss sustained by the shipowners, directly flowing from the breach of contract to load the goods at the agreed rate was the difference between the amount of freight which they would have earned and the amount they in fact earned. That loss was recoverable as damages from the charterers.

Decision of Greer, J. affirmed.

APPEAL from a decision of Greer, J. in an action tried by him without a jury.

The plaintiffs, Aktieselskabet Reidar, were the owners of the Norwegian steamship *Sagatind*, and the defendants, Arcos Limited, a Russian firm carrying on a business of timber

importers in England, were the charterers thereof. By a charter-party dated the 26th May 1923 the vessel was to proceed to a Norwegian port named therein and load a "full and complete cargo" of wood goods and thence proceed to a port, and one port only, in the United Kingdom or in Holland or Belgium or North France, or a French Bay port not south of Bordeaux, as ordered. Owing to unforeseen circumstances the port of loading had to be altered, and by a supplementary charter-party dated the 19th Sept. 1923 the vessel was directed to proceed to Archangel and there load her cargo of wooden goods, as that port was not closed by ice as early as the original port. The other conditions of the charter-party of the 26th May were to attach to the substituted voyage, and by one of the clauses it was provided "the steamer to be reckoned a four-hatch steamship and the cargo to be loaded at the rate of eighty standards per weather working day for deals and battens and sixty standards for other goods, and should the steamer be detained beyond the time stipulated as above demurrage shall be paid at 25l. per day and *pro rata* for any part thereof." The *Sagatind* arrived at Archangel on the 3rd Oct. 1923, and if the loading had been carried out at the agreed rate she would have been able to carry a full summer cargo and to have arrived at Manchester (the notified port of destination) without incurring any penalty under sect. 10 of the Merchant Shipping Act 1906 (6 Edw. 7, c. 48), which forbids a ship arriving at a port in the United Kingdom from a foreign port carrying a deck-load of timber. The loading was not carried out at the agreed rate, and instead of having a full summer cargo of 850 standards by the 17th Oct., the vessel had to sail on the 23rd Oct. owing to weather conditions with only 544 standards.

Sir Robert Aske for the plaintiffs.—The failure of the defendants to load at the stipulated rate was a breach of contract which occasioned loss to the plaintiffs. This was quite different from demurrage, which is only agreed damages for the detention of the ship. In the present case the failure to load at the stipulated rate occasioned loss to the shipowner both on account of short cargo and on account of detention.

Raeburn, K.C. and D. B. Somervell.—The charter-party contains no definition of "a full and complete cargo." The test is not what should be the cargo if the ship arrived at the proper date, because the charterers are entitled to keep the ship beyond the lay days on demurrage. The clause in the contract fixing the rate payable for demurrage must be taken to include all classes of damage and not merely damages for detention.

GREER, J.—This case involves a question of the interpretation of a charter-party and is not without its difficulties, but on the whole I have come to the conclusion that the plaintiffs

(a) Reported by EDWARD J. M. CHAPLIN, and R. A. YULE, Esqrs., Barristers-at-Law.

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are entitled to succeed in their claim for what is called dead freight, which in legal terminology is damages for failure to load a full and complete cargo.

A vessel called the *Sagatind* was chartered on the 26th May 1923 by the defendants to go to a port called Mesane in Norway. It was contemplated, as appears by the charter-party, that she would get there some time in July, in the summer, and by the charter-party when she got there she was to load a full and complete cargo of wood goods of the description mentioned in the charter-party. Being loaded with a full and complete cargo she was "there-with to proceed to London or East Coast of the United Kingdom or West Coast of England or Scotland (including Bristol Channel) or English Channel or North France or Holland or Belgium or French bay port, not south of Bordeaux, in charterers' option, one port only, as ordered on signing bill of lading or at Lodingen." The vessel was detained through no fault of her own, and as a result it was agreed that instead of going to Mesane she should go to Archangel, the object being to get her to a port which would not be closed by ice as early as the port mentioned in the charter-party. All the other terms of the charter-party continued to be applicable to the substituted voyage and the substituted loading at Archangel. The clause relating to demurrage is clause 3 of the charter-party which says, "Steamship to be reckoned as a four-hatch steamship and the cargo to be loaded at the rate of eighty standards per weather working day for deals and battens and sixty standards for other goods, steamship having four winches." It goes on, after providing for discharge, "Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at 25*l.* per day, and *pro rata* for any part thereof." It seems to me that, apart from authority, that is an undertaking to load at the agreed rate, and if the charterer does not load at that agreed rate it is a proper description of his conduct to say that he has broken the term of the contract, but at the same time he has agreed as to the damages that are to be payable for that breach. I think the effect of the cases is that a breach of that kind is not one that goes to the root of the contract, and therefore the vessel is not entitled to say, "As you have not loaded within the agreed time I will not wait." But the charterer is entitled to say, "This clause was put in for my benefit as well as yours; it measures the damages I have to pay; it does not entitle you to go away, and by paying those damages I am entitled to go on loading the ship." Whatever may be said in other cases where the lay days are specifically mentioned as so many, in my judgment with a contract of this sort it is not accurate to say, as Lord Trayner is reported as saying in *Lilly v. Stevenson* (1895, 22 Ct. of Sess. Cas. (4th series) 278, 286) that "days stipulated for by the merchant, on demurrage, are just lay days, but lay days that have to be paid for." That

may be quite accurate where a specific number of lay days are mentioned, which is not the case here.

What happened was this. The vessel arrived at Archangel on the 3rd Oct. She arrived in plenty of time, if the rate of loading provided by the charter-party had been complied with, to have loaded her cargo and to have sailed with a full summer cargo to England without suffering any penalty under sect. 10 of the Merchant Shipping Act 1906, for having loaded more than the permissible amount of cargo. She ought to have started to load on the 4th Oct. when notice of readiness was given. I do not know when she started to load, but she completed loading 544 standards by the 23rd Oct. If she had loaded at the rate provided for by the contract she would have put on board a full summer cargo by the 17th Oct., and if ordered to London, could have discharged without being liable to any penalty or without being liable to a charge of having broken the laws of this country. She was in fact ordered to go to Manchester, that is to say a port in the United Kingdom and a port to which the provisions of the Merchant Shipping Act would apply; I think I am entitled to interpret the charter-party as if that port had been mentioned in the charter-party because it became the chartered port of discharge when the vessel was ordered to go there. What are the obligations of the charterer? He has, as the plaintiffs' counsel has argued, two duties to perform in relation to the loading of the cargo. One is that he has to load a full and complete cargo, and the second is that he is to load at the agreed rate. What is the meaning of a full and complete cargo under the charter-party of this vessel, chartered to load at Archangel and discharge in Manchester? In my judgment it means that which would be a full and complete cargo if the charterer complied with his obligation to load at an agreed rate. That means that it would in this case have been a complete summer cargo and would have consisted of, I think, 850 standards. It is said that all that happened in this case was that there was a delay in loading and that the contract has completely provided for the amount that is to be paid by the charterer for that delay in loading, and attention is called to the provision about the 25*l.* per day demurrage. In my judgment, though I have had some hesitation about it during the course of the argument, Sir Robert Aske is right in saying that that merely provides for damages at so much per day for the detention of the ship. But that does not prevent the plaintiff ship-owner from saying, also, in a case where there has been detention of the ship, that there has been a breach of the primary obligation to provide a full and complete cargo. As I say a full and complete cargo in my judgment means that which would be a full and complete cargo for the vessel if loaded in accordance with the terms of the charter-party.

For these reasons I think that the plaintiffs are right in their contention and are entitled

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to recover the amount which they seek to recover for dead freight.

The defendants appealed.

C. T. Le Quesne, K.C. and *D. B. Somervell* for the appellants.

A. T. Miller, K.C. and *Sir Robert Aske* for the respondents.

Cur. adv. vult.

BANKES, L.J.—This appeal raises a question of very considerable general importance, and one upon which there appears to have been some difference of judicial opinion.

The action was brought by shipowners against charterers for damages for breach of a charter-party. The breach alleged was a failure to load a full and complete cargo.

Greer, J. decided in the plaintiffs' favour and he founded his decision upon the view that what constituted a full and complete cargo must be ascertained by reference to those stipulations of the charter-party which provided for the rate at which the charterers had undertaken to load. For the reason to which I refer later the plaintiffs' claim (if any) must, I think be based upon a breach of the stipulations as to the rate of loading, and the case thus presented raises the two important questions whether, in view of the terms of the charter-party, there was any breach on the part of the charterers, and, if there was, whether the breach is satisfied by a payment of demurrage at the stipulated rate.

The material facts are as follows. The charter-party is dated the 26th May 1923, and it provided that the steamer should proceed to Mesane after completing her then intended voyage and there load a full and complete cargo of timber for a port in the United Kingdom or North France, Holland or Belgium, at charterers' option, orders to be given on signing bills of lading or at Lodingen. Time was not to count before the 15th July 1923. The clause dealing with the loading and discharging was, so far as is material, in the following terms:

"Steamship to be reckoned as a four-hatch steamship and the cargo to be loaded at the rate of eighty standards per weather working day for deals and battens and sixty standards for other goods. Should the steamer be detained beyond the time stipulated for loading demurrage to be paid at 25*l* per day and *pro rata* for any part thereof."

Owing to the delay in completing her then intended voyage, the vessel was not ready to proceed to Mesane at the time contemplated by the charter-party. After some discussion as to what should be done, the parties ultimately agreed on the 19th Sept. 1923 to substitute Archangel for Mesane at an altered rate of freight, "all other conditions of charter-party to apply."

The vessel proceeded to Archangel and arrived there on the 3rd Oct. 1923. The position created by the delay in arriving at the port of loading was a peculiar one, if the vessel was ordered to a port in the United

Kingdom, owing to the provisions of the Merchant Shipping Act 1906. Unless this vessel could arrive on or before the 31st Oct. 1923, the master or owner would be liable to a fine if he carried a larger deck cargo than is specified in sect. 10 of that Act. If the vessel could have been fully loaded, and could have sailed on or before the 20th Oct. 1923, so as to arrive at a port in the United Kingdom on or before the 30th Oct. she could have carried 850 standards. If the loading was delayed so as to prevent the vessel sailing on or before the 20th Oct., she could only carry 544 standards without infringing the provisions of sect. 10. If the charterers had commenced to load the vessel as soon as notice of readiness had been received, and had loaded her on an average at the agreed rate for eleven and three-quarter days, the full 850 standards could have been put on board and the vessel could have sailed in plenty of time to enable her to have arrived in a United Kingdom port before the 30th Oct. What in fact happened was that the cargo was not loaded at the agreed rate, and by the 23rd Oct. she had only 544 standards on board. By that time it was impossible for the vessel to arrive at a United Kingdom port before the 30th Oct., and the master anticipating, or being told (it does not appear which) that he would be ordered to a United Kingdom port, refused to take any more cargo. The entry in the deck log is as follows: "Tuesday 23rd. Loading from 8 a.m. until 4.30. Was then fully loaded. Height of deck cargo is level with the railings." This clearly indicates that the master had in mind the restrictive provisions of sect. 10 of the Merchant Shipping Act 1906. The orders given to the master on signing bill of lading were that he was to proceed to Lodingen for orders. When he arrived there he was ordered to Manchester. I see a difficulty upon the facts in saying that the vessel did not load a full and complete cargo, as it appears to me that the time for ascertaining whether she had or had not a full cargo is the time when she sailed. At that time, assuming her destination to be a port in the United Kingdom, she had a full and complete cargo. Whether this is or is not a correct view of the facts is really immaterial, because, on the assumption that the obligation to load a full and complete cargo, and the obligation to load the cargo (that is, the goods of which the cargo consists) at a stipulated rate, are separate and distinct obligations, as I think they are, the plaintiffs are still entitled to say that but for the failure to load at the agreed rate they would have received 850 standards on board instead of the 544 which they in fact received. In whichever way the case is put the same two questions arise to which I have already referred, both of which are of importance, and upon neither of which can I find any direct authority which is binding upon this court, though upon the first of the two questions judicial opinion has been by no means unanimous.

The answer to the first question depends upon what is the true view of a contract

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expressed as this charter-party is, with a fixed number of lay days, and with a provision as to the demurrage rate, but with no provision for any fixed number of days on demurrage. Cleasby, B.'s view of what is meant by demurrage as expressed by him in *Lockhart v. Falk* (3 Asp. Mar. Law Cas. 8; 33 L. T. Rep. 96, at p. 98; L. Rep. 10 Ex. 132, at p. 135) is often referred to and may well be quoted again. He says:

"The word 'demurrage' no doubt properly signifies the agreed additional payment (generally per day) for an allowed detention beyond a period either specified in or to be collected from the instrument; but it has also a popular or more general meaning of compensation for undue detention, and from the whole of each charter-party containing the clause in question we must collect what is the proper meaning to be assigned to it."

It will be noted that the learned judge draws the distinction between the "allowed detention" and "undue detention." It may well be that where a charter-party, as in *Francesco v. Massey* (2 Asp. Mar. Law Cas. 594; L. Rep. 8 Ex. 101), provides for a given number of days (in that case ten days) on demurrage, so much of the much-discussed judgment of Lord Trayner in *Lilly and Co. v. Stevenson and Co* (22 R. 278) as holds that days stipulated for by the merchant on demurrage are just lay days, but lay days that have to be paid for, is well founded. In the present case it is not necessary to express any opinion upon that particular point.

We are here dealing with what Cleasby, B. refers to as undue detention. In dealing with this question it is necessary to bear in mind one of the outstanding features of the contract of the parties as contained in the charter-party. It is well established that, even where the number of lay days for loading and discharging, or for loading or discharging, is fixed, time is not of the essence of the contract. The shipowner is not entitled, merely because the lay days have expired and the contract is not completed, to treat the contract as at an end and to withdraw his ship. It is for this reason, I think, that the stipulation for a demurrage rate is so often inserted in the contract in order that, if the vessel has to remain in order to enable the charterer to complete his obligation, either of loading or of discharging, the parties may know what sum will have to be paid for the detention. The Court of Appeal in *Ethel Radcliffe Steamship Company Limited v. W. R. Barnett Limited* (ante, p. 55; 135 L. T. Rep. 176) and *Roche, J. in Proctor, Garrall, Marston Limited v. Oakwin Steamship Company Limited* (16 Asp. Mar. Law Cas. 600; 134 L. T. Rep. 388; (1926) 1 K. B. 244), both left the point over for future decision whether the obligation upon the shipowner to keep his ship at the port of loading or discharge or at the port of call, as the case may be, after the expiration of the time limited by the charter-party for the performance by the charterers at the port of some obligation undertaken by them to be

performed there, rests upon an implied term of the contract, or upon the necessity that the master shall remain a reasonable time before he is in a position to say that the conduct of the charterers in not performing their obligation amounts to a repudiation of the contract. I see no sufficient reason for construing the provision for demurrage, contained in the charter-party in the present case, as a contractual extension of the lay days either for a reasonable time or for any other time, or as an implied term of the contract that the vessel shall remain for any time. I prefer to rest the necessity for remaining upon the ground that, time not being of the essence of the contract, the shipowner will not, except under some exceptional circumstances, be in a position to assert that the contract has been repudiated unless the vessel does remain a sufficient time to enable that question to be tested. If this is the correct view, it follows that where a charter-party is in the terms of the present charter-party, and the charterer fails to load or to discharge, as the case may be, within the agreed lay days, or at the stipulated rate, he does commit a breach of contract. So far as there is any authority on the point, I think that it is in favour of the view which I have expressed. I do not feel sure that Lord Trayner's language, which has been relied on as expressing the contrary view, has not been strained beyond what was really intended. It is, I think, consistent with that language that what the learned judge had in mind was the obligation of the vessel to remain even after the expiration of fixed lay days where there is a provision for demurrage. Be that as it may, Lord Trayner's view and Mr. Carver's approval of it have quite recently been expressly disapproved by Scrutton, L.J. in this court in *Inverkip Steamship Company Limited v. Bunge and Co.* (14 Asp. Mar. Law Cas. 110; 117 L. T. Rep. 102; (1917) 2 K. B. 193). The only case which I can find in which any approval of Lord Trayner's view has been expressed in this court is *The Saxon Steamship Company Limited v. The Union Steamship Company Limited v. The Union Steamship Company Limited v. Davis and Sons Limited* (9 Asp. Mar. Law Cas. 114; 81 L. T. Rep. 246), where A. L. Smith, L.J. was dealing with a case as between vendor and purchaser of coal in whose contract the colliery guarantee was incorporated. The guarantee provided for lay days and for demurrage. The point for decision was the date when the purchaser made default, and it was in that connection that the Lord Justice referred to Lord Trayner's decision with approval, and he may well have been confining his remarks to so much of that decision as referred to the fixed lay days on demurrage.

Thinking, as I do, that this particular point is free from authority, and that I am at liberty to express my own opinion, I agree with Greer, J. in coming to the conclusion that at the termination of the fixed lay days the charterers in the present case were in breach. The only question which remains for decision, therefore,

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is the question of damages. If the plaintiffs' claim was in substance, though not in form, a claim for detention of the vessel, the special damage here claimed for would not be recoverable (*Inverkip Steamship Company and Co. v. Bunge and Co. (sup.)*). Upon the special facts of this case the plaintiffs' claim appears to me to be, both in substance and in form, essentially distinct from any claim for the detention of the vessel. In substance what the plaintiffs are saying is that if the charterers had loaded the goods at the agreed rate the plaintiffs would have earned freight on 850 standards, whereas owing to the failure to load at that rate the plaintiffs could only earn freight on 544 standards, and that their loss, directly flowing from the breach of contract, is the difference between the amount of freight which they would have earned and the amount which they in fact earned. This loss is, in my opinion, on the facts of this case, recoverable as damages for the breach of contract to load at the agreed rate.

At one time I was inclined to think that, where parties had agreed a demurrage rate, the contract should be construed as one fixing the rate of damages for any breach of the obligation to load or discharge in a given time. On further consideration I do not think that such a view is sound. I can find no authority on the point, and it is noticeable that in the *Saxon Steamship* case (*sup.*) it was not suggested that the claim for demurrage excluded the additional claim for special damage arising from the detention of this vessel.

In my opinion the appeal fails and must be dismissed with costs.

ATKIN, L.J.—This case raises a question of considerable importance in shipping circles, and it is surprising that there is so little direct authority to guide us. The question is whether, if the charterer had failed to complete the loading of the ship within the lay days, and the ship during the demurrage days becomes without the default of the shipowner unable to carry as much cargo as she would if loaded within the lay days, but receives from the charterer a full cargo for his diminished capacity, the loss falls upon the charterer in addition to the demurrage. In my opinion our decision should be for the shipowner. The result of the authorities appears to be that in a contract fixing a number of lay days and providing for days at demurrage thereafter, the charterer enters into a binding obligation to load a complete cargo within the lay days subject to any default by the shipowner or to the operation of any exceptions, matters which do not arise in this case. If the lay days expire without a full cargo having been loaded the charterer has broken his contract. The provisions as to demurrage quantify the damages, not for the complete breach, but only such damages as arise from the detention of the vessel. For correlative to the ship's right to receive the agreed damages is the charterer's right to detain the ship for the purpose of enabling him, if possible, to perform his broken

contract and so mitigate any further damage. If, however, for reasons other than the shipowner's default, the charterer becomes unable to do that which he contracted to do, namely, put a full and complete cargo on board during the fixed lay days, the breach is never repaired, the damages are not completely mitigated, and the shipowner may recover the loss that he has incurred in addition to his liquidated damages or his unliquidated damages for detention. It appears to me to be incorrect to say that days on demurrage are extended lay days unless the contract is so drawn. On the contrary, demurrage days are days in which the charterer is in breach, and this view alone explains what I conceive to be the well-established principle that unless by express stipulation exceptions that would protect the charterer during lay days no longer protect him during demurrage days. If a stipulation for demurrage either directly extended the contract time for performance or waived a breach, there could be no difference between illegality supervening during the lay days, or after the lay days and during demurrage days. Yet in *Reid v. Hoskins* and *Avery v. Bowden* (6 E. & B., at p. 972) and *Esposito v. Bowden* (7 E. & B. 963), all in the Exchequer Chamber, it is plain that the decisions treated as material the allegation or proof that the illegality (outbreak of war and consequent trading with the enemy) occurred during the lay days, that is, during the time for performance and before breach. In those circumstances the charterer was excused. I know of no authority that subsequent illegality would relieve the charterer of the consequences of his accrued breach. If the occurrence were one which would occasion the frustration of the contract, then on principles established in England, though not in Scotland, the contract would end, with accrued liabilities left subsisting.

It is said, however, that in this case there is no evidence that the charterers had not furnished and were not willing to load a cargo sufficient to satisfy a summer loading. I will assume that such a cargo was available. Nevertheless, it appears to me that, the charterers having exercised their option to order the ship to the United Kingdom, the charter must be treated for all purposes as a United Kingdom charter. In the circumstances of this case I am satisfied that they made it clear to the master when they ceased loading that the eventual destination was the United Kingdom. If this be so the charterers had no right to put on board, and the master was entitled to reject, any further cargo that would expose him to penalties under the Merchant Shipping Act if carried within the winter months. The excess cargo over the winter load would not be a lawful cargo. The ship, therefore, sailed with what was a complete cargo at the date of sailing, but less than a complete cargo if the loading had been completed within the lay days. For any damages caused thereby I think that the charterers are liable. No question of the amount of damages arises here.

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I think, therefore, that the appeal fails and should be dismissed, with costs.

SARGANT, L.J.—In my opinion the judgment of Greer, J. should be affirmed.

The original charter-party of the 26th May 1923 undoubtedly contemplated that the ship should carry a full cargo of 850 standards. And when on the failure of that contract the charter-party now in question was made on the 19th Sept. 1923 by endorsement on the original charter-party, and adopted with some variations the terms of the original contract, it seems to me that the parties must have been contemplating the same full cargo. There was ample time, as was proved by the event, for the ship to reach Archangel in good time to load a full cargo and sail with it for any of the specified British ports without the risk of any objection on arrival. And it is not immaterial in construing this part of the contract to observe that the charterers had the option of proceeding to any one of a number of foreign ports at which no objection could arise. This view gives a plain and straightforward meaning to the words used and does not, I think, impose any unreasonable obligation on the charterers. For it is no doubt implied that the ship shall reach Archangel in time to load a full cargo, either for a British port or for a foreign port at the option of the charterers; and, should the arrival of the ship at Archangel be delayed so as to render the alternative of proceeding to a British port with a full cargo unavoidable, the charterers, if electing to proceed to a British port and loading a winter cargo only, could set up the default of the ship in arrival against any claim for failure to load more than such a cargo as would satisfy the requirements of British ports. Further, if the meaning of the phrase "full and complete cargo" in clause 1 is to be interpreted (as the appellants have urged) with reference to the cargo which could lawfully be carried to a British port, the result must be the same. For the time at which that cargo must be ascertained is, in my judgment, the time when the charterers received the ship for loading, that is the 4th Oct., and not the time at which they ceased to load in fact. It cannot be that by their delay in loading they were entitled to diminish the extent of the cargo which they were under obligation to load, and thus take advantage of their own default.

It is next necessary to consider the effect of clause 3 of the charter-party. Here I agree with the view of the learned judge that the second sentence of that clause does not enlarge the express obligations as to time of loading expressed in the first sentence of the clause, but merely assesses damages at 25*l.* a day for any detention of the ship due to a failure of the charterers to load at the prescribed rate, and incidentally indicates that their obligations in this respect are not of the essence of the contract, and that some unpunctuality in this respect will not entitle the owners to treat the contract as repudiated and to withdraw their

ship. Such a construction gives full effect to the language of the clause and is consistent with the views expressed in the text books on the subject which summarise the general effect of the decisions: (see Scrutton on Charter-parties, 12th edit., p. 348, and Carver on Carriage by Sea, 7th edit., pp. 828–9, and note on p. 907). And this is in accordance with the view taken of somewhat analogous provisions in contracts for the sale and purchase of property: (see *Patrick v. Milner and another*, 36 L. T. Rep. 738; 2 C. P. Div. 342; *Howe v. Smith*, 50 L. T. Rep. 573; 27 Ch. Div. 89).

On the footing then that clause 3 of the charter-party fixes the damages for the detention of the ship at 25*l.* a day, does the payment of a sum calculated on this basis form an agreed compensation for the loss which the owners have sustained in the circumstances of this case? I cannot think so. The loss inflicted on the owners and claimed by them is loss of another character—namely, loss of freight caused by the breach by the charterers of their contract to load a full and complete cargo as prescribed by clause 1 of the charter-party. The obligation of clause 1 is, in my judgment, rightly described by the learned judge as the primary obligation. The object of the second sentence of clause 3 is to provide compensation for a detention of the vessel in the course of fulfilling this primary obligation, not to give compensation for the breach of the primary obligation itself. No doubt the same delay in loading, which might give rise to a claim for detention, also resulted in a breach of the obligation to load a full cargo, but the breach of this latter obligation caused a definite separate loss independent of and largely exceeding any loss arising from mere detention: or, to put the matter in another way, the object of the second sentence in clause 3 being to ascertain the damages arising from a delay in loading for the purpose and in the course of fulfilling the primary obligation of clause 1, namely, the loading of a full cargo, it would unwarrantably widen the scope of this second sentence, if it should also ascertain the damages arising from a breach of the primary obligation itself.

The same result would, I think, follow if, contrary to the view above expressed, the second sentence of clause 3 were to be read as an agreement that the charterers might have some extra time for loading at an agreed rate per day. Even on this interpretation this could not, in my view, be read as extending further than an agreement to allow some extra time for the purpose of loading a full cargo. It could not properly be construed as an agreement that such an extra time might be occupied in loading as to diminish the quantity of cargo that had ultimately to be loaded.

There was a further contention on the part of the appellants that should perhaps be noticed—namely, that they had only to provide cargo, not to load it, and that there was no evidence that they had not provided a full summer cargo. In my judgment, under

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this charter-party, the charterers had both to provide and load; and there is no evidence that there was any default on the part of the ship to provide the assistance mentioned in clause 20. Nor is it shown that the master at any time declined to accept more than a winter cargo. From his letters of the 10th and 19th Oct., I should gather that he was willing to accept a full summer cargo provided that, if he was ordered to sail after the 20th Oct. to a British port, provision was made for the fines he might incur. The points mentioned in this paragraph are not the real points in issue between the parties, they are not raised by the charterers' defence in the action, and they do not seem to have been argued before the learned judge.

Appeal dismissed.

Solicitors for the appellants, *Wynne-Baxter and Keeble.*

Solicitors for the respondents, *Botterell and Roche.*

July 15, 16, and 19, 1926.

(Before Lord HANWORTH, M.R., SCRUTTON, L.J., and ROMER, J.)

CAYZER, IRVINE, AND CO. LIMITED v. BOARD OF TRADE. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Arbitration — Charter-party — Crown — Vessel chartered by Government—Loss by war risk—Claim by owners—Plea of Statute of Limitations—Action not maintainable until award made in arbitration—Right of Crown to plead statute—Statute of Limitations 1623 (21 Jac. 1, c. 16).

A charter-party under which a steamship was chartered in May 1917 by the Crown through the Director of Transports, during the war, contained a clause providing that all war risks should be undertaken by the charterers, and an arbitration clause, referring all disputes to arbitration and providing that the making of an award should be a condition precedent to any action thereon. The steamship was sunk in July 1917 by a collision. The owners claimed damages for their loss from the Crown in 1923, and an arbitration was held. The arbitrator found that the vessel was lost as a consequence of warlike operations and awarded damages against the Crown. The owners brought an action on the award, and the Crown pleaded that the claim was barred by over six years' lapse of time under the Statute of Limitations (21 Jac. 1, c. 16).

Held, that as the charter-party provided that no right of action should arise until the making of an award in an arbitration, time did not begin to run until after 1923, and the action was therefore not statute barred.

Quære whether the Crown is entitled to plead against a subject a Statute of Limitations in

(a) Reported by H. LANGFORD LEWIS, Esq., Barrister-at-Law.

which it is not named, and by which it is not bound.

Scott v. Avery (1856, 5 H. L. C. 811) applied.

Decision of Rowlatt, J. reversed.

APPEAL from a decision of Rowlatt, J. upon a special case stated by Mr. Cloughton Scott, K.C. as arbitrator upon a claim for damages for loss by war risks of the steamship *Clan MacLachlan* which was chartered by the Director of Transports on the 14th May 1917 under the form of charter-party known as T. 99, and was sunk by collision with an Italian steamer on the 19th July 1917, both vessels being negligently navigated, but without lights in pursuance of Admiralty Orders. The claim was not made until 1923, and the Crown pleaded it was barred by the lapse of over six years under the Statute of Limitations. The arbitrator found that the *Clan MacLachlan* was sunk as the result of a collision which was a consequence of warlike operations, and made an award in favour of the claimants, subject to the opinion of the court on certain questions and particularly on the question of the Statute of Limitations. He stated his findings in the form of a special case.

Sir Douglas Hogg, K.C. (A.-G.) and Russell Davies for the Crown.

Miller, K.C., A. T. James, and James Macmillan for the claimants.

Dec. 8, 1925.—ROWLATT, J.—The point in this case is whether the arbitrator was right in refusing to give effect in favour of the Crown, to the defence of the Statute of Limitations. That statute does not affect the existence of a debt; it merely limits the remedy. Nor does it of itself apply to arbitrations, and the question, when it has arisen in arbitrations has always been whether the terms of the submission require the arbitrator to follow the analogy of the statute. The case of *Re Astley and Tyldesley Coal and Salt Company Limited* (80 L. T. Rep. 116) is an authority that where a submission is silent on the matter it must be construed as directing an arbitrator to take the statute into his consideration. In this case the submission was in the form adopted in *Scott v. Avery* (5 H. L. C. 811), which makes the making of an award a condition precedent to an action. It is immaterial that the statute runs only from the making of an award, for the question I have to determine is what the arbitrator must consider in making the award.

The Crown cannot be sued, but can admit proceedings against itself by petition of right. The statement in *Rustomjee v. The Queen* (34 L. T. Rep. 278; 1 Q. B. Div. 487) that the Statute of Limitations cannot be pleaded in a petition of right was not necessary to the decision, and the Crown did not consider whether by admitting proceedings against itself by petition of right the Crown impliedly imported the Statute of Limitations. If the Crown

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enters into a submission in a matter which can be the subject of arbitration between two subjects, and if in such an arbitration between two subjects the statute would be imported, does not the Crown enter into the submission upon the same terms as would apply to a submission between subjects? In my opinion it does; the statute is imported just as it is between subjects. There is no quality in the Crown which prevents it from taking advantage of the statute, for the Crown can always take advantage of an Act of Parliament. In this case therefore the submission must have its ordinary effect.

As to the right of a subject to plead the Statute of Limitations against the Crown, and thus to destroy the inherent right of the Crown not to be prejudiced by the laches of its servants, I will say nothing, for that question involves the consideration of other principles which do not arise in this case. The award therefore must be in favour of the Crown.

The claimants appealed. The facts are fully stated in the judgments below.

Sir John Simon, K.C., *A. T. James* and *James Macmillan* for the appellants.—The Crown, not being bound by the Statutes of Limitation, unless expressly named cannot plead them as a defence. The statements in the textbooks that the Crown can do so have no authority to support them, except a dictum in argument in *The Magdalen College* case (11 Co. Rep. 66b) (*Rustomjee v. The Queen*, 34 L. T. Rep. 278; 1 Q. B. Div. 487). The arbitration clause in the charter-party was in the *Scott v. Avery* (5 H. L. C. 811) form, providing that no right of action should arise until the award was made; therefore time did not begin to run until after 1923, when the award was made, and the action is not statute barred, even assuming the Crown is entitled to take advantage of the statute; (*Caledonian Insurance Company v. Gilmour*, (1893) A. C. 85).

Sir Thomas Inskip, K.C. (S.-G.) and *Russell Davies* for the Crown.—The arbitrator was bound to apply the ordinary law and give effect to the Statute of Limitations; otherwise there would be no time limit placed on nearly all the claims against the Crown arising out of the war. The statute applies to arbitrations as well as actions. The statute can only be excluded by express agreement between the parties: (*Re Astley and Tyldesley Coal Company Limited*, 80 L. T. Rep. 116; *Turner v. Midland Railway*, 104 L. T. Rep. 347; (1911) 1 K. B. 832; *Hart v. Hart*, 45 L. T. Rep. 13; 18 Ch. Div. 670; *Coburn v. Colledge*, 76 L. T. Rep. 608; (1897) 1 Q. B. 702). The point that the arbitration clause was in the *Scott v. Avery* form was never taken before the arbitrator.

Cur. adv. vult.

Lord HANWORTH, M.R.—This is an appeal from a decision of Rowlatt, J. upon a special case stated by Mr. Cloughton Scott, K.C.

Messrs. Cayzer, Irvine, and Co., Limited are owners of a steamship called the *Clan*

MacLachlan. On the 14th May 1917 she was requisitioned for and on behalf of the Admiralty, under the terms of what is shortly known as the T. 99 charter-party. That charter-party contained three important clauses: "18. The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather or any other cause arising as a sea risk. 19. The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause: Warranted free of capture, seizure, and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war." Thus the owners took the ordinary marine risks, and the Admiralty undertook the war risks. The third clause that it is necessary to refer to is clause 31: "Any dispute arising under this charter shall be referred, under the provisions of the Arbitration Act 1889 or any amendment thereof to the arbitration of two persons, one to be nominated by the owners and the other by the Admiralty, and should such arbitrators be unable to agree, the decision of an umpire whom they must elect shall be final and binding upon both parties thereto, and it is further mutually agreed that such arbitration shall be a condition precedent to the commencement of any action at law." On the 19th July 1917 the *Clan MacLachlan* was in collision with the *Europa*, an Italian commercial ship, and was sunk. On the 21st Aug. Messrs. Cayzer, Irvine, and Co. gave notice of the loss, and a reply from the Director of Transports and Shipping was to state that the Department "admits no liability at present." On the 27th Aug. the reply by the owners was: "As soon as the position has been fully considered we shall further notify you if a claim on war risk policy is likely to be made." So matters rested, and it must be remembered that at that time losses which fell within ordinary marine risks and losses which constituted war risks were by no means clearly defined. In 1919 the marine underwriters paid 50 per cent. of the loss as a loan and the terms upon which that payment was made contain this clause: "But this case to be reconsidered upon *Peter-sham* and *Matiana* judgments." The clause referred to two ships, about which there was a contest as to whether they had been lost under marine or war risks, and it may be stated that it was not until this case was determined, as it was in 1921, by the House of Lords that a conclusion was reached as to on which side of the line the claim fell: (*Britain Steamship Company v. The King*, 15 Asp. Mar. Law Cas. 58; 123 L. T. Rep. 721; (1921) 1 A. C. 99). There was another case of *The Warrilda* which was not decided in the House of Lords until 1923 (*Attorney-General v. Adelaide Steamship Company*, 16 Asp. Mar. Law Cas. 178; 129 L. T.

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Rep. 161; (1923) A. C. 292; and I think in the same year *The Geelong* was also decided: (*Commonwealth Shipping Representative v. P. and O. Branch Service*, 16 Asp. Mar. Law Cas. 33; 128 L. T. Rep. 546; (1923) A. C. 191). It is said that during those years from July 1917 onwards, there was a tacit agreement, or at least acquiescence in the delay which took place in making any claim, for it had been indicated in the letter of the 27th Aug. 1917, to which I have referred, that the owners, when the matter had been fully considered, would notify the Admiralty if a claim was to be made upon the war risk policy. Those cases that I have referred to were decided, and therefore on the 14th Aug. 1923, a claim was made on behalf of the marine underwriters claiming that, while the *Clan MacLachlan* was under the requisition by Minister of Shipping, she was engaged on warlike operations and was sunk, as she was in collision with the *Europa* at that time, it having been discovered that she was carrying war material for the British Government.

The representatives of the Admiralty did not accede to the claim or agree that they were in any way liable. Consequently, on the 29th Nov. 1923, the owners took the step of appointing an arbitrator in accordance with clause 31 of the charter-party. The Admiralty did not join in that procedure, and did not appoint an arbitrator on their side in accordance with the terms of the Arbitration Act, and therefore, in accordance with sect. 6 (b) of the Arbitration Act, notice was given by the owners appointing the arbitrator that they had selected and appointed to act a sole arbitrator in the reference. That was on the 10th Dec. 1923. Mr. Claughton Scott was then empowered to act as sole arbitrator, and he heard the reference. He decided the case in the form of a special case. It is just necessary to refer to two findings on his part. He found that "at the time of the said loss Malta was a war base and the *Clan MacLachlan* was engaged in a warlike operation within the meaning of clause 19 of the said *pro formá* charter-party, namely in carrying war stores to a war base," and (e) "That the said collision was a consequence of warlike operations within the meaning of the said clause 19."

Upon those findings, therefore, it would appear that the Admiralty were liable under clause 19 of the policy which I have read. The Admiralty claimed, however, that they had a defence because they said the claim of the claimants was barred by the Statute of Limitations (21 Jac. 1, c. 16). Before Mr. Claughton Scott the question of the actual amount of the loss was left over for determination either by agreement or by a second reference. The proceedings, however, before the arbitrator included the submission of the amount of the liability as well as the question of liability, and no point arises by reason of the fact that the arbitrator did not in terms actually fix the quantum consequent upon the findings which he came to and which I have read. Rowlatt, J.

decided that the claim was barred by the Statute of Limitations. He held that, when the Crown entered into the terms of the charter-party T. 99 containing clause 31, they entered into it on the same basis as a subject, and that the Crown had a right to plead the statute of James in the same manner as a subject would do. Although his judgment was this, that in terms the form of clause 31 is what may be shortly called a *Scott v. Avery* form, yet he held that the claim itself perished before it ripened into an award, and that, as the arbitrator ought to have held that the claim collapsed in accordance with a decision of the *Astley and Tyldesley Coal and Salt Company Limited* (80 L. T. Rep. 116), there was no valid claim which could be measured or crystallised into a money claim against the Crown. In that case it was held that the Statute of Limitations of James I. did apply to arbitrations, and that it ought to be given effect in an arbitration.

Upon appeal to this court, Sir John Simon takes four points. His first is that the statute, 21 Jac. 1, does not apply to arbitrations inasmuch as in terms it only applies to actions and suits, which do not include arbitrations. Secondly, that clause 31 of the charter-party is what may be shortly termed a *Scott v. Avery* clause, the result of which is that the cause of action is not complete until the award is made, and that time under the statute does not begin to run until the award is published. The award in fact was published on the 9th Feb. 1925. His third point was, disregarding the question of the Crown being in the arbitration, if the arbitration was between two subjects and the Statute of Limitations does not apply to arbitrations, (a) you cannot read into the agreement to refer an implied term that the arbitration must be brought within six years of the loss, and (b) it cannot be implied where there is a *Scott v. Avery* clause and where powers are given to appoint an arbitrator which can be forced on the other side under sect. 6 of the Arbitration Act. Fourthly, he said that the Crown cannot rely upon 21 Jac. 1; the Crown is not bound by the statute; and if it is not bound it cannot rely upon a statute or take advantage of a statute by which correlatively it is not bound. It is obvious that the first and the third and the fourth points raise very difficult questions indeed. The first point involves the question as to whether the case of the *Re Astley and Tyldesley Coal and Salt Company* was rightly decided; the third point is dependent upon our reaching a decision on the first point; and the fourth point involves the question as to whether a dictum in the argument or in the judgment of a certain case is still valid. It has been found and repeated in a number of text-books, but Sir John says that upon true investigation his point is good and that the passage usually relied upon in Chitty's Prerogatives of the Crown (1st edit., at p. 382) is based upon a misconception of what was determined in the *Magdalen College* case (11 Co. Rep. 66b). We

are told that the dictum to be found in that case has been acted upon in decisions, and that, if it had been necessary for the Crown to argue that point, authority could have been produced, not merely from the text-books but from decisions binding upon this point, that Sir John's point is untenable.

It is, however, unnecessary to go into those three questions, for the second point raised by Sir John, if we agree with him, is conclusive of the case and would make any decision upon the other three points merely *obiter*. I turn, therefore, to the consideration of what is the effect of clause 31. The last words of that clause are: "It is further mutually agreed that such arbitration," by which, I think, is meant an arbitration which is concluded and ends in an award, "shall be a condition precedent to the commencement of any action at law." It is to be observed that those words contemplate that there may be an action at law, and that before such an action can be brought there must have been the fulfilment of a condition precedent namely, a completed arbitration. In *Scott v. Avery* the words are different, but it appears to me that the effect is the same. It was a case in which a decision was given in the House of Lords after the judges had been summoned and had given their opinion; four judges were in favour of the decision of the Exchequer Chamber, from whom the appeal was taken, and three were in favour of reversing the decision of the Exchequer Chamber. I turn, however, to look at some observations made by three of the judges who were in favour of the maintenance of the decision of the Exchequer Chamber, the view which was ultimately accepted by the House of Lords. In that case (5 H. L. C. 811, at p. 824) Crowther, J. says this: "Collecting the substance of the contract from the allegations in the first count of the declaration and the sixth plea, it appears to me that no cause of action can arise before the sum to be paid is ascertained and settled by the arbitrator." Wightman, J., at p. 831, says this: "... nor did it impose upon the assurer a condition preliminary to his right to sue for a loss, that the amount of the loss shall be ascertained by arbitration," and Cresswell, J. at p. 836, says this: "The very rule contemplates"—that is the rule which was embodied in the policy—"that an action is to be brought," and further, "and by the contract itself obtaining a settlement of the claim, according to that rule, is made a condition precedent to the right to maintain an action . . . for after the settlement by arbitration it contemplates an action or suit on the policy, and not on the award." Turning to the actual speeches of the learned Lords who gave the judgment in the case, it appears that Lord Cranworth, L.C. says this: (5 H. L. C., at p. 248): "If I covenant with A. B. that if I do or omit to do a certain act, then I will pay to him such a sum as J. S. shall award as the amount of damage sustained by him, then, until J. S. has made his award, and I have omitted to pay the sum awarded, my covenant

has not been broken, and no right of action has arisen," and he holds that here "that was to be ascertained in a particular mode, and that until that mode had been adopted, and the amount ascertained according to that mode, no right of action should exist." Lord Campbell says (5 H. L. C., at p. 852): "I am clearly of opinion that, upon a just construction of this instrument, until those questions had been determined by the arbitrators, no right of action could have accrued to the insured." Further (5 H. L. C., at p. 854) he says: "Now, in this contract of insurance it is stipulated, in the most express terms, that until the arbitrators have determined, no action shall lie in any court whatsoever." It appears to me, from a consideration of those passages in *Scott v. Avery* which are not based on a meticulous examination of the rule which had to be construed, that the substance and meaning of clause 31 is definite and clear, that the arbitration and its result must be entered into and obtained first as a condition precedent to the commencement of any action at law. If so, then it is abundantly plain from the section of 21 Jac. 1. that the time has not begun to run, because the words of that statute are "within six years next after such cause of action or suit," and if the cause of action is not complete until the award is made, the time has not begun to run. But it is useful to look at one or two other cases in which the effect of *Scott v. Avery* has been considered. In a case of *Horton v. Sayer* (4 H. & N., 643), the matter was considered. The Chief Baron, at p. 649, dealing with *Scott v. Avery*, says this: "Even before the case of *Scott v. Avery* there was a form in which a covenant, or condition, or proviso might be framed which would prevent the parties from maintaining any action until the amount to be paid was ascertained by a third person; for instance, it there was a covenant to pay for building a house, or for the performance of any work such a sum as A. B. should think reasonable, with a stipulation that the party who performed the work should not claim anything except what A. B. awarded; there the party could not maintain any action until A. B. had found what was due; for there would be no contract to pay in any other way." The case to which our attention has been called of the *Caledonian Insurance Company v. Gilmour* (1893) A. C. 85 is to the same effect. I forbear to quote the passages to which attention has been called in the course of the argument.

Finally, I refer to a case of *Spurrier v. La Cloche* (1902) A. C. 446, a case in the Privy Council in which a similar clause or clauses of the same effect had to be considered, and Lord Lindley, who gives the judgment, says this: (at p. 450) "It follows from these observations that no action could be sustained in Jersey any more than in this country for any money payable under the policy unless and until the amount so payable had been settled by arbitration pursuant to the twelfth condition," and he cites *Scott v. Avery* and the *Caledonian Insurance Company v. Gilmour*. "The contract

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is one on which no cause of action could accrue until the amount to be paid had been determined by arbitration, and by arbitration as provided by the contract." He then makes a reference to *Scott v. Avery*, not only in the House of Lords but to the manner in which Maule, J. had put the matter in the Exchequer Chamber as right, where he said: "There is no decision which prevents two persons from agreeing that a sum of money shall be payable on a contingency, but they cannot legally agree that when it is payable no action shall be maintained for it." It appears to me that, after examining *Scott v. Avery* and the other cases to which I have referred, it is impossible to distinguish the substance and effect of the latter part of clause 31 from the decision in *Scott v. Avery*, and that the words in that clause provide a condition precedent, which must be fulfilled before the time begins to run. The result is that their condition was not fulfilled until the 9th Feb. 1925, and time has not run out under the Statute of Limitations so as to forbid the owners from pressing their claim.

I will add just a word or two as to the other cases which have been referred to, though it appears to me not much help can be gained from them. I agree that *Turner v. Midland Railway Company* (104 L. T. Rep. 347; (1911) 1 K. B. 832) is not authoritative here. There, there was not compensation or right to be paid compensation until the action compensation was estimated and determined. Again, in *Cheshire County Council v. Hopley* (130 L. T. Rep. 123), there it was a case where the cause of action only arose when the sum was ascertained. *Coburn v. Colledge* (76 L. T. Rep. 608; (1897) 1 Q. B. 702), was a case upon a solicitor's bill. It is a case where the cause of action arose when the services were rendered and the impediment to the action was not fundamental to the cause of action but only a preliminary to the procedure under which there was a right enforceable.

It appears to me for these reasons that no question of the Statute of Limitations arises. There is no impediment to the claim of the owners, with the result that we must hold, as Rowlatt, J. himself did, that this is a *Scott v. Avery* clause, and, being a *Scott v. Avery* clause, the other points did not arise, and are not fatal to the claim of the owners, whose claim must be admitted and allowed.

The result will be the appeal will be allowed with costs.

SCRUTTON, L.J.—If it were necessary to decide all the points which were argued in this case undoubtedly we should have to have heard further argument from the Solicitor-General, and it would have been necessary very carefully to consider the result, but in the view I take of the case it can be determined on one point only, and it is only necessary to express a reservation of one's opinion on the other two points.

The case arises in this way. During the war the Government requisitioned a steamer, and

they did so in these terms: they forwarded a requisitioning letter: "It has been found necessary to requisition the steamship *Clan MacLachlan* for use on urgent Government service under the conditions of the *pro formâ* charter-party T. 99 enclosed," and, said the letter, "attached is also one copy of the *pro formâ* charter-party T. 99, terms of which apply, but it is not proposed at this juncture to enter into a formal charter." I personally have never understood why the Government which was going to pay large sums of money under requisitions did not take the ordinary business precaution of signing a charter. If they had done so some Government official would not have been tempted to take the ridiculously unbusinesslike point that there was no submission in writing under which an arbitration could be made. But for some reason the Government department did carry out the transaction in that way. They sent a copy of the charter, the terms of which were to apply, but did not sign it. That charter provided that the Admiralty should not be liable for what may be described as marine risk happening to the steamer, but that they should be liable for what may be described as war risks, and the war risks were described in a form of language which has been of the greatest advantage to the Legal Profession, and has, I think, taken various shipowners to the House of Lords on no less than four occasions. Very shortly after the ship had been requisitioned she was sunk by collision under circumstances which at the time rendered it very doubtful whether her sinking by collision was a marine risk or a war risk, and the Government Department said: "It is not understood on what grounds you are claiming this as loss due to a war risk." A series of cases had to be taken to the House of Lords before, what was undoubtedly, in the language used, a very difficult question, was finally decided, and it was not until 1923, some six years after the ship had been lost, that it was decided in the circumstances under which the ship was lost was not a marine risk which fell on the marine underwriters, but did not constitute a war risk which would ordinarily fall on the Crown. Now what had happened when the ship was lost was that on the 21st Aug. 1917, the shipowners say, writing to the Admiralty: "It is possible that the responsibility for the loss will fall to be dealt with as a war risk, and we beg to give you notice of same." Again on the 27th Aug.: "As soon as the position has been fully considered we shall further notify you if a claim on war risk policy is likely to be made." Sometimes the question which arose was between two sets of underwriters, war risk underwriters and marine underwriters, neither of them the Government. Sometimes the question which arose was between the Crown and the shipowner with the marine underwriters behind him.

It was not until *The Warilda* and *The Geelong* in 1923 (*sup.*) had been decided by the House of Lords that any definite rule was laid down, and it was the Crown who were taking those

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cases to the House of Lords. Any delay was due to the difficulty of the wording of the charter and the fact that the Crown were taking the proceedings to the highest tribunal. When, it having been finally settled that this did fall within the terms of a war risk, the shipowner came and said, now will you pay me for the war risk under T. 99, somebody in a Government department thought the proper position for the Crown to take was to say—"Statute of Limitations." I am sorry if the business of Government departments is carried on in that way. Of course, if it is a good legal point the Crown is entitled to it. It is a very bad business point in my opinion. The question is not whether it is a good business point, but whether it is a good legal point.

The three points which were taken before us—they substantially resolve themselves into three—were, first of all, an arbitration having been set up under the clause in the charter, which I shall have to read, was the arbitrator in that arbitration, or the arbitrator in any arbitration, bound to apply the Statute of Limitations? Secondly, if he was generally bound to apply the Statute of Limitations, what was the effect of the Statute of Limitations in this particular case where the arbitration clause in the charter was worded so as to bring the matter within the well-known decision of the House of Lords in *Scott v. Avery*? Thirdly, could the Crown say "*nullum tempus occurrit regi*"? No, we are not bound by the Statute of Limitations, but we can take advantage of it." Those are the three points which emerge. I am not going to express any final opinion on the first point as to whether arbitrators generally are bound by the Statute of Limitations. I reserve myself liberty to consider when the case gets before this court whether the decision in the *Re Astley and Tyldestey Coal and Salt Company*. I think that subject has not yet been properly considered. That it is a very difficult question, and that it is probably a question which does not admit of an absolute rule being laid down applicable to all arbitrations. There have been general statements for some time couched in very wide language that an arbitrator is bound by the rules of law. I find one in 1801, in *Aubert v. Mase* (2 B. & P. 375), there is no doubt that an arbitrator is bound by the rules of law like every other judge. I find another in this court in the case of *Jager v. Tolme and Runge and The London Produce Clearing House Limited* (114 L. T. Rep. 647; (1916) 1 K. B. 953). "The Council"—that was the Council of the London Produce Clearing House—"are to give a decision—they are to decide—and in the absence of fuller and wider powers expressly given that means to decide according to the legal rights of the parties." On the other hand, I find there have always been cases where it is said that arbitrators are not bound by the rules carried on in the High Court. I find in *Re Badger* (2 B. & A. 691) a statement: "An arbitrator is not bound by a rule of practice, adopted by courts of law for general convenience; and, therefore, where on

a reference of a Chancery suit and all matters in difference between the parties, the arbitrator had allowed interest (when it would not be allowed by a court of law or equity) the court refused to set aside the award on that ground."

We had a case the other day in the other Court of Appeal where the Committee of Tattersalls sat as arbitrators to decide what was due on a bet, and they gave a decision. I do not know whether it is suggested that they were bound by the rules of law that no action would lie on a bet, and that consequently the arbitrators must act as if they were in actions and they ought not to have heard the case at all. I am acquainted with arbitrations, where to avoid the rule that the courts will not hear a case on a p.p.i. policy, the question what is due on the policy has been referred to arbitrators. I do not know whether it is to be said that in that case the arbitrators should not hear the case at all because a policy which has a p.p.i. clause in it is not enforceable in any court of law. I am not saying this for the purpose of expressing a final opinion, because in my view it is not necessary to express a final and general opinion, but only for the purpose of saying that in my view there is a great deal to be considered when the matter does come before this court in a case which really raises the question. If an arbitrator is to be bound by the Statute of Limitations it must be by some implied term in the submission. He is not bound by the statute itself because the statute only applies to actions, and this is not an action, and it must be, therefore, that there is some implied term in the contract that he shall give effect to such defence as there would have been if an action had been brought in the courts. The submission does not say so, and one does not usually imply terms in submissions unless they are so obvious, so necessary, that if it was said: "Well, what is the point about?" the two parties would have said "Of course we did not say that, that is too obvious for words; everybody knew we meant that." You do not make contracts for the parties, you only imply terms when they are so necessary and so obvious that they must be taken to be part of the submission. From that point of view I say no more than to say that it is very doubtful in my judgment whether you can imply a term that the arbitrator in an arbitration is to be bound by the statute of limitations as if he were trying an action. But, as I say, it is not necessary finally to decide it.

But then comes the question: Never mind general arbitrations, all arbitrations, what about this arbitration? If the arbitrator is to give effect to the Statute of Limitations what he has to give effect to is this, that it is a defence that more than six years have elapsed from that complete cause of action before legal proceedings were begun to enforce it. If, therefore, you get a case where in fact the complete cause of action is only complete within six years from the time that the arbitrator has considered what decision he shall give, the Statute of Limitations does not apply. I see Rowlatt, J. does not seem

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to think that there is any difference between a *Scott v. Avery* case and another case, because he says of an action on an award the cause of action in an action on an award is not complete until the award is given, and therefore, if you are talking about actions on awards there is no difference between a *Scott v. Avery* case or any other case. As I understand it, the point is we are not talking about actions on the award; we are talking about the cause of action which is being enforced in an action independently of an arbitration; and the difference between the *Scott v. Avery* case and the ordinary arbitration is that whereas in ordinary arbitrations you cannot bring an action by law unless you were stopped by the court because of the arbitration clause, in a *Scott v. Avery* case you could not bring an action at law because you had nothing to bring an action on until you had got the award of an arbitrator. I think, if I may respectfully say so, that the flaw in Rowlatt, J.'s judgment is that he had not appreciated the difference between a *Scott v. Avery* case and the ordinary case where there is no necessity to get the award of an arbitrator before you bring an action at law. The peculiarity of a *Scott v. Avery* case, as stated by Lord Campbell at p. 854, of *Scott v. Avery*, is this: "Now in this contract of insurance it is stipulated, in the most express terms, that until the arbitrators have determined, no action shall lie in any court whatsoever. That is not ousting the courts of their jurisdiction because they have no jurisdiction whatsoever, and no cause of action accrues until the arbitrators have determined." The clause in the charter in this case, clause 31, is, though not quite in the ordinary *Scott v. Avery* form, substantially in the *Scott v. Avery* form: "Any dispute shall be referred to the arbitration of two persons, and it is further mutually agreed that such arbitration shall be a condition precedent to the commencement of any action at law"—substantially the same as the *Scott v. Avery* case. Now if the arbitrator is bound to hear this arbitration as if the rules which apply to an action at law applied to it, what he has to do under the well-known decisions is to ascertain when the cause of action was complete and say whether those arbitration proceedings are started more than six years after the cause of action was complete. But in the *Scott v. Avery* case the cause of action is not complete until there has been an award of the arbitrator, and to such a case clearly it seems to me the Statute of Limitations if applicable to arbitrations generally, has no application. On this point, which seems to me to be fatal to the claim of the Crown, I think that the learned judge was wrong, the arbitrator was right, and the appeal therefore succeeds.

The only remaining question which is one of great historical interest and importance, is whether the Crown can successfully say "We are not bound by the statute but we are at liberty to take advantage of it," which looks rather odd. There are undoubtedly a long series of statements in text-books to that effect

repeating each other for some centuries. I have not heard the Solicitor-General on the foundation of those statements in text-books, but there is something to be said for the view argued by Sir John Simon that they start with a passage in the unsuccessful argument of a law officer which had not even the merit of being relevant to the case which the court had to decide, which has been taken out by a text writer and repeated by text writer after text writer for centuries until people began to believe that it must have some foundation somewhere. Again I have not heard the Solicitor-General and, therefore I am not going to say more than this, that it will need careful consideration when it comes up in a case where it has to be decided whether there is any foundation for this confidently repeated statement of text writers except the passage in the *Magdalen College* case and possibly another passage in a case in Coke's Seventh Reports, which is not the report of a case decided in the House of Lords, but the case of a private conference between the law officers of the Stuart Kings and the Chief Justices of the Stuart Kings in a case where the parties, the subjects affected by the decision which was given against them, were not present and were not heard. Which of the two is the more satisfactory foundation for the text-books I do not quite know, but the history of the statements in the text-books will need to be carefully looked into when the question becomes material to be decided. It is not material in this case and, therefore, I say nothing more than that there is ample material for considering the question when it has to be decided.

The appeal is allowed, and I personally am not at all clear in view of the course which has been adopted by the arbitrator on the agreement of the parties as to what is to happen next, whether it is to go back to the arbitrator or what is to happen. Perhaps the parties can offer some suggestion.

ROMER, J.—Of the six contentions advanced before the arbitrator on behalf of the Crown one alone survives. In this special case it is stated in these terms: "That proceedings in the arbitration were not taken within six years after the date of the loss of the said steamship and that by reason thereof the claimant's claim was barred by the Statute of Limitations (21 Jac. 1, c. 16)." If this contention be taken literally it must obviously fail. The statute does not mention proceedings by arbitration and cannot apply to them.

I agree, however, with the Solicitor-General that the contention is not to be taken too literally, and that it ought to be treated as asserting that the arbitrator was bound to take the statute into his consideration, and that if he did so he ought to award that, by reason of the statute, the claimants are not entitled to recover anything from the Crown.

The argument in support of the contention so construed appears to be this. It is said that where litigation is pending between two

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persons and they agree to refer their dispute to arbitration instead of having it determined by the courts, every plea that was open to them had the matter proceeded in the normal way remains open to them before the arbitrator. If, therefore, the Statute of Limitations would have afforded a defence to the plaintiffs' claim in an action at law, it will equally afford a defence to the claim in the arbitration. This must, I think, be conceded. The arbitrator in such a case has by agreement between the parties been substituted for the court and he must decide as the court itself would have decided.

It is next said that similar considerations apply to an arbitration held in pursuance of a claim in an agreement referring to arbitration all disputes that may arise thereunder between the parties, such clause not being what is called a *Scott v. Avery* clause. For myself I am inclined to agree that in general this would be so. I do not, however, think that it is necessary upon the present occasion to come to any definite conclusion upon the point or to express any opinion whether the case of *Re Astley and Tyldesley Coal and Salt Company (sup.)* was rightly decided. I am content to assume the point in favour of the Crown. The next step in the argument of behalf of the Crown appears to me to enter upon even more debatable territory. It is said that even when the arbitration clause is in the *Scott v. Avery* form, it is still the duty of the arbitrator to consider whether the Statute of Limitations would be a bar to any proceedings by a claimant to enforce his claim at law, and that if the statute would be such a bar the arbitrator must make his award against the claim. This contention would seem to be in direct conflict with the opinion given by Cresswell, J. when advising the House of Lords in *Scott v. Avery*. Speaking of the clause in that case which provided that no member should be entitled to maintain any action at law or suit in equity on the policy until the matters in dispute should have been referred to and decided by the arbitrators, and that the obtaining of the decision of the arbitrators was a condition precedent to the right of any member to maintain any such action or suit, he said this (5 H. L. C., at p. 840): "And this part of the rule, as to maintaining an action, shows that it was never intended to substitute the arbitrator for the courts of law or equity, but to make them ancillary to an action or suit; for after the settlement by arbitration it contemplates an action or suit on the policy, and not on the award."

But let me again concede the point and assume, contrary to Cresswell, J.'s opinion, that the arbitrator in the present case was substituted for the courts of law and could award or not award a sum to the claimants according to whether a court of law would or would not have given judgment in their favour. For even if all these assumptions be made in favour of the Crown I am of opinion that the appellants' claim is not barred by the Statute of Limitations.

The arbitration clause in this case appears to me to differ in no respect that is material to the present purpose from that in *Scott v. Avery*, as to which Lord Campbell made the observation referred to by Scrutton, L.J. In my judgment we are bound by that case to hold in the present case that until the arbitrator makes his award no cause of action accrues to the claimants. That being so it necessarily follows that their claim has not been barred by the Statute of Limitations. I agree, therefore, that the appeal should be allowed with costs.

Solicitors for the appellants, *Ince, Colt, Ince, and Roscoe*.

Solicitors for the respondents, *Solicitor for Board of Trade*.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, July 13, 1926.

(Before BATESON, J.)

THE ALDE. (a)

Limitation of liability — Collision — Damage caused " . . . by reason of the improper navigation of the ship " — Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 503.

The plaintiffs' barge the Alde caused damage to the defendants' steamship Ascania by forcing another barge, the Tom Tit, against the propeller of the steamship, whereby the propeller was damaged and the Tom Tit sank with her cargo. At the trial of the collision action the judge expressed the opinion, but did not decide, that there had been some heaving of the Alde by means of a capstan on a stationary grain sucker also belonging to the plaintiffs, and that such heaving had caused or contributed to the collision.

By the Merchant Shipping Act 1894, s. 503, shipowners may limit their liability in accordance with the Act where loss or damage is caused "by the improper navigation" of their ship.

In an action by the plaintiffs to limit their liability,

Held, that if the heaving by the grain sucker was a cause of the collision, such heaving was not navigation of the Alde or the grain sucker. The statute does not confer a right of limitation in respect of the negligence of individuals, but only in respect of improper navigation of ships. There is no right of limitation in respect of negligence which is not improper navigation. The damage was, therefore, solely caused by the improper navigation of the Alde. There was no improper

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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navigation of the grain sucker. Therefore the plaintiffs were entitled to limit their liability on the tonnage of the Alde.

ACTION for limitation of liability.

The plaintiffs, the Port of London Authority, owners of the barge *Alde*, claimed to limit their liability in respect of a collision between the barge *Tom Tit* and the steamship *Ascania*, which took place in the Greenland Dock on the 28th July 1925, for which the *Alde* had been held responsible. The *Tom Tit* and her cargo sank. The defendants were the owners of the *Ascania*, the owners of the *Tom Tit*, and the owners of her cargo.

On the 28th July 1925 the *Ascania* was lying in the Greenland Dock, head up dock, moored fore and aft. The steamship *London Commence* was also moored on the starboard side of the *Ascania*, heading up the dock, and the grain sucker *Turbo*, belonging to the plaintiffs, was lying between the *London Commence* and the *Ascania*. The *Tom Tit*, in these circumstances, attempted to pass between the *Turbo* and the *Ascania*, but the *Alde*, which had been lying alongside the *Tom Tit*, was let go by the plaintiffs' servants so as to force the *Tom Tit* on to the propeller of the *Ascania*, damaging the propeller and holeing the *Tom Tit*, so that she sank with her cargo. At the trial, Bateson, J. found the *Alde* alone to blame. The following passage is taken from the judgment delivered by the learned judge in the collision action on the 23rd March 1926 (reported, 24 Ll. L. L. Rep. 408, at p. 412): "The Elder Brethren think (and I agree with them) that the *Alde* in motion even by the wind alone, working in against the side of the *London Commence* and pushing her nose out by the stem of the *Turbo*, would get quite sufficient way to move the *Tom Tit* in the way described, pressing her, pushing her sideways, to produce the damage that is found: *a fortiori* if there was any heaving by hand to assist that motion, or still more any movement by the capstan; and I am not at all satisfied that there was not both, either one or the other method of getting the *Alde* into position. I am inclined to think that there was some heaving."

Batten, K.C. and Noad for the plaintiffs.—The damage was solely caused by the negligent navigation of the *Alde* by the defendants' servants. There is no finding that the defendants were heaving upon the capstan on the *Turbo*. Even if there had been any such heaving, it was not navigation of the *Alde*, which could not be navigated by being heaved with a capstan. [Reference was made to *The Warkworth* (5 Asp. Mar. Law Cas. 326; 51 L. T. Rep. 558; 9 Prob. Div. 145) and *The Umona* (12 Asp. Mar. Law Cas. 527; 111 L. T. Rep. 415; (1914) P. 141).]

Dunlop, K.C. and Balloch.—The plaintiffs are only entitled to limit their liability if they can prove that the damage was caused solely by the negligent navigation of the vessel in respect of which they claim to limit. But they

have not proved that their damage was in this case solely caused by the negligent navigation of the *Alde*. The damage was caused partly by the negligence of the *Alde* and partly by the negligence of the *Turbo*. [Learned counsel read passages from the judgment, and contended that their effect was that the learned judge at the trial had found that the negligence of the *Turbo* in heaving had partly caused the collision.] The case is analogous to the cases of tug and tow, *e.g.*, where the tow is negligent in having failed to cast off and the tug is negligent for having put the tow in motion. Alternatively, if the plaintiffs are entitled to limit liability, the tonnage of both the *Turbo* and the *Alde* is the basis for limitation. *The Ran*; *The Graygarth* (15 Asp. Mar. Law Cas. 517; 126 L. T. Rep. 675; (1922) P. 80) is authority for the proposition that where damage is caused by the joint action of two vessels limitation must be calculated upon the joint tonnage of both ships. *The Harlow* (15 Asp. Mar. Law Cas. 498; 126 L. T. Rep. 763; (1922) P. 175) is a direct authority. [BATESON, J.—If the plaintiffs in *The Graygarth* (*sup.*) had wanted to go against the *Graygarth* they could have done so.] Yes, but there it was unnecessary that they should.

Batten, K.C. replied.

BATESON, J.—I think the plaintiffs bring themselves within the words of sect. 503, sub-sect. 1 (d), of the Merchant Shipping Act 1894. The action is brought to limit the liability of the Port of London Authority to an amount based on the tonnage of their barge *Alde*, which forced the barge *Tom Tit* into collision with the steamship *Ascania*, and also to the cargo of the *Tom Tit*. I am quite clear that at the trial of the collision action I thought the accident was caused by the improper navigation of the *Alde*. The *Alde* was navigated by the man in charge of her, but apparently, according to my judgment in the collision action, he may have got some assistance from some other men on a grain sucker, the *Turbo*, to help him navigate the *Alde*. It does not seem to me that that makes it any the less the navigation of the *Alde*. It never occurred to me, I feel sure, during the course of the trial, that the *Turbo* was being navigated or that the *Turbo* navigated the *Alde*, and I do not think that the capstan on the *Turbo*, even if used—and I did not find as a fact that it was being used, although I suggested there might have been some heaving either by hand or by the capstan—was navigating the *Turbo*. I do not think that heaving by a capstan on board a ship, so as to pull another ship, is navigating the former ship any more than pulling by a capstan on shore is navigating the shore, as distinct from navigating the ship; or that when a man is pushing a vessel, either by a pole from the shore or from another ship, or when he is heaving by a winch on board another ship, he is doing anything by navigating the ship which he is moving. The navigation is that of the vessel which is being moved, and not of the implement which is stationary, either on a ship or on shore, whether

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it is made to revolve by steam or used by hand.

The words of the section are : "Where any loss or damage is caused to any other vessel . . . by reason of the improper navigation of the ship." Mr. Batten contended that the plaintiffs are clearly covered by those plain words, and that in this case the damage was all caused by the improper navigation of the *Alde*, and no improper navigation of any other ship. Mr. Dunlop, for the owners of the *Ascania*, argued that it is for the plaintiffs to show that the damage was solely caused by the improper navigation of the *Alde*. In my opinion it was clearly caused solely by the navigation of the *Alde*. I think that confusion of thought arises when one discusses the negligence of individuals as distinct from improper navigation. Individual negligence does not seem to me to have anything to do with the section, which allows the relief for improper navigation of the ship. Of course, the navigation of a ship must be done by individuals, but it is the navigation of the ship which gives a right to limitation of liability, and not the negligence of individuals. Mr. Dunlop contends that the plaintiffs are not entitled to limit their liability at all, because they have failed to show that the damage was solely caused by improper navigation. According to his contention it was caused by the joint operation of the *Alde* and the *Turbo*. I do not think it was the operation of the *Turbo* at all. The *Turbo* was used either as a winch or as a heaving post. It was also argued that persons on both the *Alde* and the *Turbo* were guilty of negligence. I do not think that matters. The question is, Was the navigation of the *Alde* improper? Mr. Dunlop's last contention was that even if the plaintiffs prove that the damage was caused solely by the navigation of the *Alde*, nevertheless, on the principle laid down in *The Ran*; *The Graygarth* (*sup.*) and *The Harlow* (*sup.*), the limit of the plaintiff's liability must be the tonnage of both the *Alde* and the *Turbo*. I think those cases are consistent and show that damage caused by a barge in tow due to the improper navigation of the tug and of the tow comes within the section, and that both vessels have to provide the amount of their joint tonnage. In those cases, however, there was improper navigation by the tug. It is suggested that the *Turbo* in this case was in a position similar to that of a tug. As I have pointed out, however, those cases are no authority for saying that the improper use of a capstan is improper navigation of a vessel on which the capstan is. It is the mere use of a machine for the purpose of navigating the other ship and not for navigating herself.

For these reasons I think the plaintiffs are entitled to the usual decree.

Solicitors : J. D. Ritchie, William A. Crump and Son ; Keene, Marsland, Bryden, and Besant ; Thain, Davidson, and Co.

June 14 and July 12 and 26, 1926.

(Before BATESON, J.)

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Collision—Successive collisions—Maritime liens—Priorities.

Maritime liens in respect of damage by collision rank against the res pari passu and not in order of date of the respective collisions, where the decrees are obtained together or subject to priorities.

SUMMONS to determine priorities.

On the 30th Nov. 1924, a collision took place between the steamship *Squawk* and the defendant's steamship *Stream Fisher*.

On the 6th Feb. 1925 a collision took place between the steamship *Criterion* and the *Stream Fisher*.

On the 7th Feb. 1925 a third collision took place between the steamship *Enable* and the *Stream Fisher*, and later on the same day a fourth collision took place between the *Rio Leopold* and the *Stream Fisher*.

In each case proceedings were commenced against the *Stream Fisher* and judgments subject to priorities were obtained by default, no appearance being entered by the defendants. The *Stream Fisher* was accordingly sold but failed to realise sufficient to satisfy all the claimants against the fund. This summons to determine priorities was accordingly taken out.

Carpmael for the owners of the *Criterion* and the *Enable*.—The rule in Admiralty is that maritime liens in respect of damage claims rank against the *res* in the order in which the collisions in respect of which they attach took place. Therefore in the present case the claim of the *Criterion* should be preferred to that of the *Enable*, and the claims of both vessels are preferred to that of the *Rio Leopold*. Authority for this rule is to be found in the statement in MacLachlan's Law of Merchant Shipping, which appears in all editions, and at p. 598 of the First Edition, to the effect that the sufferers by an earlier collision are preferred to the sufferers by a later collision upon the well-known legal maxim, "Qui prior in tempore, potior est in jure." Apart from this statement, and from the statement in Halsbury's Laws of England, there appears to be no authority upon the point. *The Saracen* (1846, 2 Wm. Rob. 451) is distinguishable because in that case what was under consideration was the date of the decree and not the date of the collision.

Brightman, for the master of the *Squawk* suing for his lost effects, supported the above argument, and referred to *The Ripon City* (8 Asp. Mar. Law Cas. 304 ; 77 L. T. Rep. 98 ; (1897) P. 216).

Stranger for the owners of the *Rio Leopold*.—There is no such rule as that contended for on behalf of the owners of the *Criterion* and the

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Enable and the plaintiff in the *Squawk* case. There is no authority for distinguishing between one creditor of a shipowner and another where all claims are of the same nature, except in salvage and bottomry cases, where there are special reasons for preferring the later claimants. One of the consequences of the doctrine that one damage lien is preferred to another would be that a vessel, having had a substantial collision, might secure immunity in respect of later collisions, no one venturing to commence proceedings until the prior lien had been discharged. So far as authority is concerned, it is submitted that *The Africano* (7 Asp. Mar. Law Cas. 427; 70 L. T. Rep. 250; (1894) P. 141) is an authority for the proposition that the liens will rank *pari passu*. Sir F. Jeune there points out that at the time when it was thought that a maritime lien existed for necessities, the claims of necessities men were dealt with *pari passu*, irrespective of rules of the acts of service. In the United States the law, so far as it is settled, appears to be that the damage claims rank *pari passu*. Indeed in so far as that proposition is in doubt, the doubt seems to be as to whether the claims do not rank, like salvage liens, in the inverse order in which they attach. [Counsel referred to the following United States authorities: *The Cyclopaedia of Law and Procedure* (1907), vol. 26, p. 809; *The John G. Stevens* (1897, 63 Davis Rep. 170 U. S. Rep. 113), and *The Frank G. Fowler* (1881, 8 Fed. Rep. 331; 1883, 17 Fed. Rep. 653.)

Carpmael replied.

Cur. adv. vult.

July 26, 1926.—BATESON, J.—This is a motion to settle priorities, if any, between four claimants for damages by four collisions on four separate occasions. The actions were all in *rem* and the *res* has been sold, but the proceeds are not sufficient to satisfy all the four claims. The dates of the various claims are these: 1924, the 30th Nov. is the *Squawk* collision, and that is a claim for the master's effects. The collision action by the owners of the *Squawk* appears to have been settled. The master held back and did not proceed with his action until considerably later. The second collision was in 1925, on the 6th Feb., when the *Criterion* was in collision with the *Stream Fisher*. The third collision was on the 7th Feb. 1925, at 1.45 p.m., the vessel called the *Enable* being in collision with the *Stream Fisher*; on the same day, but later in the day, what time I am not told, the *Roi Leopold* was in collision with the *Stream Fisher*. The writs in the various actions were the 10th Feb. 1925—the *Roi Leopold*—and on the same day the *Enable* sued a claim in the County Court. The next one was the *Criterion* claim in the County Court on the 27th April 1925; and the last one was on the 7th Oct. 1925, in the *Squawk* case by the master. In the *Squawk* case also I think there was a writ. The *Roi Leopold* got an admission of liability on the 17th April 1925; the *Enable* got judgment in the County Court on the 22nd April 1925; and on the 25th

that action was transferred to the High Court. On the 25th May 1925 the *Criterion* got judgment in the County Court; on the 22nd March 1926 the master of the *Squawk* got a default judgment in the High Court; and on the 24th May 1926 the *Roi Leopold* claim figures were agreed. No one contended that any date was material except the date of the collision. Mr. Carpmael and Mr. Brightman, for the claimants in the first three collisions, the *Squawk*, the *Criterion* and the *Enable*, contended that their claims ranked in order of date at the time of collision. Mr. Stranger contended either that they should rank in inverse order or at any rate *pari passu*.

In my judgment they rank *pari passu*. There is no English authority for Mr. Carpmael's and Mr. Brightman's contention except a passage in MacLachlan on Merchant Shipping, the earliest edition; and the passage that is mainly relied on is at p. 598 of the first edition: "Liens in the nature of reparation for wrong done, usually arise out of collision, and form the subject of proceedings in damage causes. They have their origin in positive law, and in the policy of quieting strife by distributing compensation for injuries done at the expense of the wrongdoer. They are severally co-extensive in point of right with the value of the ship and the gross amount of the freight being earned; they furnish, therefore, to sundry sufferers by the same collision the claim to rank equally and share *pro rata* in the common fund. Of two successive collisions with the same ship, the sufferers by the earlier standing to the sufferers by the later in no relation of demerit or obligation, retain their priority of claim against the fund, on the principle of the legal maxim: 'Qui prior in tempore, potior est in jure.'"

Mr. Carpmael said that that meant that whoever was first in time had priority. No authority is cited for that proposition in the original edition of MacLachlan, and nowhere else is that statement supported. Abbott contains no support for it in the editions by him, though a passage does appear in the 14th edit. (that is, a later edition), in which he says that "maritime liens *ex delicto* rank in the order of their attachment," and cites in support of that *The Hope* (1872, 1 Asp. Mar. Law Cas. 563; 28 L. T. Rep. 287); but when *The Hope* is looked at it does not support that view. Later on, at p. 1027, in dealing with the case of *The Elin* (1883, 5 Asp. Mar. Law Cas. 120; 49 L. T. Rep. 87; 8 Prob. Div. 39, 129), which was a case as to wages subsequent to a collision, he says:—"There seems, however, to be no decision that such a claim is to be postponed if the seamen, from the bankruptcy of the owner, or some similar cause, have no other remedy for the recovery of what is due to them." So that in the learned author's opinion the question of seamen's wages on a bankruptcy might easily be preferred to a collision lien.

In Halsbury's Laws of England the author of the shipping portion of that work repeats the passage in the later page and again cites *The Hope* (*sup.*). No such authority could be

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found by counsel in the Scottish cases. There is some support in two cases in an American District Court and in a Circuit Court of a kind, and elsewhere there is authority to the contrary. I will deal with the American cases later.

Mr. Stranger pointed out that there was authority to the contrary and referred me to Mr. Carver's book on Carriage of Goods by Sea, 6th edit., sect. 320, and especially to p. 436. In dealing with priority of creditors on the ship he states what the maritime liens are, including damage done by the ship, and the broad rule he says is: "That among themselves these claims rank inversely to their order of date. The last come first. One ground for this is, that the claims for services which have conserved the *res* should come before earlier charges upon the *res* which have been thereby preserved. Another ground is that one who has a lien on the ship holds that subject to the chances of the ship's voyage, which may give rise to fresh liens. The lien is ordinarily a charge upon a ship in course of an adventure, not upon a ship in safety. Whether willingly or unwillingly the holder of it has become a party to the adventure; and may properly be considered to take the risks of it, as against those who may render services to the adventurer, or who may suffer by the negligent conduct of it."

The other books I have give no support to Mr. Carpmal's and Mr. Brightman's contention; nor in Roscoe on Admiralty Practice, 4th edit., can any such support be found. His view is set out on pp. 117 and 118: "Liens arising *ex delicto* take precedence over prior liens arising *ex contractu*, including salvage, and in respect of damage claimants *inter se* their claims in actions *in rem*, based on lien, in respect of the same collision, rank in the order of the judgments; for on obtaining judgment in a damage action the lien may be enforced to the exclusion of another damage claimant subsequently instituting his action even on the same day, but if instituted before judgment the damage is assessed rateably."

And he cites for that *The Clara* (1855, Swa. 1) and *The Africano* (7 Asp. Mar. Law Cas. 427; 70 L. T. Rep. 250; (1894) P. 141). In Williams and Bruce, 2nd edit., I can find nothing to support this argument. Williams and Bruce is a mine of learning and knowledge in all matters connected with Admiralty; see pp. 85, 289, and 312. Nor can I find any support for it in Marsden from the first edition downwards. On p. 91 of the last edition (which, I think, is merely a repetition of the earlier editions) he says: "Where several claimants for damages in several actions *in rem* in respect of the same collision obtain successive judgments against the ship, their respective liens are enforceable against the ship in the order of the judgments. A plaintiff who institutes his action after another has been instituted, but before judgment, is entitled to damages rateably with the plaintiff in the earlier action."

Mr. Stranger further contended that all maritime liens are the same, but the court has

never held that the order of date of lien arising gives any priority. If one maritime lien does, one would suppose that all would. He also relied on the principles and reasoning of *The Africano* (*sup.*), and the fact that all the arguments and decisions of the great number of priority cases were unnecessary if claimants were right here, that is, the claimants in the earlier collision.

In my judgment, all maritime liens are the same. They are defined in *The Bold Buccleugh* (1850, 19 L. T. Rep. (O. S.) 235; 7 Moo. P. C. 267), and the important passages are at pp. 284 and 285. It is to be noted that in those pages it was thought that the maritime lien is the foundation of the proceeding *in rem*: "a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process."

In later times that has been held not to be so, but in the old days I have very little doubt myself that the two things were the same. Then: "This claim or privilege travels with the thing, into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process by a proceeding *in rem*, relates back to the period when it first attached." This is considering throughout the collision between the owners of the *res* and the person who has suffered damage and is not a question of priority between two persons who have suffered damage. Then it goes on to cite *The Aline* (1839, Wm. Rob. 111), which seems to be the foundation of the view of Mr. Carpmal: "So by the collision the interest of the claimant attached, and dating from that event the ship in which he was interested having been repaired, was put in bottomry by the master acting for all parties, and he would be bound by that transaction." *The Aline* (*sup.*) was a case of preference of a bondholder, and that passage seems to me to make it obvious that the damage lien does not necessarily take priority even of bottomry. Therefore there is no magic in the first attachment of the lien.

In *The Ripon City* (8 Asp. Mar. Law Cas. 304; 77 L. T. Rep. 98; (1897) P. 226), Gorell Barnes, J. says: "Such a lien is a privilege claim upon a vessel in respect of service done to it, or injury caused by it, to be carried into effect by legal process. It is a right acquired by one over a thing belonging to another—a *jus in re aliena*. It is, so to speak, a subtraction from the absolute property of the owner in the thing." Then he goes on to deal with the facts of that case as showing that the right must be a right against the owner as well as against the *res*. In *The Tervæle* (16 Asp. Mar. Law Cas. 48; 128 L. T. Rep. 176; (1922) P. 259 (at p. 155 Asp. Mar. Law Cas.; p. 183 L. T. Rep.; p. 270 P.), Scrutton, L.J., says: "The

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so-called maritime lien has nothing to do with possession, but is a priority in claim over the proceeds of sale of the ship in preference to other claimants." And lower down, on the same page, he says: "But for a lien to arise, in my view, some person having by permission of the owner temporary ownership or possession of the vessel must be liable for the collision. If he is so liable, a privilege or lien at once arises in this sense, that if the vessel comes within English territorial waters it may be arrested, and the claim or privilege on it will date back to the time of the lien. Any purchaser after collision takes the ship subject to this possibility of claim."

He is not there considering priority of claims *inter se*; he is considering priority of claim as against another person. He also says (at p. 55, *Asp. Mar. Law Cas.*; p. 184, *L. T. Rep.*; p. 271, *P.*): "To hold that a lien would come into existence, if the Government sold the ship to a private purchaser, would be to deprive the Belgian Government of part of their property, for such a lien about to arise must reduce the price paid to the Government and so affect the property of the Government."

There he is speaking again of the subtraction from the property of the owner. *Atkin, L.J.* says (at p. 56, *Asp. Mar. Law Cas.*; p. 185, *L. T. Rep.*; p. 274, *P.*): "It is not a right to take possession or to hold possession of the ship. It is confined to a right to take proceedings in a court of law to have the ship seized, and, if necessary, sold."

There, again, that is a case of a claim as against the owner of the *res*, and not a claim as between competing liens. *The Tervaete* is an interesting case as showing that the maritime lien does not necessarily always attach for damage to a ship, because in that case the vessel, being owned by a foreign Government or sovereign, there is no claim at all. I see no indication in any of these cases of any difference between one maritime lien and another.

Before dealing with the priority cases I want to say a word as to necessities. Previous to 1840 a necessities man who had supplied necessities within the body of a county had no remedy in the Admiralty Court. The Admiralty Court Act of 1840 gave in certain cases jurisdiction *in rem* over claims for necessities. Following *The Bold Buccleugh* (*sup.*), necessities men under the Act were held to have maritime liens; and so it was for something like forty years: see, e.g., *The West Friesland* (1859, 2 *L. T. Rep.* 613; *Swa.* 454). Such was the law down to 1886, when *The Heinrich Bjorn* (1886, 6 *Asp. Mar. Law Cas.* 1; 55 *L. T. Rep.* 66; 11 *App. Cas.* 270) was decided. That decision was that claimants for necessities had no maritime lien. The treatment of priorities in necessities cases during that period of enjoyment of a maritime lien is, however, quite instructive. I could not follow Mr. Carpmael's argument that the maritime lien in a necessities case was different from any other maritime lien. Questions of priorities have constantly arisen and been

decided; but so far as I know no similar case of separate claimants for damage by separate collisions as distinguished from separate claimants for damage by the same collision has ever been raised and decided, although one would think it would have occurred. Two or three collisions are common. Not long ago there was a case of five, followed by a limitation suit. Moreover, the eminent solicitors acting for the second, third, and fourth collisions here both thought—I say "both" because there were only two solicitors—that a rateable distribution was the right one, and so stated in their letters of the 15th and 17th July, which were put in.

The priority cases divide themselves into two groups: (1) Competing claims for similar causes of action; and (2) competing claims for different causes of action; and one finds that in these cases the rule is not always the same. It has always been held that necessities men shared *pari passu* excepting where one had got priority of decree. Salvage is in inverse order; bottomry is in inverse order. Wages, I think, are *pari passu*, although I do not know that the question has ever been definitely raised. My attention was not drawn to any case where one seaman had served and earned wages long before another seaman, and as far as I know they have always been treated as sharing *pari passu*: (see *The Salacia*, 1862, 1 *Mar. Law Cas.* (O.S.) 261; 7 *L. T. Rep.* 440; *Lush.* 578). Where the causes of action have been different, equitable grounds have been relied upon to give various priorities according to what was thought to be right. In necessities and damage cases, priority of decree was the only priority ever argued or recognised. It is significant that date of supply or date of damage was never suggested: (see *The Clara*, 1855, *Swa.* 1; *The Desdemona*, 1856, *Swa.* 158; *The William F. Safford*, *Lush.* 69; and *The Saracen*, 1846, 2 *Wm. Rob.* 451, 4 *Notes of Cases* 498). In salvage, the later salvor was always preferred to the earlier. That was on equitable grounds, because the later salvor made it possible that the earlier salvor should get payment. In bottomry it was the same rule as in salvage.

I have not dealt with the master's lien for wages and disbursements. That, of course, stood on rather a different footing, because the master was occasionally postponed to the seamen. Subsequently his lien for disbursements was statutory. The damage lien generally was treated as coming first, but not always, the reason being that all the other claims were with regard to voluntary dealings with the ship. Cases other than cases of damage were described as arising out of contract or quasi-contract; salvage (apart from a bargain to save) is not contract at all. As between bottomry and wages, equitable grounds gave sometimes one and sometimes another priority (see *The Veritas*, 9 *Asp. Mar. Law Cas.* 237, at pp. 310, 312, 313, and 314; 85 *L. T. Rep.* 136; (1901) *P.* 304; *The Union*, 1860, 3 *L. T. Rep.* 280; *Lush.* 128; and *The Gustaf*, 1862,

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1 Mar. Law Cas. (O. S.) 230; 6 L. T. Rep. 660; Lush. 506). In *The Gustaf* I think the shipwright who had a possessory lien was preferred to the necessities man. "With regard to the claims for necessities, I am of opinion that they cannot compete with the shipwright's lien." That is Dr. Lushington in *The Gustaf* (sup.).

Lastly, in damage cases where the damage claimants for the same collision are competing—that is to say, ship and cargo—it was decreed here that gave priority, otherwise they must rank *pari passu*, although it may well be that the damage to the cargo occurred later than the damage to the ship.

The result as to priority of lien seems to be this: First of all you could get priority if you obtained judgment first; secondly, you could get priority by later lien, as in salvage and bottomry; and thirdly, there were the cases where they rank *pari passu*.

The first of those is not contended for here at all, probably because all judgments are now given subject to the question of priority being determined hereafter. In the second case of priority in inverse order—that is, by the later lien—I see no reason to apply this except possibly as to the *Squawk* case, owing to the delay; because the master of the *Squawk* could quite well have put forward his case at the same time as his owners put forward their case, and either have got bail or have got paid. But, the other three collisions all happening within a very short time of each other—in one case only a few hours, and in the other case only a few days—I do not think it would be equitable or fair to give any priority for such as that. With regard to the *Squawk* case, if I had to decide whether there were laches or not, I should want to have all the facts before me. So far as the facts in this case are concerned, if anybody had to be postponed, certainly a man who waited such a long time as the master of the *Squawk* would have to be postponed, because he had an option whether he should allow the ship to go free of his claim, or wait for some considerable time. The other people had no option.

Now the third remains, and I think that certainly is equitable as regards the last three. I should mention that Mr. Stranger did not strongly contend to postpone the *Squawk* as distinct from the other ships' claims. The general result of the examination of the cases on priorities leads me to this: that no such rule as contended for by Mr. Carpmacel and Mr. Brightman has ever been applied, and I do not think it ought to be. I think the origin of the lien and its uncertainty of attachment in some of the cases points to the same conclusion. *The Linda Flor* (1857, 30 L. T. Rep. 234 (O. S.); Swa. 309) points to the same view; because there, although Dr. Lushington gave priority to a claimant for damage by collision over a claim for wages, he specially reserved the case of a bankrupt owner. He says, after deciding that the damage lien took priority of the wages lien in that case: "This

is not the case of a bankrupt owner: it will be time to consider such a case when it arises." Again, in *The Markland* (1871, 1 Asp. Mar. Law Cas. 44; 24 L. T. Rep. 596; L. R. 3 Adm. & E. 340); that is a useful case when dealing with these matters; because in that case a suitor had obtained a decree, but payment out had not been made, and the decision was this: "The rule that the court will give priority to the suitor who first obtains a decree applies only as between claimants in *pari conditio*ne. Where, in a suit *in rem*, a decree has been made *per incuriam* for the payment of money out of the proceeds in court to satisfy the claim of the plaintiff (so there had been a decree for payment out) the court may, before the money has been paid, revoke or vary the decree." That case points to the fact that so long as the court has possession of the proceeds it will see that they are properly distributed. Then in *The Sea Spray* (10 Asp. Mar. Law Cas. 462; 96 L. T. Rep. 792; (1907) P. 133), Bargegrave Deane, J. postponed a claimant in possession of a maritime lien for damage by collision to the claimant for services of the Thames Conservancy who had raised the ship and incurred expenses in so doing, on the ground that "as the *res* had been preserved through the instrumentality of the Conservators, their claim ranked first, and therefore they would be at liberty to sell the vessel and her cargo, reimbursing themselves for their expenses and costs, in the first instance, out of the proceeds of the cargo, and then out of the proceeds of the vessel, paying the surplus, if any, of proceeds into court for the benefit of the parties entitled thereto"; clearly showing that he did not consider that a damage lien took precedence over all others.

Lastly, in *The Africano* (sup.), which was a question of rival necessities men, the President, Sir Francis Jeune, at p. 147 says: "If priority in distribution follows the attachment of lien or security, and if a sounder view of the law has transferred that attachment from the date of supply of necessities to the date of action brought in respect of it, we should expect to find it held in the less enlightened period before *The Heinrich Bjorn* (sup.) that funds in court should be distributed among material men according to the priority of their acts of service. But such was not the view of the judge"; and then he refers to *The Desdemona* (sup.) and *The William F. Safford* (1860, 2 L. T. Rep. 301; Lush. 69): "It is not, perhaps, easy to understand why Dr. Lushington limited, as he appears to have done in that case, the advantages of priority to the earliest decree; but it is clear that he contemplated a decree as alone capable of conferring priority." That seems to be the effect of all the cases where any priority is given at all. The same view was taken in an Irish case decided in 1869. "So that, on the whole, I have come to the conclusion that *pari passu* is the right method of dealing with these different claims." The American cases referred to by Mr. Carpmacel were two, *The*

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J. W. Tucker (1884, 20 Fed. Rep. 129) and *The Frank G. Fowler* (1883, 17 Fed. Rep. 653). *The J. W. Tucker* was a District Court case before Judge Brown; that was a case of competing liens for towage, where the rule in America seems to be that towage or necessities in the same season on the Great Lakes rank *pro rata*. In that case the same rule was applied to canal boats on Connecticut River for liens arising in the same season. The judgment refers to *The Frank G. Fowler* (1881) 8 Fed. Rep. 331; (1883) 17 Fed. Rep. 653) as establishing for that circuit the principle that a lien is a vested proprietary interest in the *res* itself from the time when it accrues; and then proceeds to deal with the various rules of inverse order and *pro rata* applied in ranking of similar and different causes of action, finally deciding in favour of *pro rata* in the case before him.

In the *Cyclopædia of Law*, edited by Mr. William Mack, in vol. 26, p. 809, title: Maritime Liens, the author, Mr. Hughes, after referring to *The Frank G. Fowler* (*sup.*) and *The John G. Stevens* (1897, 63 Davis Rep., 170 U. S. Rep., 113) says: "In view of the nature of maritime lien as a *jus in re*, so firmly established by the most recent decisions, the view that the last tort lien is to be preferred seems best sustained by principle." That is apparently Mr. Carver's view. And in 1897, in the Supreme Court from Circuit Court of Appeals, *The John G. Stevens*, at p. 120, Gray, J. delivering the opinion of the court, says that this case does not "present a question of precedence between two claims for distinct and successive collisions, as to which there has been a difference of opinion in the Southern District of New York; Judge Choate . . . giving the preference to the later claim upon the ground that the interest created in the vessel by the first collision was subject, like other proprietary interests in her, to the ordinary marine perils, including the second collision." Blatchford, J. reversed the decree because the vessel had not been benefited, but had been injured by the second collision. That is the effect of *The Frank G. Fowler* in the 1881 and 1883 Federal Reporter.

This statement of American law is not enough to alter my view after full argument and such consideration of the cases as I have been able to give them.

There is one further matter, and that is this. If it be true that all maritime liens for damage attach at the moment of the damage occurring, then when the ship gets into the hands of the court she is in the hands of the court with all the several liens attaching to her. One would think that the proper thing to do under those circumstances would be to see that everybody was equally treated. Under these circumstances the motion will be dismissed.

Solicitors: for the *Criterion* and the *Enable*, Messrs. Thos. Cooper and Co.; for the master of the *Squawk*, Messrs. W. H. Crump and Son; for the *Roi Leopold*, Messrs. Downing, Middleton, and Lewis.

June 16, July 14, 27, 1926.

(Before Lord MERRIVALE, P.)

GRANT v. OWNERS OF THE YACHT ST. GEORGE; THE ST. GEORGE; DOUGLAS v. OWNERS OF THE YACHT ST. GEORGE; THE ST. GEORGE. (a)

Bottomry bonds—Mortgage existing at the time of making bonds—Authority of master—Bonds not authorised by mortgagee—No notice to mortgagee—"Owner"—Whether security of mortgagee prejudiced by the bonds—Necessity—Advances made prior to making of bonds—Advances for insurance allotment moneys and for expenses of owners in England—Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 34.

By sect. 34 of the Merchant Shipping Act 1894 it is provided that except as far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed to be the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be the owner thereof.

Bottomry bonds were given to the plaintiffs by the master of the St. G. to secure necessary advances made by the plaintiffs to the St. G. in the port of B., At the time of giving the bonds the St. G. was mortgaged to the interveners.

Held, that, assuming that the bonds in fact prejudiced the security of the mortgagees, nevertheless sect. 34 did not deprive the master of his power to bottomry the ship without the authority of the mortgagee.

Held, further, that if the lender knew of the existence of the mortgage, he should if practicable communicate with the mortgagee, but upon the facts of the case, reasonable means were taken to inform the mortgagee of what was being done, and the lenders had reasonable ground for belief that the mortgagee consented, although notice of the bonds had not actually reached him.

One of the plaintiffs was a director of the company which owned the St. G., and was himself the registered managing owner of the vessel.

Held, that he was not thereby prevented from lending upon bottomry.

Of the sum of 1000l. secured by one of the bonds, 450l. had been advanced three months before the bond was given, without promise of bottomry.

Held, that the bond was valid for 550l. only.

Of the sum of 2000l. secured by the other bond, 1000l. was expended in England in payment of insurance and allotment moneys and other purposes of the owners in London, and 113l. was paid to the master in repayment of sums advanced by him.

Held, that the bond was not valid in respect of these amounts, and was valid only for the sum of 761l. identified as having been spent upon necessities for the impending voyage.

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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ACTIONS UPON BOTTOMRY BONDS.

In the first of these actions which were tried together, the plaintiff, William Alexander Grant, claimed the sum of 1000*l.* upon a bottomry bond dated the 4th Nov. 1924, and made at Balboa, Panama, by the master of the yacht *St. George*.

In the second action the plaintiff, Major Archibald John Angus Douglas, claimed the sum of 2000*l.* upon a similar bond.

By a mortgage dated the 31st March 1924 the *St. George* was mortgaged to Ernest Harry Gates to secure the sum of 25,000*l.* advanced by him. The owners of the *St. George*, Research Expeditions Limited, did not appear, but the executors of Mr. Gates intervened and contested the validity of the bonds.

It appeared that in 1922 an association called the Scientific Expeditionary Research Association was formed for the purpose of conducting an expedition to various places in the Pacific, making cinematograph films and carrying passengers for cruising trips in return for passage money. In Feb. 1923 the defendant company, Research Expeditions Limited, was formed by members of the association, and in due course acquired the yacht *St. George* for the purpose of conducting their expedition. The plaintiff, Major Douglas, was a director of Research Expeditions Limited, and became registered managing owner of the *St. George*. Funds were provided from various sources, but chiefly by means of overdrafts which were guaranteed by Mr. Gates to the extent of 2500*l.*, in return for which he received by way of security the mortgage above referred to.

On the 9th April 1924 the *St. George* set out upon a voyage to Teneriffe, the West Indies, Panama, Galapagos, Pitcairn, the Cook Islands, Tahiti and the Marquesas, with a return voyage *via* Panama and the Azores. The expedition was intended to last some 304 days. The *St. George* carried five passengers, of whom the plaintiff, Mr. Grant, was one. The passage money for the trip was 700*l.*, but several passengers were conveyed at reduced rates. By the terms of its contracts with the passengers, the company was under no liability if the proposed cruise was cancelled or altered.

In Aug. 1924 the *St. George* was at Balboa, unable to proceed upon her voyage for lack of funds, and therefore the plaintiff, Mr. Grant, advanced the sum of 200*l.* which enabled the ship to make a cruise to Corba. In September the *St. George* was again at Balboa in need of funds, and a further 250*l.* was advanced by Grant to enable her to proceed upon a cruise to Gorgona. In October the *St. George* returned to Balboa, where she was again without funds. Correspondence by letter and cables proceeded with the directors in England, who suggested that the money should be raised by means of bottomry bonds. It appeared that communications passed between the directors and a Mr. Siggs, a solicitor, who was at the same time solicitor for the defendant company and Mr. Gates, and that Siggs suggested that money might be obtained on bottomry. Siggs in his

evidence stated that Mr. Gates was unaware that the bonds were going to be given.

The plaintiff, Mr. Grant, then made a further advance of 550*l.*, and the plaintiff, Major Douglas, advanced a sum of 2000*l.*, which he obtained from his bankers in London. Of the sum of 2000*l.* advanced by Major Douglas, 1000*l.* was placed to the credit of the defendant company's account in London, and was expended by them upon insurance of the *St. George*, allotment moneys of the crew, and general expenses in London. Of the balance expended in Balboa, 113*l.* was paid to the master of the *St. George* in repayment of sums advanced by him; it appeared that a sum of 761*l.* only was expended upon necessary stores and disbursements. On the 14th Nov. 1924 the master of the *St. George* gave the plaintiffs the bottomry bonds sued upon to secure their respective advances.

Upon the return of the *St. George* to this country the plaintiffs commenced the present actions. The executors of Gates intervened, and by their defence alleged that it was unnecessary for the *St. George* to prosecute her voyage, but that she was engaged upon a cruise. Further they alleged that under and by virtue of the mortgage the mortgagee was the owner of the *St. George*, and for the purpose of making the bonds sued upon the mortgagee was to be deemed to be the owner, and that the master of the *St. George* was not the agent of the mortgagee and had not his authority to enter into the bonds and failed to communicate with him. It was contended that any bottomry bond which the master purported to make which impaired the security of the mortgagee was therefore invalid for the purpose of hypothecating the ship. It was further alleged that there was no necessity to hypothecate the ship. In the action by Major Douglas the interveners further alleged that the bond was invalid by reason of the fact that the plaintiff was himself a director of the defendant company, and they counterclaimed any sums for which the bonds given to him or Mr. Grant might be held valid as damages for breach of an implied duty as registered managing owner to communicate to the interveners as mortgagees the doing of every act which might prejudice their security.

Sect. 34 of the Merchant Shipping Act 1894 provides as follows:

Except as far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be the owner thereof.

Balloch for the plaintiffs in both actions.

Langton, K.C. and *J. B. Aspinall* for the interveners.—The mortgagee is in law the owner of the ship, since the effect of the mortgage is to transfer the legal estate to him. By sect. 34 he is not to be deemed to be the owner except for the purpose of making the ship available as a security. The making of a

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bottomry bond falls within this reservation, and the mortgagee is therefore the person who as owner should make the bond. A bottomry bond by creating a maritime lien necessarily prejudices the mortgagee's security. It has been held that a charter-party may in certain circumstances prejudice the security; *a fortiori* a bottomry bond will do so. *Collins v. Lamport* (1864, 1 Mar. Law Cas. (O.S.) 153; 11 L. T. Rep. 497; 13 W. R. 273) illustrates this principle which was acted upon again in *Kitchin v. Irvine* (1858, 28 L. J. (Q. B.) 46), *Law Guarantee Society v. Russian Bank for Foreign Trade* (10 Asp. Mar. Law Cas. 41; 92 L. T. Rep. 435; (1905) 1 K. B. 815) and *The Manor* (10 Asp. Mar. Law Cas. 446; 96 L. T. Rep. 871; (1907) P. 339).

In any case notice should have been given by the master or the owners or by the lenders, one of whom certainly knew of the existence of the mortgage at the time of lending. There is no direct authority for this proposition, but the statement expressed in *Abbott on Merchant Shipping*, 14th edit., at p. 202, is relied upon. *The Helgoland* (1859, Sim. 491) is no authority to the contrary for there all that was held was that there was no duty upon a lender on bottomry to give notice of his bond to a subsequent mortgagee.

Further the 450*l.* which was first advanced by the plaintiff, Grant, was not advanced upon bottomry or promise of bottomry at all. This plaintiff knew nothing of bottomry at that time. As regards the advances by the plaintiff, Douglas, the money spent in England was clearly not a necessary for the *St. George* at Balboa. Nor was the sum of 113*l.* repaid from the balance to the master, for the vessel already had the benefit of these advances.

Balloch replied.—Sect. 34 has not the effect contended for. In any case the bonds do not prejudice the security, but rather protect it, since they enabled the *St. George* to return to this country. Had the funds provided by the plaintiffs not been forthcoming the *St. George* might have been proceeded against at Balboa in respect of other claims, *e.g.*, canal dues. As to the advance made in August and September by the plaintiff, Mr. Grant, it is true that this advance was not made upon promise of bottomry. But had the master not offered to give a bottomry bond in respect of this advance in addition to the advance made in November, Mr. Grant would not have advanced the later sum of 550*l.* There was therefore necessity in that sense.

Cur. adv. vult.

July 27, 1926.—Lord MERRIVALE, P.—These are actions brought by the respective plaintiffs to establish the validity of a bottomry bond for 2000*l.* in favour of the plaintiff Douglas, and a later bond for 1000*l.* in favour of the plaintiff Grant made by the master of the yacht *St. George* in the port of Balboa in the Republic of Panama on the 14th Nov. 1924 by way of security as is alleged by the plaintiffs for moneys lent by them respectively upon

terms of bottomry in order to enable the *St. George* to proceed from Balboa to Tahiti in course of a voyage from London by way of Panama to various points in the Pacific. The defendants, the owners of the *St. George*, do not contest the plaintiffs' claim. They have under the circumstances of the case no interest in the litigation. Both claims are contested by an intervener, the legal personal representative of Ernest Everard Gates, now deceased. Mr. Gates was mortgagee of the *St. George* for an amount which is no doubt largely in excess of the realised value of the vessel. She has been sold under order of the court and has produced 6600*l.* The alleged loans of the plaintiffs are not admitted; the necessity of borrowing is denied. The bonds are impugned also on the ground that no notice of the several transactions was given by the lenders or the master of the *St. George* to the owners of the vessel. The mortgagee, it is further contended, was the owner, and it is said that he had no notice and that no bottomry bond which impaired his security could be given without his authority. For want of such authority the bonds are said to be invalid.

The intervener formulated a counterclaim whereby he demands to recover from the plaintiff Douglas as damages any sum or sums which may be found payable to the plaintiffs respectively in respect of the several bonds, on the ground of an alleged breach of duty of the plaintiff Douglas in the making of the bonds. Objection was taken at the hearing to the admissibility in this action of this personal claim in respect of this mortgage, but this matter need not be dealt with at length. The counterclaim was eventually not pressed. It is not founded upon facts or allegations of fact which appear to me to give the intervener a cause of action.

The litigation arises out of an ocean adventure uncommon in its character, mode of prosecution, and incidents. When these are known, it seems not to be out of keeping with other singularities of the enterprise that at a critical stage in the undertaking resort was had for its further prosecution to a mode of raising money out of common use at the present day and unfamiliar in current practice—borrowing on bottomry of the ship.

There was formed in London in 1923 "to promote scientific research by expeditions to various parts of the world," the "Scientific Expeditionary Research Association." The association registered a private joint stock company with a capital of 3000*l.* in order for the purchase and fitting out of a ship for its expeditionary cruises. This ship was the *St. George*, a three-masted schooner with auxiliary engines. The first expeditionary cruise was planned for Sept. 1923. The itinerary from and to London included Teneriffe, the West Indies, Panama, Galapagos, Pitcairn, the Cook Islands, Tahiti, and the Marquesas, with a return voyage by Panama and the Azores; 20,860 nautical miles and 304 days, of which 162 days were designed to be spent at sea and

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136 on shore. For equipment expenses subscriptions from scientists and loans on security were obtained. Toward the necessary costs of the expedition passage money at the rate of 700*l.* each was received from passengers. The number was not to exceed thirty; and, in fact, did not exceed six or seven. A contemplated further source of income of the company incidental to the cruise in question was the sale of cinema and publication rights, and among the staff of the expedition were various persons who were employed with a view to this possible means of profit. The passengers contract note described the passage money as a contribution to the expenses of the expedition, and provided that "no action for damages shall lie against the owners by reason of cancellation or alienation of the proposed cruise," and said further: "It is understood that repayment of deposit," *i.e.*, 50 per cent. of the passage money, "will be made in full if the expedition fails to proceed on the voyage."

The objects of the company as stated in its memorandum of association included besides the formation, management and control of expeditions to any part of the world for the purpose of scientific research, various commercial purposes including the business of ship-owners, the carriage of passengers, acquisition, and sale of concessions or licences, photography, cinematography, and taxidermy, and a multitude of other occupations capable of producing profit and loss.

The purchase of the *St. George* and setting out of the expedition cost, it is said, from 80,000*l.* to 35,000*l.* Part of the outlay was advanced by a London bank on a guarantee. Mr. Gates, in whose right the intervenor is acting, became guarantor, first of 20,000*l.*, and then of a further 5000*l.*, and to secure his liability to the bank he took from the company the mortgage of the *St. George* which is relied upon in the intervenor's pleadings. He received, also, the agreement under which the company was bound, whether he should or should not become liable under the guarantee, to account to him for a percentage of any profits derived by the company from the sale of cinematographic plans, photographs or exhibitions.

The *St. George* set out upon her cruise in April 1924 with supplies and funds which provided for her transit to Balboa. She arrived there in June 1924. Three directors of the company were on board, one of them being the plaintiff, Douglas, who had also been registered under the Merchant Shipping Acts as managing owner of the ship. Her commander was an officer of naval experience, Captain David Blair. At Balboa the ship's available resources speedily became exhausted. The company's directors in London had been negotiating for further funds; they were in fact using all possible exertions in this behalf at all material times, before and until some months after the making of the bonds in question. As they informed their colleagues on the *St. George*, they had high expectations of success in this regard, but they

wholly failed to secure funds. This failure led to applications locally at Balboa to various persons and ultimately to the several loans by the plaintiffs in respect of which, as is claimed, they took bottomry bonds. At the hearing of the cause every stage of the enterprise came under close examination on the various questions of necessity which arise in the case, with the result of making it clear beyond all reasonable doubt that it was only by means of moneys furnished by the plaintiffs to meet the extreme urgent difficulties of the company that the company's officers were enabled to proceed with the *St. George's* cruise in the Pacific.

The material facts as to the advances by the plaintiff can be concisely stated. At all times from June to November the company had the *St. George* ready for departure to the Pacific as soon as they could raise the requisite funds. By arrangement between the directors in London and those on board short cruises from Balboa were planned and carried out: to Gorgona, Corba, Galapagos, and again to Gorgona. The first expedition to Gorgona exhausted all the company's available resources. The directors on board and the master borrowed from the plaintiff Grant 200*l.* to enable them to arrange the trip to Corba. Mr. Grant lent the money on the credit of the company's undertaking, without any knowledge of bottomry or any mention of security. In September the second Gorgona cruise was planned. No funds were available for it or for any of the current expenses of the ship and her crew. On condition that the company would carry out the expedition to the Pacific Mr. Grant provided towards the ship's necessities for this voyage 250*l.*, which sum was duly expended upon provisions, coal, canal dues, seamen's advances and other necessary outlay of the vessel. The advance on Aug. the 22nd was described by cable from the ship to the board in London as "for present needs." The September advance was obtained by the master, at the board's instance, and reported by him as being made "on the understanding we should continue to Tahiti." When the *St. George* returned from her second Gorgona expedition, at the end of Oct. 1924 the board in London instructed the master to obtain 3000*l.* on bottomry bond, and stated to the master that this had been "advised by Siggs." As to this instruction and alleged advice more must be said later. Until at any rate late in Sept. 1924 the subject of bottomry is unknown to both the plaintiffs. Cable messages from the board in London in Oct. and Nov. 1924 led to the obtaining of information by the plaintiffs with regard to bottomry and prepared the way for an arrangement which was entered into about the 5th Nov. 1924, whereby Mr. Douglas agreed to advance 2000*l.* on bottomry and Mr. Grant a further 550*l.* to enable the *St. George* to proceed to Tahiti. In response to continued urgent representations by the board in London of the desperate financial plight of the company and its inability to provide for overdue premiums upon the

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insurances of the vessel and allotments payable to dependants of the crew, Mr. Douglas also arranged an advance to the company in London by his bankers of a further 1000*l.*, which the directors applied to the amount of 700*l.* for these pressing needs. With the balance they met various small current expenses.

The advance of 1000*l.* at Balboa agreed for by Mr. Douglas in Nov. 1924 was put to the ship's credit at Balboa on the 10th Nov. He made the advance on the promise that it should be secured by bottomry. Mr. Grant's loans in November were put to the ship's credit in Balboa; 500*l.* on the 5th Nov., 50*l.* on the 13th Nov. The respective bonds were executed by the master on the 14th Nov. Mr. Douglas's advance of 1000*l.* to the company in London became effective on the 12th Nov. The inclusion in the security of his two advances of 1000*l.* each was made in accordance with an arrangement he made with the master of the *St. George*. Mr. Grant lent the 500*l.* which he provided on the 5th Nov. and the 50*l.* which he provided on the 13th Nov. after a statement had been made to him that if he made them he would be given a bottomry bond for 1000*l.* to cover the sum total of his loans at Balboa.

The sums of 1000*l.* and 550*l.* which were paid into the bank at Balboa by Mr. Douglas and Mr. Grant in Nov. 1924, were disbursed by the master. Cash payments were made for provisioning and coaling the ship, advances to the men, canal dues, and daily outgoings; 113*l.* 5*s.* 2*d.* was appropriated to discharge an advance the master had made shortly before out of his own moneys to provide coals. The balance was left in the bank at Balboa, and appears to have been applied to complete the payment of the expenses incurred in order to enable the *St. George* to quit Balboa and proceed to Tahiti. Before examining the various objections which are made to these bonds it will be useful to state shortly my understanding of the law which governs the case. The root of the matter seems to be that the power to effect bottomry arises when there is necessity, and not otherwise. Lord Stowell cites and adopts in his judgment in *The Gratitude* (1801, 3 C. Rob. 240, at 266) a passage in which Bynkershoek sums up the principle of ancient maritime usage whereby a ship's master on his voyage had been from remote times empowered to deal with emergencies by hypothecating the ship "*magistro peregre agenti permiscum est navem ex causa necessitatis obligari.*" Speaking in a time when necessity at sea arose in modes which are not common under the changed conditions of to-day, Lord Stowell also said this at p. 288: "The law of necessity is not likely to be furnished with precise rules. Necessity creates the law; it supersedes rules; and whatever is reasonable and just in such cases is likewise legal." The subject under consideration there was the extent to which the power to bottomry a ship's cargo is dependent upon previous communication of this need to the owners.

Necessity in two particulars must be proved by a lender who claims upon bottomry. The first essential is to show the ship's need for the expenditure in order to complete the voyage from the foreign port; *The Royal Arch* (18 Swa. 269, 277, 278); *The Carnak* (3 Mar. Law Cas. (O.S.) 103, 276; 21 L. T. Rep. 159; (1869) L. R. 2 P. C. 312). The next to show that this necessity could only be met by hypothecating the ship. See also *The Mersey* (1837, 3 Hagg. Adm., 404, at p. 408), Abbott on Shipping, 14th edit., p. 202.

To whatever extent the validity of a bottomry bond depends upon notice of the intended transactions to be given to a person whose rights it will postpone or impair the condition which requires such notice seems to me to spring from the general principle that the power to effect bottomry depends upon necessity. As to owners it was said in *Australasian Steam Navigation Company v. Morse* (1872, 1 Asp. Mar. Law Cas. 407; 27 L. T. Rep. 257; L. R. 4 P. C. 222) that "where there is a reasonable expectation that effective communication can be made the master must endeavour to obtain the owners' instructions." As to owners of cargo the judgment in *The Bonaparte* (1853, 8 Moo. P. C. 459) laid down the rule that before making bottomry of cargo the master should satisfy the owners. "It was his duty to communicate with the owners or at least to attempt to do so. The existence of this obligation had not always been recognised. When difficulties of communication and other causes of sudden and urgent necessity at sea led to insistence on the "high and privileged nature" (*The Alexander*, 1812, 1 Dods. 278) of bottomry transactions, notice to mortgagees as a condition of bottomry of the ship appears not to have been invariably treated as essential. Text-writers have cited Dr. Lushington's observation in *The Helgoland* (1859, Swa. 491, at pp. 498, 499), that a lender on bottomry is under no obligation to communicate with the mortgagee of the ship, without due regard to the fact that the mortgage there under consideration was granted subsequently to the bottomry bond.

In various reported cases, however, loans on bottomry have taken precedence of moneys due on previous mortgages; *The Duke of Bedford* (1829, 2 Hagg. Adm. 234); in *Smith v. Bank of New South Wales*; *The Staffordshire* (1872, 1 Asp. Mar. Law Cas. 365; 27 L. T. Rep. 46; L. R. 4 P. C. 194), the subject of notice to mortgagees is discussed, and notice is not treated as immaterial, but the absence of notice under the circumstances of the case was held to be immaterial by reason of the fact that there was really no opportunity. Having regard to the principle which seems to me to underlie the authorities, I have considered that I ought to examine this case upon the footing that as is said with regard to this matter by the learned editors of Abbott on Shipping, 3rd edit., p. 156: "If a lender should happen to know that the mortgagees are more interested than anybody else in getting the ship home, he will do well to

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DOUGLAS D. OWNERS OF THE YACHT *ST. GEORGE*; *THE ST. GEORGE*.

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see that they have notice of the necessity for hypothecation if communication is practicable." "What is necessary" and "what is reasonable and just" were, as I have before mentioned, conditions of validity of bottomry bonds which Lord Stowell laid down in *The Gratitude* (*sup.*).

In the light of the authorities there was, in my opinion, necessity at Balboa that those in charge of the *St. George* should raise money there if the ship was to continue her voyage. It was said at the hearing that the undertaking of the company in this cruise was not of a commercial nature. I have indicated particulars in which it has that character. The documents show that the company had money-making aims in respect of possible sales and exhibitions of pictures and films, and carriage of passengers at substantial rates of charge. It is not clear either that if this cruise had been abandoned at Balboa the passengers would have had no claim to repayment of passage money. Further, the ship lay in a foreign port subject as I suppose, to arrest and sale for all kinds of liabilities which were daily accumulating. There was necessity to take her on or bring her home. There was necessity at Balboa also, if money was to be obtained, to obtain it by hypothecating the ship, *i.e.*, by bottomry. Every contemporary opinion of informed persons capable of advising seems to have been to that effect. The mortgagee's solicitors were of that mind; indeed the suggestion of recourse to bottomry appears to have originated with them.

In the case of the plaintiff, Douglas, objections were made that he could not lend on bottomry of the *St. George* because he was a director of the company and "managing owner." As director he was the owners' agent; his statutory position as managing owner did not in any sense vest the ship in him in point of property either at law or in equity. When it was said long since that an agent's advances on bottomry will be very carefully scrutinised, the reference was, I think, to a ship's agent, one of whose functions was to grant or obtain credit for the ship. I see no ground on which it can be said that Major Douglas was disabled from making such advances. I must hold him to have been in the circumstances a capable lender on bottomry of the ship.

The question as to notice to the mortgagee, Mr. Gates, is by no means easy of solution. It is complicated by the fact that the company's legal adviser, Mr. Siggs, of Robert Greening and Co., was at all times the legal adviser of the mortgagee. He was also the mortgagee's friend and brother-in-law. The plaintiff, Douglas, knew of the mortgage, and had good reason for the believing as he did, that the mortgagee approved of his making a loan to the company on a bond which would take precedence of the mortgage debt. There is no precise proof that the plaintiff, Grant, knew of the mortgage, but the course of events lead me to suppose it had been mentioned to him, and that he shared generally the belief on this subject of the plaintiff, Douglas. The company's directors on

board the *St. George* and the master supposed, and had good reason to suppose, that the mortgagee knew of an intended borrowing on bottomry and assented to it. So far as the board in London are concerned, they had reason for supposing—and I think they did suppose—that the mortgagee was being kept informed by his solicitor and relative, Mr. Siggs. The mortgagee had in August written to one of their secretarial staff that he left them to Mr. Siggs. I accept the evidence of Mr. Siggs that Mr. Gates did not think or, in fact, know of the making of the bonds in question before, or within some weeks after the same were made. Mr. Siggs had means of knowledge which, I think, he avoided using because he apprehended that knowledge might be inconvenient. The decisive question is not whether notice of the making of the bonds reached the mortgagee. Reasonable means were taken to satisfy him of what was being done through his authorised agent, and there was reasonable ground for the belief the plaintiff, Douglas, had—and I think the plaintiff, Grant, had—that the mortgagee consented to the hypothecation.

The questions with which I have dealt arise upon the supposition that the case is one in which bottomry was possible. It was contended, however, on the intervener's behalf, that any bottomry of the *St. George* was impossible because of the existence of the mortgage. This proposition depends upon the construction of the terms of the Merchant Shipping Act 1894 (sect. 34), which reproduces sect. 70 of the Merchant Shipping Act 1854. The section is in these words: "Except so far as may be necessary for making a mortgage on the ship or share available as a security for the mortgage debt the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to cease to be the owner thereof." The exception in the statute was said to exclude from the powers of a mortgagor in possession any dealing which makes the ship unavailable for the mortgagee's security. The argument was based upon cases like *Collins v. Lamport* (1864, 1 Mar. Law Cas. (O.S.) 153; 11 L. T. Rep. 497; 13 W. R. 273); the *Law Guarantee Society v. The Russian Bank for Foreign Trade* (10 Asp. Mar. Law Cas. 41); 92 L. T. Rep. 435; (1905) 1 K. B. 815; and *The Manor* (10 Asp. Mar. Law Cas. 446; 96 L. T. Rep. 871; (1907) P. 339), where the courts were invited to, and sometimes did, interfere, at the instance of mortgagees of ships, to protect mortgage securities which were imperilled by dealings of mortgagors in possession. More particularly the argument depended upon a passage in the judgment of Lord Westbury, L.C., in *Collins v. Lamport*: "As long . . . as the dealings of the mortgagor with the ship are consistent with the sufficiency of the mortgagee's security, so long as their dealings do not materially prejudice or detract from, or impair the sufficiency of the security of the vessel as conferred in the mortgage, so long is the Parliamentary authority given to the mortgagor to act in all respects as owner of the

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[ADM.]

vessel." These words were insisted upon in their tenor and implications as though they constituted an enactment of the Legislature—which, of course they do not. The judgment in *Collins v. Lamport* (*sup.*) does not, and so far as I know there is no judgment which does, determine that a mortgaged ship cannot be bottomried, or that consent of the mortgagee is a pre-requisite of such a hypothecation. Generally the cases appear to me to proceed upon the hypothesis that but for the intervention of the court acts of the mortgagor might be effective in prejudice of the rights of the mortgagee. Fletcher Moulton, L.J., in his judgment in *The Manor* (*sup.*) says this: "It may well be that to allow a ship to become subject to a maritime lien may not be an infringement of the rights of the mortgagee even though that maritime lien ranks above claims under the mortgage." By what means precisely, and at what point, the powers of a mortgagor in possession are intended to be confined or curtailed by the words of a statute I need not here attempt to determine. It appears to me incredible that the Legislature, either in 1854 or in 1894, intended by the words relied on for the interveners, to extinguish the powers of a ship's master to bottomry a distressed ship in case of need, or to subject a damaged ship to a possessory lien in order that she might be repaired. The language used is not apt for the purpose if it was meant to deprive masters of ships of powers which they notoriously had. Acts in the exercise of those powers seem to me not to be dealings by the mortgagor. Nor is it obvious that they impair, or are calculated to impair, the security of the mortgagee. They are perhaps rather calculated to preserve it. In the well-known judgment of Lord Gorell—then Barnes, J.—in *The Ripon City* (8 Asp. Mar. Law Cas. 304; 77 L. T. Rep. 98; (1897) P. 226) a passage is found which militates against the argument of the intervener on this subject. The learned judge enumerates the classes of claims which give maritime liens—"Bottomry, salvage, wages"—and others—and discusses, with sect. 34 of the Act of 1894 before him, the grounds on which such claims take precedence of the rights of mortgagees, stating as the cause of such precedence that: "The vessel is permitted by a party interested in her to be in another's possession, and employed so as to become subject to maritime liens." On the construction of the section, and in my view of the law applicable to the case it is impossible I should give effect to the contention of the intervener under the Merchant Shipping Act 1894, s. 34.

An alternative proposition, which was glanced at in course of the argument upon sect. 34, was that the court on examination of the particular transaction—as for example this—might hold it to be avoided by the statute as being, in fact, a dealing of the kind defined by the section. The relevant issue of fact was not specifically formulated in this case, and upon the materials before me, I am by no means convinced that the resort of the master of the *St. George* to bottomry at Balboa was a dealing

which made the ship unavailable for the mortgagee's security. All the proprietary interests concerned were being prejudiced by the situation from which the *St. George* was removed. In the view I take of the dealings of the plaintiffs with the *St. George* there remains only the question whether the moneys there respectively lent were lent for and applied to the necessities of the *St. George* for the continuance of her voyage. As to the plaintiff, Douglas, 1000*l.* of the sum for which he claims to have security was lent in London, and applied in London to various purposes of the company. The 600*l.* paid for insurance was not a necessity of the voyage to the Pacific. Allotments to seamen's dependants did not secure the continuance of the cruise. No part of this expenditure in London seems to me to be properly chargeable on the ship by the bond in question. The total amount of the alleged disbursements in Balboa, and of the moneys provided by the new plaintiffs, appears to have been about 1424*l.* Of this the plaintiff Grant provided 550*l.* which is expressly identified as having been expended upon necessities for the impending voyage. A sum of 113*l.* was paid to the master, Commander Blair, as I have said in repayment of sums he had advanced to the company as appears by his affidavit, but I do not find it proved that the plaintiff made his loan with a view to this payment. Deducting the amounts I have specified, 761*l.* remains which could be, and I think was, disbursed for the continuance of the voyage. This is the full amount in which, so far as present proof goes, the vessel can be deemed to stand charged by bottomry in favour of the plaintiff, Douglas.

The difficulty with regard to the plaintiff, Grant, is that his advances in August and September, though they were applied for necessary purposes of the ship, were not lent on bottomry. I accept his evidence that the master told him afterwards that these sums should be included in his bond. I am not sure, however, that he stipulated for such inclusion or made his further advances conditional thereon. On the whole I come to the conclusion that the bond of the plaintiff Grant ought to be held a valid security for the advances of 550*l.*, and not as to the earlier loans. There is jurisdiction in the court to direct an inquiry by the registrar and merchants as to the amounts due to the respective plaintiffs. In Mr. Grant's case I think there is no reason for such an inquiry. Should either party desire a further investigation of the accounts on which I have arrived at my provisional figure of 761*l.* in the case of Mr. Douglas I shall duly consider any application in that behalf which it may be thought fit to make.

Solicitors in the first action: *Croft and Russell; Savory, Pryor, and Blagden*, agents for *Wade, Tetley, and Co.*, Bradford.

Solicitors in the second action: *Crawley, Arnold, and Co.; Savory, Pryor, and Blagden*, agents for *Wade, Tetley, and Co.*, Bradford.

House of Lords.

July 19, 20, and Nov. 5, 1926.

(Before Lords DUNEDIN, SHAW, SUMNER,
PHILLIMORE, and BLANESBURGH.)

THE CLARA CAMUS. (a)

ON APPEAL FROM THE COURT OF APPEAL IN
ENGLAND.

Collision — Both to blame — Appeal — Omission by judge at trial to take into consideration an important matter — Variation of the degrees of blame — Maritime Conventions Act 1911 (1 & 2 Geo. 5, c. 57), s. 1 — Fog — Steam vessel "hearing apparently forward of her beam the fog signal of a vessel the position of which is not ascertained" — Duty to stop engines and navigate with caution — Regulations for Preventing Collisions at Sea, art. 16.

The plaintiffs' vessel, M., came into collision with the defendants' vessel, C., in a fog at a point eleven and three-quarter miles off Cape R. Both vessels were travelling at excessive speed in the fog. Very shortly before the collision those on board the plaintiffs' vessel heard a fog signal on their starboard bow which they took for the fog signal at Cape R. Accordingly they starboarded and continued without stopping their engines. The sound proved to be the signal of the defendants' vessel. Art. 16 of the Regulations for Preventing Collisions at Sea provides that: "A steam vessel hearing apparently forward of her beam the fog signal of a vessel the position of which is not ascertained shall . . . stop her engines and then navigate with caution until danger of collision is over." Had those on board the plaintiffs' vessel recognised the signal as coming from the defendants' vessel it would have been their duty to have stopped their engines in accordance with the above article.

Held, that it being impossible that the C. had never heard the automatic whistle of the M., the C. was at fault in not stopping, just as the M. was at fault in not stopping when she first became aware of the proximity of another vessel. Both vessels had broken art. 16 of the Regulations for Preventing Collisions at Sea. The damage causing faults were therefore not two to one, but two to two.

Decision of the Court of Appeal (16 Asp. Mar. Law Cas. 570; 134 L. T. Rep. 50) reversed.

APPEAL by the plaintiffs from the decision of the Court of Appeal (Bankes, Warrington, and Scrutton, L.J.J.) (reported 134 L. T. Rep. 50). The defendants cross-appealed.

The plaintiffs were the owners of the steamship *Metagama*, 12,420 tons gross, 520ft. long, 64ft. beam, fitted with triple expansion engines 1492 h.p. nominal. The defendants were the owners of the Italian steamship *Clara Camus*, 7048 tons gross, 4416 tons net register, 435ft. in

length, fitted with triple expansion engines of 529 h.p. nominal.

The collision took place in fog on the 19th June 1924 at a point some eleven and three-quarter miles east of Cape Race. Both vessels were sounding their whistles for fog in accordance with the regulations. Each vessel complained of the speed of the other, failure to sound signals, and other matters. According to the plaintiffs' case, shortly before the collision a faint whistle was heard on the starboard bow of the *Metagama*, which was taken for a shore signal from Cape Race. The *Metagama* thereupon starboarded, but she continued to proceed without stopping her engines. The signal proved to be from the *Clara Camus*.

Art. 16 of the Regulations for Preventing Collisions at Sea provides as follows: "A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over."

The Court of Appeal (Bankes, Warrington, and Scrutton, L.J.J.) held that the failure of the plaintiffs' vessel to stop her engines upon hearing the signal of the defendants' vessel forward of her beam having contributed to the collision, and such failure not being excused by the fact that the signal was mistaken for a signal from Cape Race, the decision of the court below should be varied by pronouncing the plaintiffs' vessel two-thirds, and the defendants' vessel one-third to blame. They held further that where a judge sitting in Admiralty had apportioned the blame between two wrongdoing vessels in accordance with the provisions of sect. 1 of the Maritime Conventions Act 1911, the Court of Appeal, if it found that he had not taken into consideration at all an obviously important matter, was bound to review his decision as to the apportionment of blame in the same way as it would if it had differed with him on the facts and had found that one of the vessels was more blameworthy as regards matters in respect of which it was not held to blame in the court below. The plaintiffs appealed; the defendants cross-appealed.

D. Stephens, K.C. and G. Langton, K.C. for the plaintiffs.

Buller Aspinall, K.C. and E. Aylmer Digby for the defendants.

The House took time for consideration.

LORD DUNEDIN.—The sole question in this appeal and cross-appeal is as to the apportionment of blame between the two vessels, the *Clara Camus* and the *Metagama*, who were found in collision at a point some twelve miles east of Cape Race; the *Metagama* being on a voyage from Glasgow to Quebec and the *Clara Camus* on a voyage from Montreal to Havre. The *Clara Camus* struck the *Metagama* with her stem on the starboard side, and severe damage was occasioned to both ships. The learned President who tried the case found that

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

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both vessels were to blame in respect that they were going too fast in a fog, and he apportioned the blame equally.

The Court of Appeal altered and apportioned the blame two-thirds to the *Metagama* and one-third to the *Clara Camus*. The appeal by the *Metagama* seeks to restore the judgment of the President. The cross-appeal for the *Clara Camus* would have some larger fraction than two-thirds attributed to the *Metagama*.

The facts as set forth are these: The *Metagama* was going on a course 237 degrees true. She was entering a fog, and on entering it she started her automatic whistle. She then heard a whistle, not very loud, on her starboard bow. Thinking that it was the land signal of Cape Race, she starboarded and altered her course 10 degrees. Shortly afterwards she heard for the first time a signal from a ship enveloped in fog. The *Clara Camus* then emerged from the fog, and though, on hearing the signal the *Metagama* had stopped and reversed her engines, the collision occurred. All these facts are found as true by the President.

The case of the *Clara Camus* was that she was going on a course N. 81 E. true, and was in thick fog. She slowed her engines. She heard no signal from any other ship till on hearing a blast on her port bow, she stopped her engines and blew a blast in reply, which was shortly afterwards repeated, but the *Metagama* emerged from the fog and the collision occurred. The reason that the Court of Appeal altered the judgment of the President was this: Counsel for the *Metagama* had admitted that when the first whistle was heard, whether that whistle was from land or a ship, the *Metagama* ought to have stopped in accordance with art. 16 of the regulations. They considered that the President had only gone on excessive speed, but that the non-stopping constituted an extra fault. Inasmuch as the learned President had not found in terms that the *Clara Camus* ought to have stopped, this left it at two faults on *Metagama's* part and only one on the part of the *Clara Camus*. In the cross-appeal, counsel for the *Clara Camus* urged that there was also a third fault on the part of the *Metagama*, viz., the altering of her course 10 degrees, when she did not know what was ahead. This point had been decided adversely to her by both the President and the Court of Appeal, the latter having consulted their assessors.

Counsel for the *Clara Camus* also urged that those on board the *Metagama* had no business to attribute the whistle which they heard to a land signal, because the land signal had a different class of sound. This last point as to starboarding was very ably and very pertinaciously argued by the junior counsel for the *Clara Camus*. We therefore thought it right to consult our own assessors, and they agreeing with the assessors of the Court of Appeal unanimously were of opinion that in the circumstances there was no negligence. They thought that the sound was too far off to be discriminated with certainty; and assuming

the officers of the *Metagama* were honest in thinking it to be a land signal (a view to which the President had come) and seeing that they knew they were approaching Newfoundland, it was quite right slightly to alter the course to port. This extra ground of liability, therefore, disappears from the case. Much of the argument before your Lordships turned on a minute analysis of the President's judgment as to whether he had or had not inferentially (for he had not directly) found that the *Clara Camus* ought to have stopped as well as the *Metagama*. I do not think it is necessary to discuss that question, because I am of opinion that the *Clara Camus* ought to have stopped. The President did not believe the story of the *Clara Camus* as to their having stopped before finally stopping in the agony of the collision. Accordingly we also asked our assessors as to whether they thought it possible that the *Clara Camus* had never heard the automatic whistle of the *Metagama*, which the President held was blowing all the time till the collision was imminent. They said they considered it was quite impossible, and that it must have been heard. I am of the same opinion, and I therefore consider the *Clara Camus* was at fault in not stopping, just as the *Metagama* was at fault in not stopping when it first became aware of the proximity of another vessel. It is pointed out that the *Clara Camus* did something which the *Metagama* did not, that is, slowed down her engines to a speed of some six or seven knots, whereas the speed of the *Metagama* was fourteen, but I have not been able to think that that made any difference, because the real relevancy of speed is as to the power of pulling up; and the *Metagama* with her twin screws was so much more powerful than the *Clara Camus* with her one screw that I think the pulling-up power of the vessels at the speed they were respectively going was probably equal. Neither was enough, as the President held.

I am therefore of opinion that the damage-causing faults are not two to one, as the Court of Appeal held, but two to two, and I move, therefore, that the appeal be allowed, the judgment of the President restored, and the cross-appeal be dismissed.

LORD SHAW.—I agree. I express no dissent from, but, on the contrary, my concurrence in, the view taken in the court below as to the principle to be applied to such cases. It is thus expressed by Scrutton, L.J.: "The question is, whether there is anything to justify the departure from the ordinary rule in apportioning both to blame of equal proportions, and I think it is clear that where a court of appeal accepts the findings of fact of the judge and agrees with him as to whether there is or is not a breach of the regulations, the court will be very slow to interfere with the apportionment made by the judge below."

The Court of Appeal, in the present case, differed, however, from the President on one important particular of fact. The difference

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is put in a sentence in the judgment of Warrington, L.J., namely, there "having been a breach of the regulations on the part of the *Metagama* with no corresponding breach of the regulations having been committed by the *Clara Camus*, I think the learned judge ought to have apportioned the blame two-thirds to one-third, instead of half and half."

A Court of Appeal may, of course, come to the opinion that the judge at the trial either did not reach a true conclusion on the evidence, by reason of failure to take some relevant and material fact or facts into consideration, or, that (2) having considered all the facts he erred in the proper and reasonable conclusion to be drawn from them. I am inclined to think that in the present case the Court of Appeal differed from the learned President on the former ground. It was assumed that he had omitted to consider whether the *Metagama* as well as the *Clara Camus* broke the regulation.

I do not think this assumption of no consideration is warranted. Upon the facts recorded, my conclusion is the same as that just expressed by my noble and learned friend on the Woolsack; I think both vessels broke reg. 16. I further think that this is really the large and substantial matter to be considered in the apportionment of blame.

There may be a danger in these cases of error in refinement and ultra analyses in what is at best a highly difficult exercise, viz., the quantification of cause by the quantification of blame. It is clear, to my mind, that a mere enumeration of errors or faults goes no distance to satisfy the case, and forms no safe prescription of any rule of quantification. For many errors or mistakes on minor incidents or in minor particulars (although none of them could have been ruled out of the category of causes contributory to the result) may be completely outweighed in causal significant by a single broad and grave delinquency. One error of the latter kind may have done more to bring about the result than ten of the former.

These considerations confirm me in the view that the result of equal apportionment should not lightly be departed from. Still less lightly should such an apportionment, when reached by a judge of first instance, be departed from on appeal.

LORD SUMNER (read by Lord Blanesburgh).—In this collision the *Clara Camus* struck the *Metagama* with her stem and starboard bow about amidships on the starboard side. Both vessels were proceeding at an excessive speed in a fog, and having each become aware of the presence of the other before the actual collision both broke art. 16 of the Regulations for Preventing Collisions at Sea. The *Clara Camus* was the smaller and lighter vessel. Their speeds, as the learned President found, were about the same. Ought his half-and-half division of the resulting damage to the two ships to be altered in favour of the *Clara Camus*? I think not.

Under such circumstances it is hardly possible *a priori* to say that one ship was more blameworthy or did more damage than the other, nor do I think that an examination of the two damaged ships was likely to lead to any better result. Who can say that the difference in favour of the *Clara Camus* by reason of her smaller momentum was not fully counterbalanced by the advantage she gained from the position in which the blow was given and received? It is also fairly plain that the direct and almost the whole cause of the damage was the excessive speed on both sides. If both ships had been proceeding at a speed moderate enough to have kept themselves in hand, there should have been no collision, and hence the courses previously steered and the precise interval before the collision, at which sound signals were first heard on either side, become of quite minor importance on the question of apportionment, which depends rather on the question how much damage each did than on the question how much each broke how many rules. With all respect to the Court of Appeal I am not convinced that the President's finding of substantially equal speeds was erroneous. I agree with the advice given to your Lordships, that the *Metagama's* change of course, after she first heard the other ship's whistle, was not in the circumstances bad seamanship, and I think that the *Clara Camus* must have received and heard whistle signals from the *Metagama* considerably before she says she did. They may, of course, have come in at one ear and have gone out at the other unnoticed, but the powerful apparatus used by the *Metagama* was specially strident and strenuous, and if the *Metagama* could hear the *Clara Camus* in spite of the fog, as she did, I think the *Clara Camus* at much about the same time, though proceeding in an opposite direction, must have been able to hear the *Metagama's* whistle in the same fog, whether she paid actual attention to her or not. If so, both ships were equally in fault in respect of the remoter causes of the damage as well as in respect of the direct cause, and an equal apportionment is the right one.

LORD PHILLIMORE.—I am in some doubt whether the judges in the Court of Appeal correctly appreciated the nomenclature which the President had used in his judgment. They thought that he had confined his condemnation of the *Metagama* to the fault of her original speed in the fog and that he had not seen that those who navigated her had made a second error in not stopping their engines as soon as they heard the whistle from the other ship. For my part I am not sure that the learned President did not mean to treat of engine action as a whole as distinguished from the question of direction or helm action.

Be this, however, as it may. I am in agreement with the judges of the Court of Appeal that there were two errors in the navigation of the *Metagama*. But on the other hand I am also of opinion that there were two errors in

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the navigation of the *Clara Camus*, and I am not sure that the learned President did not mean to apply to each ship an equal condemnation for what in one point of view is a double and in the other a single error. At any rate, I agree with your Lordships who have spoken that there was also a double error on the part of the *Clara Camus*. It is true that on the presentment of her story by her own witnesses there was no such double error, for they said that they stopped, as soon as they heard the sound of a whistle from the other ship, though that sound was a solitary one and heard only just before the ship came in sight.

But this cannot be accepted. That the *Metagama* was sounding her whistle at regular intervals and had been doing so for some little time was found by the President, and I agree with your Lordships and with the nautical assessors who have advised us that more than one sound from that whistle must have been audible to those on board the *Clara Camus*, whether they attended to it or not. The *Clara Camus* therefore ought to have stopped sooner than she did, and both vessels are equally to blame, each with two separate faults to their charge, the one proceeding too fast in the fog, the other not stopping their engines as soon as they heard the whistle from the other ship.

It was much pressed upon your Lordships that there was a third fault to lay to the count of the *Metagama*, inasmuch as she had altered her course by starboarding her helm to the extent of 10 degrees when she heard the whistle of the *Clara Camus*.

I thought that this argument required grave consideration. Few things are more unwise or more likely to lead to mischief than an alteration of course in a fog, based on the bearing or supposed bearing of the sound of a whistle. In this case, however, all the nautical assessors who have in turn advised the President, the Court of Appeal and your Lordships' House, have been of opinion that this change of course is not to be taken as an item against the *Metagama*. I gather that their principal reason for taking this view is one which is wholly within their competence. They thought that the collision would have happened, though perhaps not exactly in the same way, if the *Metagama* had not made this change in her course. Further, the assessors who advised your Lordships' House thought that those on board the *Metagama* might have taken the first sound as possibly being a signal from the lighthouse at Cape Race, in which case they might do wisely in standing further out from the shore.

The first reason is that which most appeals to me; but anyhow I agree that there were no more faults in the navigation of the *Metagama* than there were in the navigation of the *Clara Camus*, and that the judgment of the President should be restored.

I cannot, however, say that I do this without regret. The *Clara Camus* paid some homage of obedience. She did reduce her speed for the fog to some extent though not enough, while the *Metagama* made no reduction at all; and if the

President had thought fit to mark his sense of this by laying some additional burden on the *Metagama* I should not have advised your Lordships to interfere with his conclusion. But perhaps it is as well that there should not be too much refinement in these cases and that the scales of justice should not be over delicately poised, and, broadly speaking, it does remain as a fact that the *Clara Camus* was going too fast.

Therefore I concur in the judgment proposed.

LORD BLANESBURGH.—I have in this case an uneasy impression that the nautical assessors who advised your Lordships, possibly also those who advised the Court of Appeal, as well as the Elder Brethren who advised the learned President—all of them sailors thoroughly familiar with the area of collision here—found it difficult to accept in its fullness the convention with reference to which the navigation of the *Metagama* on this occasion has on the appellants' admission to be judged—the convention, namely, that the faint whistle which she heard came, and to the knowledge of those on board her, from another vessel navigating in the fog, and not, as was in fact supposed, from the lighthouse at Cape Race. I have an uneasy feeling that the assessors who advised your Lordships at all events were not satisfied in their own minds that those on board the *Metagama* were under any mistake at all in this matter, and I doubt accordingly whether in tendering to your Lordships the advice which they did, more particularly as to the action of the *Metagama*, in altering her course to starboard when the whistle was heard, they made sufficient allowance for the convention under which that manœuvre was to be judged, viz., that the whistle emanated in time of fog not from a fixed point on the land, but from a moving object at sea. It does not need nautical instruction to enable one to see that such a manœuvre was probably on the one hypothesis a counsel of prudence, and on the other in a fog might be one of grave hazard.

I confess also to an impression that generally in the matter of this collision the conduct of the *Metagama* was all through substantially more blameworthy than that of the *Clara Camus*; and I share Lord Phillimore's regret that the learned President did not see fit to mark his sense of that conduct by throwing some additional burden upon the *Metagama*. But he did not do so, and I am constrained to the conclusion that there is no sufficient ground shown for making any alteration in his actual finding.

I, too, therefore, concur in the judgment proposed.

Appeal allowed.
Cross-appeal dismissed.

Solicitors for the plaintiffs, *William A. Crump and Son*.

Solicitors for the defendants, *Thomas Cooper and Co*.

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HOGARTH AND OTHERS v. CORY BROTHERS AND Co.

[PRIV. CO.]

Judicial Committee of the Privy Council.

June 17, 21, 22, 24 and July 26, 1926.

(Present: Lords HALDANE, DUNEDIN, ATKINSON, PHILLIMORE, and CARSON.)

HOGARTH AND OTHERS v. CORY BROTHERS AND Co. (a)

ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM.

Bengal — Ship — Charter-party—Duty of charterer to supply cargo — Vessel not allowed to come to loading berth until a reasonable part of cargo ready—Damages for detention of vessel—Exception in charter-party —“ Government regulations and restrictions ” —Effect on local regulations made by port authorities.

If a ship is prevented from getting to a loading berth owing to an obstacle created by the charterer, or in performing his duty, the shipowner has then done all that is needful to bring the ship to the loading place and the charterer must pay for the subsequent delay. It is the charterer's duty to have a reasonable portion of the cargo on the quayside ready to be shipped and to be in a position to supply the rest as and when it is required, and if by reason of the charterer not having a reasonable portion ready the dock authorities will not allow the ship to come to the berth, the charterer is liable to pay damages for the detention of the vessel.

An exception in a charter-party of “ Government regulations and restrictions . . . affecting the normal shipment of the cargo ” does not include local regulations made by the port authorities and affecting the time or manner of loading in the port.

APPEAL from a decision of the High Court of Judicature at Fort William in Bengal (Greaves and Chakravarti, JJ.), reversing in part and affirming in part the decision of Buckland, J. at the trial.

There was also a cross-appeal.

The facts appear fully from their Lordships' judgment.

Le Quesne, K.C. and *Sir Robert Aske* for the shipowners.

A. T. Miller, K.C., *Norman Birkett*, K.C. and *D. N. Pritt* for the charterers.

The considered opinion of their Lordships was delivered by

LORD PHILLIMORE.—In this action both plaintiffs and defendants are appealing from a decree of the High Court of Judicature at Calcutta.

The appeal of the plaintiffs—Hogarth and others—was preferred before that of the defendants—Cory and Co.—and the latter

is therefore treated as a cross-appeal; but historically the subject of the defendants' appeal comes first and will be taken first in this judgment.

The plaintiffs are owners of the steamship *Baron Ardrossan*, and they on the 31st July 1920 entered into a charter-party with Messrs. Graham and Co., of London, acting as agents for the defendants. By this charter-party this steamship was to receive on board at Calcutta, “at such dock, place or wharf as charterers may direct, lying always afloat, from the said charterers or their order, a full and complete cargo of coal in bulk, which cargo the said charterers bind themselves to ship, or cause to be shipped,” and to proceed with all possible despatch to Colombo, where she was to deliver the cargo.

The charter-party contained many of the usual provisions and exceptions which need not be here specified. The important ones for the purpose of this case are clauses 3, 11, 12, 13, 22, 24, 25, which are as follows: “(3) In the event of war, or disturbances, or strikes, lock-outs, or stoppage of labour, from whatever cause, or pestilence, or epidemical sickness, or earthquakes, fires, storms or floods, or the failure on the part of the railways to supply wagons, or detention by railways, or other hindrances beyond the control of suppliers affecting the working of this contract, suppliers shall not be bound to deliver nor shall they be held responsible for their inability to do so, and such time not to count as lay-days. The steamer, however, reserves the right to sail from loading port with what she has on board; if, from causes other than the weather, she is delayed more than twenty-four hours, no claim resulting against charterers for dead freight. (11) The cargo to be shipped at Calcutta and discharged at port of destination within eighteen weather working days (Sundays and holidays excepted); such lay-days at loading port are to count after expiry of usual twenty-four (24) hours' notice from master or agents of steamer's readiness, steamer having been duly entered at the Custom House, but not until steamer is in berth and not before the 31st Dec. unless with the charterers' consent and steamer ready. The usual twenty-four hours' notice to be given by the master at the port of discharge. Holidays which the Chambers of Commerce at Calcutta and port of discharge declare to be working days to count as lay-days. (12) The charterers to have the option of cancelling this charter if the steamer be not ready to load at Calcutta on or before the 25th Dec. (13) Demurrage, if any, at the rate of Rs. 2000 per running day, and *pro rata* for part of a day, payable day by day in cash as incurred. (22) Steamer to be consigned in Calcutta to Messrs. Graham and Co. (24) Steamer to be consigned at port of discharge to charterers' agents, paying them the usual fee for attending to steamer's business. (25) Subject to Indian Government Licence for export of coal being obtained, if necessary, and the cargo being released and coals available,

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

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and in all respects to customs and other Government regulations, restrictions, or otherwise, affecting the normal shipment of the cargo and clearances and sailing of the vessel."

The charterers made arrangements for the supply of the coal through Messrs. Graham and Co., who in turn arranged that the coal should be supplied and shipped by the firm of Kilburn and Co., who again were managing for the Tata Iron and Steel Company Limited.

The ship arrived in port on the 27th Dec. 1920, and the master forthwith gave notice to Messrs. Graham and Co. that he was ready to load, and his notice was accepted as from ten o'clock of the following day, but she did not enter her berth till the 13th Feb. 1921. Coal was then begun to be loaded upon her, but there were from time to time delays in the process of loading; and twice over from the 25th Feb. to the 27th Feb. and from the 27th Feb. to the 9th March, she was removed by the port authorities from her berth out into the docks, because there was no cargo for her. She eventually left Calcutta on the 22nd March, and arrived at Colombo on the 30th March. She began her discharge on that day and completed it at 3.15 on the 4th April. The time lost between the 13th Feb. and final discharge has been agreed between the parties as twenty-two days and five hours, the demurrage for which would amount to Rs. 44,416.10.8.

The plaintiffs assert that this sum is payable in any event, but they also claim Rs. 94,000 as damages for detention at the same rate as that fixed for demurrage from the 29th Dec. to the 13th Feb. on the ground that it was by the act or default of the defendants and their agents that the ship did not reach her berth as soon as she had entered the Kidderpore dock. The defendants denied their liability for both claims and further said that in respect of the claim for demurrage proper, there had been an accord and satisfaction, the plaintiffs having accepted the sum of Rs. 2,076.3.9 in full discharge of their claim for demurrage. The case was tried in the High Court by Buckland, J. who, after hearing oral evidence and receiving many documents which were put in at the trial, decided against the plaintiffs' claim for damages for detention up to the 13th Feb. but in favour of the plaintiffs' claim for demurrage proper; and he further rejected the defence of accord and satisfaction. He gave judgment, therefore, for the sum of Rs. 44,416.10.8 with interest and costs.

Both parties appealed, and the case was heard in the appellate court, civil jurisdiction, by Greaves, J., and Chakravarti, J., who gave judgment on the 2nd Jan. 1925. By this judgment the claim of the plaintiffs, for detention was allowed, but the amount of the damages was left for further determination. The claim of the plaintiffs for demurrage proper was accepted as good in itself, but the defence of accord and satisfaction was maintained, and

therefore the decree for this sum was reversed, and certain consequential provisions were made about the costs. From this decree, as has been said, both parties have appealed.

The defendants put their case in this way. They say that it was not their duty to find a berth for the steamship, and that their duty to load coal only began when the ship was berthed. They deny that they had failed to provide cargo; they deny that there was any delay in fact in the steamship getting a berth; and they say that if there was any such delay, it was due to causes beyond their control. With regard to the interruptions and delay during the loading they relied on failure of the railway company to supply wagons and upon the restrictions imposed by Government upon loading. Generally, they claimed the benefit of the exceptions to the charter-party. Graham and Co. procured a proper licence for the exportation of coal, and they indented upon the railway company for wagons, and eventually but not till the 13th Jan., they opened what is called "a station" for the steamship—that is, they procured a place upon the wharf to which coal could be sent for loading—and Kilburn and Co. began to send down coal labelled for the *Baron Ardrossan*. But, as the *Baron Ardrossan* was not at a berth, coal so labelled was put instead upon other steamships which were also taking coal from Kilburn and Co. through Graham and Co.; and Kilburn and Co. got the indenture of the wagons transferred from the *Baron Ardrossan* to other ships.

The rule of the port was that a vessel could not have a berth assigned to her until there was either coal actually ready for her on the wharf or about to come down immediately in sufficient quantities to make the loading continuous. As a matter of fact, when the *Baron Ardrossan* did get a berth and had begun to load, she was twice removed from her berth because there was no coal ready to put on board her. Under the terms of the charter-party, lay-days were not to count until the steamer was in berth, and as she was not in her berth till the 13th Feb., lay-days in the strict sense of the term did not begin to run until then. But the plaintiffs alleged that the delay in getting to her berth was due to the fact that the charterers were not ready to load, and that, not being ready, they did not take proper steps to procure a berth.

If a ship is prevented from getting to a loading berth owing to an obstacle created by the charterer, or owing to the default of the charterer in performing his duty, then it is well established that the shipowner has done all that is needful to bring the ship to the loading place, and that the charterer must pay for the subsequent delay. Whether the latter's measure of liability is arrived at by giving to the shipowner damages for the delay, or whether the lay-days are antedated to the date when they ought to have begun, and the charterer pays for them at the agreed rate of demurrage, does not seem to have been determined. But no point as to which of these two

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measures of payment should prevail, has been made by the parties in this case. The plaintiffs appear to have put their claim as for lay-days ; but the appellate court, which has decided in their favour, has treated the question as one of damages which are to be assessed if no agreement is come to, and this decision has been accepted by the plaintiffs. Their Lordships have, therefore, to decide whether the delay in getting to a loading berth was, or was not, due to the act or default of the charterer. The judge of first instance thought that it was not so due. He thought that a berth was not available, and that it was the congestion of shipping which prevented the vessel from getting to a berth. He found "that so far as the period anterior to the 14th Feb. is concerned, the delay in loading the cargo was due to the *Baron Ardrossan* not obtaining a berth by reason of causes for which the charterers cannot be held responsible." He added : "If it is requisite to invoke an exception of the charter-party, I should be prepared to hold that the charterers are protected by clause 25."

As to this application of clause 25 in the charter-party, their Lordships cannot agree with Buckland, J. The words "Government regulations and restrictions" do not include local regulations made by the port authorities and affecting the time or manner of loading in the port. If the charterers are to succeed in this case, it will be because the delay in getting a berth was occasioned by causes for which they were not responsible. Dealing, then, with this question, their Lordships are of opinion that the view of the facts which was taken by the appellate court is sounder than the view taken by Buckland, J. As Greaves, J. says : "If a cargo of coal had been ready for the *Baron Ardrossan* on the 29th Dec. or a day or two later, a berth would have been found for her notwithstanding the condition of the port." This view is supported by the evidence, and he was right, therefore, in holding "that the steamer was prevented entering a berth by the fact that no cargo was ready for her." As Chakravarti, J. says, the reason why the steamer did not get a berth was "that there was no coal available for her at the docks to load, and unless there was such coal ready for the ship or there was immediate prospect of her getting coal there, the commissioners of the Port of Calcutta did not allow a ship to enter a coal berth, although there was no objection to her going inside the docks and mooring at the buoys there, if vacant."

The truth of the matter is that Kilburn and Co. had arranged to supply coal to many more steamships than there was room for at the coaling berths : that Graham and Co. left the matter to be arranged by Kilburn and Co., and that Kilburn and Co. thought that they had done all that was necessary if they arranged to take these steamships in the order of their arrival at the port. Coal was actually dispatched and labelled for the *Baron Ardrossan* and was then put on board some of the earlier steamships because the *Baron Ardrossan* was

not in a berth. Equally when the *Baron Ardrossan* got into a berth, coal destined and labelled for other steamships was put on board her. But as the appellate court rightly finds upon the evidence, if the port authorities had been informed that there was coal ready for the *Baron Ardrossan*, she would have got a berth and would have been loaded in time. To quote again the judgment of Chakravarti, J. : "The port authorities did not mind, which steamer out of a number of steamers, belonging to the same agents, was loaded first. Their order of loading was entirely under the control of the agents and the dock authorities were quite indifferent in this matter. The plea that the delay was due to congestion at the coal berths therefore fails. It seems to me therefore that the defendants have failed to bring their case within the provisions of either clause 3 or 25."

The facts being as the appellate court correctly found them, the case comes within the principle to be extracted from the decision in *Ashcroft v. Crow Orchard Colliery Company* (2 Asp. Mar. Law Cas. 397 ; 31 L. T. Rep. 266 ; L. Rep. 9 Q. B., 540), as explained by Lord Blackburn in *Postlethwaite v. Freeland* (4 Asp. Mar. Law Cas. 302 ; 42 L. T. Rep., at p. 851 ; 5 App. Cas., at p. 622). The vessel was at the disposal of the charterers, and it was their own act which caused the delay. It is idle to say that it was the duty of the ship's agents who, it may be observed in passing, were also the agents of the charterers, to approach the dock authorities and get the allotment of the berth. They could not do it in one capacity because they were not providing the cargo in the other capacity. On this part of the case the decision of the High Court must stand.

During the course of the argument their Lordships were referred to two recent cases, *United States Shipping Board v. Frank C. Strick and Co. Limited* (ante, p. 40 ; 135 L. T. Rep. 185 ; (1926) A. C. 545) and *The Vergottis v. William Cory and Son Limited* (ante, p. 71 ; 135 L. T. Rep. 254 ; (1926) 2 K. B. 344). The first case turned on the consideration of a charter-party, different in form to the present and is therefore of no assistance. The second case is not altogether unlike the present, and Greer, J., while holding that it was not the charterer's duty to have a full cargo waiting on the quayside to be shipped, held that it was his duty to have a reasonable portion of the cargo ready and to be in a position to supply the rest as it was required, and that if by reason of his not having a reasonable portion ready, the dock authorities would not allow the ship to come to the berth, the charterer was liable to pay damages for the detention of the vessel.

The second matter of appeal concerns the claim for demurrage after the vessel had got into her berth. The excuse for this detention was the shortage of wagons, which is an exception provided for in clause 3 of the charter-party. As to this it is said that there are

concurrent findings of fact by both courts, and if so the rule of the board is that such concurrent findings are not to be disturbed. There are conceivable exceptions to this rule, but they do not apply in the present case. It was sought to show by documents that there was, taking the port and railway generally, from time to time, some shortage; and this was apparently so, but the connection of such shortage as there was, with the delay in loading this particular ship, or any part of the delay in loading her, was not established. It was found by the judge of first instance that charterers had but to indent for a sufficient number of wagons, and they would have obtained the number required to bring down the coal to the extent to which it was required for the purpose of loading. The judges in the appellate court accept this view. Their Lordships cannot reopen this part of the case.

But it is contended for the defendants that there was an accord and satisfaction of this claim for demurrage, the sum of Rs.2,076.3.9 having been received by the plaintiffs at Colombo in full discharge of this claim. On this point Buckland, J. decided in favour of the plaintiffs, and rejected the plea. But the appellate court took a different view, and decided this part of the case against the plaintiffs, and it is from this part of the decree that the original appeal was brought, those matters which their Lordships have already decided forming the subject-matter of the cross-appeal. Upon this matter their Lordships are in accord with the judgment of Buckland, J. The burden being on the defendants to prove the accord, they fall short of so doing.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed, and that the judgment of Buckland, J., ordering the defendant company to pay Rs.44,416.10.8 with interest, should be restored, and that the cross-appeal should be dismissed and that the plaintiffs do have their costs of this appeal and cross-appeal and in both courts below.

Appeal allowed.

Cross-appeal dismissed.

Solicitors for the appellants in the appeal and the respondents in the cross-appeal, *Botterell and Roche*.

Solicitors for the respondents in the appeal and the appellants in the cross-appeal, *Ince, Colt, Ince, and Roscoe*.

Supreme Court of Judicature.

COURT OF APPEAL.

July 10 and 12, 1926.

(Before BANKES, ATKIN, and SARGANT, L.JJ.)

THE GUELDER ROSE. (a)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Harbour-master — Directions to vessels entering harbour — Regulation of speed, place of anchorage and movement within harbour — Regulation not to apply when qualified pilot on board—Whether invalid, unreasonable, or ultra vires—Whether “directions” within meaning of Harbours, Docks, and Piers Clauses Act 1847, s. 52.

Under the provisions of sect. 52 of the Harbours, Docks, and Piers Clauses Act 1847 a harbour-master may give directions for the purpose of regulating the time at which or manner in which any vessel may enter into, go out of or lie in or at any harbour, dock or pier, or within the prescribed limits, if any, and by sect. 53 a penalty is provided for any master navigating otherwise than in accordance with such regulations after notice of any such direction of the harbour-master duly served upon him. The plaintiffs, the owners and masters of certain vessels trading to the port of F., claimed against the defendants, the commissioners and harbour-master of the port of F., a declaration that certain directions given by the harbour-master and served by him upon the plaintiffs were invalid, unenforceable, and of no effect. The directions in respect of which the declaration was sought, which were in writing and were duly served by the harbour-master upon the plaintiffs, were to the following effect: (1) That the plaintiffs' vessels between the hours of sunrise and sunset should proceed up the harbour of F. at a pace not exceeding three miles per hour; (2) that between sunset and sunrise they should anchor in a particular place specified by reference to a chart attached to the directions; (3) that they should not at any time proceed above the point P.C. without the sanction of the harbour-master; (4) that they should not at any time be moved within the limits without notifying the harbour-master, unless in either case they had a qualified pilot on board. Pilotage is not compulsory at F.

Held (reversing Bateson, J.), that the directions taken as a whole were not within the power under sect. 52 of the Harbours, Docks, and Piers Clauses Act 1847. Appeal allowed, and declaration that the directions were not enforceable granted.

ACTION for a declaration.

This was an action by Messrs. Richard Hughes and Co., owners of the steamships *Guelder Rose*, *Primrose*, *Moss Rose*, *Mersey*,

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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Brier Rose, *Blush Rose*, and *Dorrien Rose*, and the masters of each of the said steamers against the Fowey Harbour Commissioners and Captain Fred Collins, harbour-master at Fowey, claiming a declaration that certain directions purporting to be directions of Captain Collins regulating the manner in which the plaintiffs' vessels should enter and use the port of Fowey were invalid.

The plaintiffs, Richard Hughes and Co., were shipowners carrying on business at Liverpool whose vessels constantly traded to the port of Fowey. On or about the 15th March 1924 the Fowey Harbour Commissioners served by post upon the plaintiffs, Richard Hughes and Co., certain directions, purporting to be made under sect. 52 of the Harbours, Docks, and Piers Clauses Act 1847. On various dates between the 28th March 1924 and the 18th June 1924 Captain Collins served upon the other plaintiffs the masters of Messrs. Richard Hughes and Co.'s vessels trading to Fowey, as such masters, copies of such directions. The directions were as follows :

Directions of the harbour-master, Fowey, for regulating the time at which and the manner in which any vessel shall enter into, go out of, or lie in or at the harbour, and for mooring and unmooring, placing and removing, vessels therein :

(1) That your steamships shall not between sunrise and sunset proceed up the harbour of Fowey at a pace exceeding three miles per hour.

(2) That between sunset and sunrise they shall anchor in the Pool east of a line from "A" to "B," and south of a line from "C" to "D" on the chart attached.

(3) That they shall not at any time proceed above Prime Cellars without the sanction of the harbour-master.

(4) That they shall not at any time be moved within the limits without previously notifying the harbour-master.

Unless in each case they have a qualified pilot on board.

Dated this day of 1924.

WALTER H. GRAHAM,

Clerk to the Fowey Harbour Commissioners.

Position "A" .. 331° 2 cables 75 yards.

Position "B" .. 19° 5 cables 45 yards.

Position "C" .. 4° 45' 4 cables 162 yards.

Position "D" .. 26° 4 cables 195 yards.

All positions reckoned from the flagstaff of Pelman C.G.S.

The plaintiffs by their statement of claim alleged that the above directions were unreasonable and (or) impractical; unfair and (or) contrary to natural justice; not directions within the meaning of sect. 52 of the Harbours, Docks, and Piers Clauses Act 1847, and (or) not directions of the harbour-master and (or) not given for any of the purposes mentioned in the said section; *ultra vires* either or both of the defendants, and (or) contrary to law and (or) to the legal rights of the plaintiffs. The plaintiffs claimed a declaration that the directions were void, invalid, and unenforceable and of no effect, and (or) that they were unreasonable and (or) unfair to them; a declaration that Fowey Harbour is a public highway of which the plaintiffs were entitled to make reasonable

use upon paying the appropriate rates; a declaration that pilotage was not compulsory on ships when not carrying passengers; and an injunction restraining the defendants from enforcing the directions.

The defendants by their defence alleged that the directions were prepared by and where the directions of and issued by or by the instructions of the harbour-master and were validly and duly issued under statutory powers in that behalf. Further, they alleged that the entrances and exits to Fowey Harbour required great skill in navigation and were in their opinion unsafe and dangerous for vessels of the size and character of the plaintiffs' vessels without either a qualified pilot on board or a person who to the knowledge of the harbour-master had special local knowledge. The plaintiffs' vessels, having, by the directions of the plaintiffs, Richard Hughes and Co., abandoned since 1921 the practice of taking pilots, were a nuisance and danger to other shipping in the port. On the 5th Nov. 1923, and again on the 6th Feb. 1924, there were narrow escapes from accidents.

The defendants admitted that Fowey Harbour was a public highway, and denied that they had ever done anything to interfere with the reasonable use of it by the plaintiffs.

The Harbours, Docks, and Piers Clauses Act 1847, s. 52 (which applied to Fowey Harbour by virtue of the appropriate special Acts), provides as follows :

52. The harbour-master may give directions for all or any of the following purposes (that is to say)

For regulating the time at which and the manner in which any vessel shall enter into, go out of, or lie in or at the harbour, dock or pier and within the prescribed limits, if any, and its position, mooring or unmooring, placing and removing, whilst therein : . . .

Dunlop, K.C. and *R. K. Chappell* for the plaintiffs.

Dumas and *A. C. Nesbitt* for the defendants.

Bateson, J. refused to make the declaration asked for.

The plaintiffs appealed.

Dunlop, K.C. and *R. K. Chappell* for the appellants.

Raeburn, K.C., *Dumas*, and *A. C. Nesbitt* for the respondents.

The arguments of counsel appear from the judgments of the learned Lords Justices.

BANKES, L.J.—This is an appeal from a judgment of a very experienced judge in matters relating to seamanship and navigation; and the appeal undoubtedly raises a question of some importance. The action is brought claiming a declaration that certain directions of the harbour-master of Fowey are invalid and unenforceable, and claiming an injunction.

The action is brought by Messrs. Hughes, a firm who own a number of vessels trading to

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Fowey, and by the masters of a number of those vessels. The defence of the defendants is that they are only doing what they are lawfully justified in doing. There is no doubt, reading the correspondence, that from Messrs. Hughes's point of view they think that these directions of the harbour-master are unfairly directed at them. But I wish to say for myself that I am quite satisfied that the action of the commissioners and the harbour-master is perfectly *bonâ fide* in the sense that they are only exercising what they believe to be their powers, and what they believe to be in the interests of the port of Fowey, and of the vessels using that port, including among other vessels Messrs. Hughes's own vessels. The question which we have to decide is whether or not they are doing what they desire to do in the right way, in the sense of the way in which the law entitles them to do what they are attempting to do.

It is necessary to go back a little into the past history of this harbour in reference to its position as to compulsory pilotage; because it appears that up to a certain date pilotage was compulsory at Fowey. I have not a doubt in my own mind that both the commissioners and the harbour-master are of opinion that the regulations which imposed compulsory pilotage upon Fowey ought not to have been withdrawn, and that the nature of the harbour is such that it requires most careful navigation and good seamanship, not only in the management of the vessels, whether they should proceed up or down the harbour, but also in reference to the moorings of the vessels; and it requires also that due regard should be paid to the position of other vessels and the interests of other vessels, and that cheerful compliance should be given to the lawful orders of the duly constituted authority. They believe that all that is essentially necessary in this harbour because of its formation, if I may use that word, and the difficulties inherent in passing these big vessels (because they are big vessels for this harbour) up and down so that they shall receive their cargoes in due course, and pass in and out of this harbour in safety.

But in spite of what the commissioners' view may be, the fact is that in June of 1921 a general exempting order, Order 58, was made. It is an "extract from the general by-laws applying to all Trinity House out-port districts." It is dated the 12th June 1921, and the effect of the order with reference to vessels of 1500 tons or under was that they were exempted from compulsory pilotage in this harbour of Fowey. Two days after, on the 14th June 1921, a letter was written by the harbour-master to Messrs. Hughes. To my mind it is a very suggestive and significant letter. It is only two days after the order, and it calls Messrs. Hughes's attention to the fact that "the moorings and laying-by berths of this harbour have all been altered during the last two months, new moorings having substituted the old ones in new positions. It is, therefore, necessary to warn you that all

vessels not having a pilot on board must not proceed above Prime Cellars during the hours of darkness unless so ordered by the harbour authorities." Speaking for myself, that seems to me a perfectly legitimate and reasonable direction, if it were given in the form of a direction, because it indicates that within the last two months, and therefore, presumably, without the knowledge of persons who may come into that harbour as masters of Messrs. Hughes's vessels, the moorings to which they have been accustomed have all been altered; and, therefore, it would not be reasonable or safe for them to go in after dark without a pilot. If matters had stopped there, and that direction had been applicable, if it professed to be applicable to this new state of things only, I do not suppose that anybody would have had any reason to complain, because the difficulty which arises from alteration of the moorings would cease in reference to any master who came in and saw with his own eyes and realised what the changes had been. That was the state of things in June 1921.

Then I think I should call attention to the harbour-master's evidence when he was asked about that letter that he had written; and it was pointed out to him that the necessity which he had referred to in that letter was a temporary one, which would cease to operate in the case of men who were frequenting that harbour regularly. He is asked about that matter, and he is asked whether a warning would any longer be necessary for these men who had come in and learned the conditions of the altered state of things, and whether pilotage would be necessary, and his answer is: "In my opinion pilotage is always necessary." I accept that as his genuine *bonâ fide* belief.

The next stage is this. In the minutes of the harbour commissioners on the 15th Feb. 1922 I find that the harbour-master reported that he had been in correspondence with Messrs. Hughes "as to their steamers moving about Prime Cellars without a pilot during the hours of darkness." [The correspondence was read.] That is nine months after the warning which I have just referred to. Then the resolution is: "That the clerk be instructed to write Messrs. R. Hughes and Co., with a copy of the commissioners' notice to masters, calling their attention to sect. 52 of the statute." Then if I turn to the clerk's letter, I find this: "You ask to be supplied with the particular by-law under which the harbour-master has given instructions that vessels not having a pilot on board must not proceed above Prime Cellars during the hours of darkness, unless ordered to do so by the harbour authority. I therefore enclose a copy of the notices to masters and owners of vessels, among which you will find marked in blue pencil the section of the Act of Parliament under which the harbour-master is acting." The blue pencil mark must have been, as appears by Messrs. Hughes's letters, on sect. 52 of the Harbours, Docks, and Piers Clauses Act 1847.

Tracing the history down to this point, what had originally been an order given in reference to a new state of things, an emergency, is now relied upon as being still required and reasonable, because the harbour-master's view is that pilots always are necessary in this harbour over which he has jurisdiction.

Then the next stage comes in 1923, when we find that the commissioners are considering the question as to whether they should not approach the pilotage authorities in order to have compulsory pilotage reintroduced. I find in the minute book that on the 16th May 1923, "The Clerk reported that the Sub-Commissioners of Pilotage had received a letter from Trinity House, London, dated the 15th inst.," in which they referred to General By-law 58, to which I have referred, and said: "As no objections were made to those proposed for Fowey that by-law was confirmed in June 1921, and the Elder Brethren in these circumstances are not prepared to consider any alterations, especially as vessels in the coasting and home trades, without passengers, have been exempted from compulsory pilotage in the out-port districts for many years past."

What is the result of that? It seems to me quite plain that up to that point the commissioners and the harbour-master were definitely of opinion that vessels should not be allowed to navigate or enter this port without pilots. They tried to get Messrs. Hughes to observe the direction which had been given in 1921, that the vessels should not go above this particular point without a pilot; and they had been unwilling to observe the regulations, because, as they pointed out, it might have been more reasonable when it was passed but it had ceased to be reasonable to everybody who frequented the port and who could get to know where the altered position of these moorings was. Then the commissioners think: "Well, can we get the exemption of Fowey removed?" They come to the conclusion that they cannot do that. They must have come to the further conclusion that they could not do what they wanted to do by by-laws, because the statutory requirements as to by-laws require that they should be confirmed in a manner which, having regard to the communication they had just received from Trinity House, would make it seem very unlikely that they would be able to get the necessary authority for. They are driven back, therefore, to this. If they are to do anything to improve the condition of things which they honestly think needs alteration and improvement, they can only do it by directions, and by directions of the harbour-master under sect. 52 of the Harbours, Docks, and Piers Clauses Act 1847.

What happens then? On the 15th March 1924 the clerk, Mr. Graham, writes to Messrs. Hughes calling attention to instances in which complaints were made of the way in which the masters of Messrs. Hughes's vessels had navigated the port and interrupted the work of the port, and endangered the safety of other vessels

using the port, according to their view. There were not many instances, but there were some. Then Mr. Graham goes on: "In the circumstances the commissioners have decided to exercise their powers under the Harbours, Docks, and Piers Clauses Act 1847 and have instructed me to serve you with the enclosed formal directions made under sect. 52 of that Act." That was a misapprehension in a sense, I think. At any rate, it was not put forward very correctly what the authority which was exercisable under sect. 52 was, because it was the authority not of the commissioners but the authority of the harbour-master. The point has been made by Mr. Dunlop that although the voice may be the voice of the harbour-master, the directing hand is the hand of the commissioners. I do not think that there is force in that argument, because I think that the harbour-master ultimately gives the direction, and it does not make it any the less his direction because he was instigated by, or it was suggested to him by, the commissioners that it would be a proper order to give. Assuming the whole thing was done *bonâ fide*, it seems to me to be only an inaccurate way of expressing what was really happening when this letter was written and the accompanying notice was sent.

The question will arise in a moment as to whether it was unfair upon Messrs. Hughes, as the regulations which this letter and this notice indicated were regulations applicable to all vessels; but this is only serving the masters of Messrs. Hughes's vessels with notice. It is said that it was only necessary to serve these masters because all the other masters had complied. That may or may not be so. I do not express any opinion on that. I am not sure what the evidence is about it, but I accept for the moment the suggestion that it was not unfair, and that it was not unfairly directed to Messrs. Hughes because it was only served upon their masters, but that it would have been served upon the other masters if they had not availed themselves of the services of a pilot. However, that is the position of the master at this date. Then what happens is that on every master who comes in in charge of one of Messrs. Hughes's vessels a notice is served, quite irrespective of whether the master is a thoroughly competent master in whom the harbour-master himself has complete confidence, or whether he is a master about whom the harbour-master has had occasion to complain. They are all swept into the net, and this general form of direction is served upon them all. It is served upon them all at a time when, in the majority of cases, the bulk of the regulations can have had no possible application, because the time has gone by when they could have any application. But they are served once and for all, and it is said, and rightly said, that the chief effect and operation of them is in reference to the future voyages of the masters of the vessels to the port, rather than to the particular occasion upon which the notice is served. I do not want for a moment to be thought

that I am holding that a harbour-master may not give a direction which shall be operative not only for the particular occasion, but for future occasions, and that it may be quite reasonable and proper to give such an order. I desire to confine my judgment to the directions as a whole, given under the circumstances in which they were given, and to ask myself the question whether they are reasonable and fair, taken as a whole, and given under the conditions in which they were in fact given. Because if the true inference from the business point of view is, whether it was intended or whether it was not intended that the effect of those directions from a business point of view is to keep the vessels out of port altogether, or else take a pilot, then in my opinion they are not reasonable. It is an indirect attempt from a business point of view to impose compulsory pilotage which is not possible directly either by by-law or by any other means.

I want to say a word about the statute, the Harbours, Docks, and Piers Clauses Act of 1847. That statute provides in sect. 52: "The harbour-master may give directions for all or any of the following purposes (that is to say): for regulating the time at which, and the manner in which, any vessel shall enter into, go out of, or lie in or at the harbour dock or pier, and within the prescribed limits, if any, and its position, mooring or unmooring, placing and removing, whilst therein. . . ." No doubt those words are wide enough to admit of allowing regulations of the character of those which are given by the harbour-master in this case. Then sect. 53 provides: "The master of every vessel within the harbour or dock, or at or near the pier, or within the prescribed limits, if any, shall regulate such vessel according to the directions of the harbour-master made in conformity with this and the special Act; and any master of a vessel who, after notice of any such direction by the harbour-master served upon him shall not forthwith regulate such vessel according to such direction shall be liable to a penalty not exceeding 20*l*." With regard to that section, the machinery provided by the Act of Parliament seems to me to be this: a provision that every master shall obey the directions of the harbour-master. Of course, if he does obey them, there is nothing more to be said. If he does not obey them, then it requires notice to be served upon him containing directions; and in the case of a continued refusal to obey, if that occurs, there is a statutory right to prosecute.

I do not think it means that there need only be a direction which is served upon him. I think the statute means that he must obey. If he does not obey then a notice is served upon him, and if he then does not obey he can be prosecuted. Then there is a provision with regard to the reasonableness of the direction—that if a harbour-master or any assistant unreasonably acts, or in any unreasonable or unfair manner exercises any of the powers or authorities vested in him, the person who

offends shall be liable to a penalty. I understood Mr. Raeburn to contend that this action ought not to be maintainable, or, at any rate, that this court ought not to grant any relief because of the statutory power of prosecuting the harbour-master. I do not take that view. I think that it is competent for this court, either by way of declaratory judgment or by way of injunction, to enforce compliance with the statute if it is of opinion that the directions are unreasonable or unfair, or both.

That being so, what I have to ask myself is this: whether, giving the harbour authorities and the harbour-master full credit for an honest belief that pilotage is necessary in this harbour, they have gone the right way to work and have done something which the law allows them to do. I cannot read these directions which, on the face of them, are intended to be applicable for all time, and whatever the conditions existing in the harbour at the moment are, as being reasonable or really anything other than an indirect attempt to impose compulsory pilotage. It is quite true to say that we sitting here do not know the conditions of the harbour at Fowey as well as the harbour-master or the commissioners. That is quite true, but sitting here one can visualise for oneself what may happen, and if one visualises what obviously may happen and then applies these directions to such a state of things, one can answer the question whether they are reasonable or not. I put to myself and I put to Mr. Raeburn the case of two or three of Messrs. Hughes's vessels arriving at night, when all the mooring places which exist, or a sufficient number of them, higher up the harbour are unoccupied, and the jetties are unoccupied, and there are cargoes waiting for the boats, but yet they are not to proceed up the harbour but they are to anchor. That is to happen on every occasion whatever the state of the harbour is and whatever the condition of things higher up is—they are to anchor. They are not to anchor in what I call every notified place. It may be technically just as safe, but it all depends upon the conditions and how it is occupied by yachts, and so forth. I stress that particular point more than the others because it seems to me that one can visualise conditions existing in the port in which it cannot be said from any point of view that that is a reasonable or fair regulation to impose upon these vessels for all time and under all conditions. I say nothing about speed. It is fair to remember that the masters of Messrs. Hughes's vessels in their evidence said nothing about it. I say nothing about the obligation not to move at any time without notifying the harbour-master. That is a matter depending upon the terms of the Act of Parliament. But I rest my judgment upon the directions as a whole; and it seems to me that they are more in their nature by-laws than directions. I think directions, if they are to be directions to be applicable and enforceable in the future, must be directions which are

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obviously reasonable to all possible existing conditions, which these are not.

Therefore, in my judgment, I think that this court should declare that these directions in their present form and as a whole are in substance not in compliance with sect. 52, and are not enforceable. There will be liberty to apply. The exact form of the judgment I will indicate presently, but I think the appeal must be allowed with costs here and below.

ATKIN, L.J.—I will proceed to state shortly why it is that I agree with my Lord that this appeal should be allowed. It appears to me that in fact what the court has to decide it a dispute not between the plaintiffs and the defendants, but a dispute between the pilotage authority of Fowey and the harbour authority of Fowey on the question of compulsory pilotage. It is quite plain from the minutes which have been read that there was a direct conflict of opinion between those authorities on the question as to whether or not it was advisable in the interests of the port of Fowey that pilotage should be compulsory for, at all events, a very much larger class of vessels than those which are now under the order compelled to take pilots on board. I have not the slightest doubt that the Fowey Harbour Commissioners have fully and honestly convinced themselves that it is expedient that more vessels should be under the obligation to take pilots than are at present compelled to take pilots, and that that class should extend to vessels of the size of the plaintiffs' vessels in this particular case. I am far from saying that there are not many circumstances connected with the port of Fowey that make that view a reasonable view. On the other hand, there are many questions connected with the coastal trade and the method of manning and equipping ships in the coastal trade and the practice of ages in respect of out-ports which makes the view taken by the pilotage authorities probably also a reasonable view. At any rate, we have not got to decide that question. The final authority for determining the question of compulsory pilotage is vested in a different authority from that of the defendants.

But in the meantime it appears to me that the plaintiffs are suffering; and a dispute has arisen which does seem to me to be of very great importance to those who are engaged in what is a very important part of our mercantile traffic, namely, the coastwise traffic along the shores of this country.

The case resolves itself on the facts into this. Messrs. Hughes, the plaintiffs, have a very large number of vessels that trade into Fowey for the purpose of engaging in the china clay trade. Their vessels are vessels which range from 600 tons to about 1200 tons, and some are a little more. They make repeated voyages to the port, managed by masters who appear to have been in the employment of the firm for a great number of years in a great many cases,

and who come quite regularly to the port and are very familiar with it. It is true that they are not certificated masters, but for generations it has been permitted to persons engaged in the coastwise trade to navigate vessels by masters who are not certificated. That is a matter for the Legislature. It is very well known that the experienced masters who manage the coastwise boats do in fact navigate their vessels round the coast and in and out of the harbours with remarkable freedom from any disaster.

A series of difficulties arose in the last four or five years between the harbour-master at Fowey and some of the masters who are employed by plaintiffs' firm. There have been complaints that the masters have not obeyed the instructions of the harbour-master, and there have been complaints by the harbour-master that the masters have been guilty of careless navigation or carelessness in mooring, by reason of which accidents have not, indeed, taken place, but have only just been avoided. That is the kind of allegation that is made. On the other hand, the view expressed by the harbour-master is controverted by the masters, and the matter has certainly not been adjudicated upon on the evidence in this particular case. There were complaints, and it culminated in the complaints being passed on to the plaintiffs, Messrs. Hughes, the shipowners. I am bound to say that I think some of the trouble in this case may have arisen because of the somewhat aggressive attitude, in a sense, taken up by Messrs. Hughes, because I think that possibly being tender for the mercantile reputation of their masters, they committed themselves to phrases in letters to the commissioners which might, I think, have been modified; but again, with that I think we are not directly concerned.

The net result was that the commissioners took the opportunity of warning Messrs. Hughes that unless the position was altered in reference to, apparently, all the ships, they would have to take steps; and it is obvious that the commissioners were contemplating moving in the matter. On the 20th Dec. 1923 the clerk to the commissioners wrote to Messrs. Hughes "that a serious accident in which your *Blush Rose* was concerned was only very narrowly averted a few days ago." Then he goes on to say: "I am sure you will appreciate that the commissioners must see to it that risks of serious accident inside the harbour must be reduced to a minimum, but before taking such action as lies within their power I am instructed to inquire what steps you suggest could be taken to improve on the present practice of your boats when they enter the harbour and moor up after dark." Then the correspondence goes on for a little time; and then we find in Jan. 1924 a letter again written by the clerk to the commissioners: "Accordingly, if in opposition to the commissioners' wishes, you continue to allow your vessels to be navigated in disregard of the safety of other shipping in the port, the commissioners will

have no alternative but to take the matter into their own hands and to put their statutory powers into immediate operation."

Then in the next month there was another complaint against the *Blush Rose*, this time by the master of the *Ciscar*. On this matter I think the commissioners did not communicate with the owners of the *Blush Rose*, but on the 15th March they stated this: "It is quite clear to the commissioners that you do not intend to take any steps to conform to their reasonable requests regarding the handling of your vessels in Fowey Harbour. In the face of serious complaints based on reliable evidence you insist on supporting your masters against the advice of the commissioners and their harbour-master." Then they complain again in relation to the *Blush Rose* and the *Ciscar*; and then they say: "In these circumstances, the commissioners have decided to exercise their powers under the Harbour, Docks, and Piers Clauses Act 1847, and have instructed me to serve you with the enclosed formal directions made under sect. 52 of that Act, and to give you formally to understand that these directions will be strictly enforced in order to safeguard as far as possible the commissioners' own property, and the safety of other ships using this harbour. If these directions are disregarded the commissioners have power to prosecute the offenders, and they will not consider it necessary to give you notice of any further complaint, as you have had very full consideration and very full warning. I may say for your information that the feeling of the commissioners is that they would rather that your ships were withdrawn from the harbour than that other shipping should be exposed to risks such as have actually been incurred by the unseamanlike handling of your steamship *Blush Rose* in the cases of the *Falmouth Castle* and the steamship *Ciscar*." Then they enclose the directions which are complained of in this particular case. The document is addressed to "Messrs. Hughes and Co., 17, James-street, Liverpool, owners of the steamship *Blush Rose*, steamship *Brier Rose* and other steamships trading to and from Fowey Harbour." "Directions of the harbour-master, Fowey, for regulating the time at which and the manner in which any vessel shall enter into, go out of, or lie in or at the harbour, and for mooring and unmooring, placing and removing vessel therein." That particular heading is taken from the first clause of sect. 52 of the Harbours, Docks, and Piers Clauses Act 1847. Then the particular directions are these: Firstly, that your steamships shall not between sunrise and sunset proceed up the harbour of Fowey at a pace exceeding three miles per hour. Secondly, that between sunset and sunrise they shall anchor in a particular place. Thirdly, that they shall not at any time proceed above a certain point without the sanction of the harbour-master. Fourthly, that they shall not at any time be moved within the limits without previously notifying the harbour-master, "unless in either

case they have a qualified pilot on board." It appears to me that that is a general order issued to the shipowners in reference to any vessel which they may have or which they may send, regardless of the question by whom the vessel is commanded, and regardless of the way in which the ship does, in fact, conduct itself; but that any of their steamships is to be subjected to these directions and to be subjected to these directions so far as one can see, for all time, that is to say, unless and until they are specially countermanded. The odd thing is (Messrs. Hughes having eight or ten vessels, or, I think, more, which have been proceeding to and from Fowey at different times) that the masters of eight of these vessels were thereafter specially served themselves with special directions in this form directed to the master of the particular vessel, not naming the particular master by name, but only addressed to him as master of the vessel.

In respect of any complaints, when the defendants are asked for particulars of complaints, the only complaints alleged are complaints against four of these particular vessels, and against four of them there were no complaints at all. In respect of four they are complaints of what has happened within the last two or three years, comprising altogether in respect of those vessels, I should imagine, something like 150 or 200 voyages. What the defendants have raised in their defence, in par. 3, is this: "If (which is not admitted) Fowey Harbour is not a compulsory pilotage area for vessels of the size and character of the plaintiffs' vessels"—I think the natural caution of the pleader led him not to admit it because it was not—"yet in fact, owing to the narrowness of the fairway and the eddies and currents and winds and water, and the congestion of shipping in and about the port, the entry to and exit from Fowey Harbour, and particularly that part of it which lies above Prime Cellars, requires great skill in navigation, and it is in the opinion of the defendants unsafe and dangerous to other shipping for any ship of the size and character of the plaintiffs' ships to navigate beyond Prime Cellars without either a qualified pilot on board, or, if not a qualified pilot, some person who, to the knowledge of the harbour-master, has special local knowledge and experience equivalent in practice to that possessed by a qualified pilot, or, in exceptional cases, by a master mariner having special local knowledge." It is to be observed that in these directions no force is given to the alternatives at all there, and the directions are given to the plaintiffs in respect of their ships, and they have to comply with them, unless they have a qualified pilot on board. The fact that they may have on board a person who to the knowledge of the harbour-master has special knowledge or experience, or a master mariner having special local knowledge, is not given effect to at all. We are told (indeed the defendants made a great point of it) that these were directions which, though they were in

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fact directed to these plaintiffs by name, were only directed to them because it was a matter of general knowledge and of general application that any vessel of the size of the plaintiffs' ships should not navigate Fowey Harbour except with a qualified pilot, and that the only reason that the notices had been served upon the plaintiffs and their masters was that no other vessels did in fact navigate the harbour without a qualified pilot, and if there were at any time such, then they intended to serve similar directions upon them.

It appears to me that that is a piece of general legislation by the commissioners. When I say "general legislation," I mean general legislation within the powers entrusted to them of dealing generally with matters that concern Fowey Harbour, and it is a matter which is very appropriate to the creation of a by-law, but is not in the least within the powers which were given to the harbour-master. It is plain from his evidence that this matter arose after considerable discussion between the Harbour Commissioners and their clerk and Messrs. Hughes. A sub-committee had been appointed to consider how to deal with correspondence, and it is on the advice of the sub-committee that the letter in question was written by the clerk and the directions enclosed to Messrs. Hughes. I have no doubt at all that the harbour-master was the person who prepared these specific instructions or directions. At the same time I have not the least doubt either that he prepared them for the purpose of carrying out the plan of the commissioners which they had expressed in their letters, both to the pilotage authority and to Messrs. Hughes, and that the real object of those directions is clearly *bonâ fide* (in perfect good faith) to protect the interests of the navigation of Fowey Harbour, but at the same time do it in this particular way, by making things so uncomfortable for anybody who does not take a pilot on board that he will be compelled either to stay outside the port or to take a pilot on board, the latter being the course which would naturally be expected to be done. It is plain that the matter was discussed between the clerk and the harbour-master as to whether indeed to proceed by by-law or to proceed by directions; and as one of them pointed out to the other—I need not stay to examine which—a breach of the directions would be accompanied by a fine of 20*l.*, whereas a breach of the by-law was only accompanied by a fine of 5*l.*, and how much more effective, therefore, would directions be than by-laws; and so apparently the scale swung down in favour of directions rather than of by-laws. I can understand also that the clerk might be rather embarrassed if he had to draw a by-law which in terms said: "Notwithstanding the compulsory pilotage orders, in fact every vessel which is excluded from compulsory pilotage under the order must still have a pilot on board" or else be subject to embarrassing restrictions which would interfere very much with his navigation in comparison with his rivals.

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I say nothing as to whether any such by-law would be effective, but I come to the powers in sect. 52. Sect. 52 says: "The harbour-master may give directions for all or any of the following purposes," such as regulating the time at which and the manner in which any vessel shall enter the harbour, and so on—I need not read the section again. I think it is not at all unimportant to bear in mind the fact that under the Act by clause 2 the harbour-master means not only himself, but his assistants, because it says: All acts so required to be done by such harbour-master . . . shall include the assistants of every such harbour-master. . . . Therefore, if the harbour-master has power to give general directions of this kind, so has the assistant or assistants of the harbour-master power to give general directions of this kind. Then the directions were given first of all to the shipowners in respect of all their ships without any limit of time, and without reference to any circumstances at all, except that they were navigating to Fowey Harbour. It is plain that they were given to the individual masters in pursuance of the general instructions which they had given to the shipowners. There is a power to give general directions and to make general rules of the nature of by-laws under sect. 83, which says: "The undertakers"—which would include the commissioners in this case—"may from time to time make such by-laws as they shall think fit for all or any of the following purposes; (that is to say)" for the purpose of regulating the use of the harbour and "for regulating the admission of vessels into or near the harbour, dock or pier, and their removal out of and from the same, and for the good order and government of such vessels whilst within the harbour or dock, or at or near the pier." That seems to me to be as large a power as could possibly be given; but those by-laws can only be made in the manner prescribed, and they have got to be confirmed in the prescribed way, and they are not to be confirmed until notice of application for confirmation has been given in the newspapers one month before the hearing of the application, and any person who desires to object may be heard by himself or by his counsel, and a copy has got to be kept at the principal office, and all persons may inspect such copy without fee or reward, and then they are to be published in the prescribed manner, and they are to be confirmed. If no confirmation is prescribed in the special Act, then they are not to come into operation until they are allowed by a judge of one of the Superior Courts.

How different that is from the procedure here. Here you have got a procedure which is the subject of all the matters which might invite protest from the persons concerned, and in respect of which one would rather think that they had a right to be heard. You have a general direction restricting the general use by them of the harbour. We are told that the direction is to have general operation in respect of all vessels in like case with the plaintiff

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owners. That does not appear to me to be in the least a matter for which jurisdiction was given to the harbour-master. Speaking generally, it appears to me that the object of sect. 52 is fairly obvious. The harbour-master is the person who controls the movements of the particular vessels when they are within the port on the occasion when they are within the port; and, generally speaking, I have not the least doubt at all that his powers are given to him for the purpose of giving specific directions to specific ships for specific movements. Those are powers that must be exercised in the circumstances sometimes at once, or on an emergency in respect of which the procedure as to by-laws would be quite unreasonable and useless. The harbour-master and his assistants are given equal powers. I am far from saying that there might not be good occasions on which the harbour-master might give a direction which is to operate for more than the event of the particular voyage. For instance, Mr. Nesbitt made the suggestion of a case where there was an obstruction in the harbour, which it was not contemplated would remain permanently within the harbour, and in respect of which I think it is very probable that the harbour-master might give a general direction that as long as that obstruction remained vessels were to leave it either on the starboard or on the port side, or were to approach it in a particular way, and at a particular tide. That seems to me to be something quite different from the general directions which were given in this case.

Counsel for the Harbour Commissioners spoke quite boldly, and I think quite fairly, because I think it represents their case, of the harbour-master and the commissioners being two legislative authorities with legislative powers that might overlap. I think that tests the matter very accurately. To my mind the harbour-master is not a legislative authority at all. He has got no power to lay down general rules of general application. His power, according to my view, is to give directions adapted to the particular circumstances of the case, as and when they arise. Therefore, it appears to me that those directions, which quite plainly were given by the authority of the commissioners, and were intended to operate quite generally and to have precisely the same operation as by-laws, do not fall within the class of powers that are given to the harbour-master under sect. 52; and to my mind, therefore, they should be declared to be invalid.

For this purpose, therefore, I have not thought it necessary to test the question whether in themselves they are reasonable or unreasonable. That is a question involving a certain amount of nautical skill and care; and though we have been told on high authority recently that, after all, questions of navigation, when you are dealing with steamships, are questions of common sense which can be apparently determined from the judicial bench as easily as from the bridge of a steamship, yet it

appears to me that one would require more assistance than we have had on this matter to deal finally with that question. It rather looks as though the assessors down below were a little doubtful on the question of the reasonableness of some of these matters, both as to speed and as to the place for anchorage. So far as we have been able to consult our assessors—we have not put to them any definite questions—I am not quite sure that they were quite agreed between themselves upon the particular matter. Therefore I express no opinion at all about it. I can see that objections might very well be made. I am quite satisfied that these regulations were made in good faith, in the sense that the Harbour Commissioners and the harbour-master had convinced themselves that if Fowey is to be navigated with safety, all vessels of the size of the plaintiffs' vessels should have pilots on board; but I think that they have no power to proceed in the way that they did proceed.

For these reasons, I think that the appeal should be allowed here and below; and a declaration made in the form which we will indicate when my brother Sargant has given judgment.

SARGANT, L.J.—I am of the same opinion. I will add very little to what has been said. It seems to me here that the Harbour Commissioners and the harbour-master objected to the relaxation of compulsory pilotage which had been granted by the Trinity House Authorities, and that they together, the harbour-master under the general directions of the commissioners, set themselves to work to render the pilotage in their harbour compulsory by means of a set of so-called directions. If the directions they issued were in fact valid, I think they would have thoroughly succeeded in their object; because it seems to me that if those directions could be enforced, it would be practically necessary for the plaintiffs, Messrs. Hughes, to employ pilots in future.

The question before us really is limited to this single point, namely, whether this set of so-called directions are really directions within sect. 52 of the Act, or whether they in fact amount to a set of general rules such as could only be properly enacted by means of by-laws of the Harbour Commissioners. In my judgment it is clear that the directions under sect. 52 are of a much less general character than the by-laws under sect. 83, and that any directions under sect. 52 would necessarily be quite subordinate to any general regulations under sect. 83. The directions contemplated by sect. 52 appear to me to be primarily—I do not say universally—*ad hoc* directions given by the harbour-master or his subordinates to the particular vessels, as to the particular acts that they are to do in particular circumstances. The by-laws under sect. 83 clearly are rules which are to be applicable generally, and are not mere directions in particular instances.

Looking at the directions here issued, under which of these categories do they fall? In my

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judgment they fall quite clearly under the category of general rules to operate for the future without qualification, and they are not particular directions such as are issuable under sect. 52. I agree, therefore, that the appeal should be allowed, and that the declaration should be made in terms to be proposed by my Lord.

Appeal allowed with costs and judgment set aside and entered for the plaintiffs, and for a declaration that the directions issued to the plaintiffs and their masters by the defendants are, taken as a whole, not within the powers of the harbour-master under sect. 52 of the Harbours, Docks, and Piers Clauses Act 1847, and are invalid.

Solicitors: Rawle, Johnstone, and Co., agents for Hill, Dickinson, and Co., Liverpool; Hancock and Willis, agents for Stephens, Graham, Wright, and Co., Fowey, Cornwall.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Wednesday, Nov. 17, 1926.

(Before ROCHE, J.)

GEORGE H. IRELAND AND SONS v. SOUTHDOWN STEAMSHIP COMPANY LIMITED. (a)

Charter-party—Port of discharge at charterer's option—Choice of berth—Rights of consignees of cargo to designate berth at port of discharge—Usual place of discharge—Custom of port.

Where at the port of discharge there are two docks both equally fit and proper to receive the ship, and one of them is the more usual for discharge of cargo of the kind carried by the ship, the charterers or assignees of the cargo have the right to decide at which berth the ship shall discharge and the shipowners or their agent must comply with any request for a particular berth.

ACTION tried before Roche, J.

The defendants were the owners of the steamship *Novington* which, under a charter-party dated the 25th Nov. 1925 proceeded to Durban, Natal, and there loaded a cargo of maize and maize meal for certain United Kingdom ports at charterer's option. The port of destination chosen was Liverpool, and the vessel arrived there on the 21st Jan. 1926. The consignees of four-fifths of the cargo interest by letter dated the 19th Jan. 1926 intimated to the Mersey Docks and Harbour Board their wish that the vessel should discharge at the Waterloo Dock. The agent of the charterer was also a signatory to the letter, and no objections were made by the owners of the remainder of the cargo. This request was intimated to the ship's agent, Messrs. Marshall and Little, but in spite thereof the

latter caused the vessel to be berthed at the Langton Dock, whereby the consignees incurred extra expenses. The plaintiffs, who were consignees of 500 tons of the cargo, sued the defendants for breach of contract and claimed 37l. 13s. 7d., the extra cost incurred by discharging at the Langton Dock instead of at the Waterloo Dock in respect of their consignment. The defendants pleaded that the Langton Dock was a more fit and proper place for the discharge of the *Novington's* cargo. Alternately, that if both docks were fit and proper places, then in law the owner of the ship had the right to choose and decide on the berth at which the ship was to discharge. In the further alternative they pleaded that if in law they did not have such a right, there was a custom of the port of Liverpool which excluded the operation of law.

Beazley for plaintiffs.

H. L. Holman for defendants.

The facts and arguments appear sufficiently from the headnote and judgment.

ROCHE, J.—In this case the plaintiff company, the receivers of cargo carried on board the steamship *Novington* belonging to the defendant company, claim damages for breach of contract. The sum in dispute in this action, namely, the sum of 37l. 13s. 7d., is very small, but it is, I am informed, a test action whereby the rights of a number of other consignees of cargo on the same ship on the same voyage and landed under the same conditions will be tested and decided, and, further, having regard to the nature of the defence raised, a question of no little importance to the trade of the Port of Liverpool is involved. The point so involved indeed concerns the rights of the shipowners and consignees of cargo generally.

The matter arises in the following way. The *Novington* was chartered to load a cargo which in fact turned out to be a cargo of maize and maize meal, from a South African port to one of various ports in Europe which in fact turned out to be Liverpool. The plaintiff company were receivers and holders of the bills of lading for some 750 tons of the cargo laden on board the *Novington* under that charter-party. The total cargo was some 5200 tons or thereabouts. The question which arose was this. The plaintiff company and all the other persons concerned in the cargo who spoke their mind at all wanted the vessel to discharge in a dock called the Waterloo Dock at Liverpool. The defendant company, acting through their agents at the Port of Liverpool, Messrs. Marshall and Little, wanted her to be discharged in the Langton Dock and the defendant company, through Messrs. Marshall and Little, got their way, with the result that the discharge was more costly to the plaintiff company by the sum I have mentioned, namely, 37l. 13s. 7d., than it would have been had they got their way. The plaintiff company say that by well-recognised principles of law if there are two usual discharging places in a port under a

(a) Reported by R. A. YULE, Esq., Barrister-at-Law.

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charter-party, in circumstances like this, it is for the charterers and, they say, also for the receivers of the cargo, if they express their wishes in a proper way, to say which of those two places of discharge shall be used by the ship. Various circumstances and attendant rights, such as questions relating to delay and expense of discharge, may incidentally arise as a matter collateral to that proposition of the right of choice, but those matters as to the incidence of expense do not, in my opinion, fall for decision in the present case. The simple question is: Had the plaintiff company a right under circumstances such as they allege, or had they not, and if they had a right, did they exercise their right in such a manner as to bring home to the defendant company, acting through their local agents, that they desired to exercise it? In other words, did they exercise the option which they claim they had a right to exercise and which they claim they exercised? In my judgment they did. It is said on behalf of the defendant company, whose case has been very well argued by Mr. Holman, that in the first place Waterloo Dock was not a proper place of discharge at all for this cargo. If he is right in that and the facts support that contention, of course the whole matter falls to the ground. If the Langton Dock was proper and the Waterloo Dock was not, neither the plaintiff company nor anyone else had any right to order this vessel to the Waterloo Dock, and a request that she should there proceed was nugatory and one which the defendant company had no duty to attend to, listen to, or comply with. I have listened to the evidence in this case, and I can state my conclusion broadly, and I think generally, by saying that in all respects where they differ I accept the evidence given on behalf of the plaintiffs and I reject as inaccurate, and not to be received, the evidence given on behalf of the defendants. The Waterloo Dock was, I am satisfied, a more usual place of discharge than the Langton Dock, or any other dock for a cargo such as this, and I find it was perfectly proper that the *Novington* should discharge its cargo there. The plain fact is that the agents, for what reason I do not know, and it is not necessary to speculate—whether it was individual preference or it was a business advantage to them to discharge outside the Waterloo Dock—were determined if possible that this vessel should not discharge in the Waterloo Dock. I regret very much that that end was secured by putting forward an entirely inaccurate version of what this cargo consisted of. There is a letter which says, under the hand of such agents, that this vessel's cargo consisted or partly consisted of some 20,000 bags of maize meal. That was quite inaccurate. The actual quantity of maize meal in question was less than half that quantity. Now it is unnecessary for me to decide, whatever my suspicions may be, whether that mis-statement was advertent or not; at all events, there was no foundation for the statement. I find it was made. I disbelieve entirely the evidence that it was ever

withdrawn by word of mouth; on the contrary, I think it was relied on and persisted in until the very end, and I so find.

The other contention on this matter of the cargo is that even though the cargo were not maize meal, yet inasmuch as it consisted of maize in bags and inasmuch as maize in bags might have to be discharged in the docks on to the quay and not through an elevator or in barges, therefore, Waterloo Dock was not a proper place of discharge because of its insufficiency of quay space compared with the Langton Dock. As to that contention I find as a fact that that contention is ill-founded. Nobody reasonably would have expected or provided for such a contingency as that a number of the receivers would take delivery in (as I find) this entirely unusual way. It is true that on request, under exceptional circumstances, discharge might be so asked for and might have to be so given; but in default of a request—which is never hinted at or suggested in this case—I hold that such an unusual course of procedure need not be anticipated and need not be provided for, and the fact that such a remote contingency exists, need not be taken into account in determining whether this dock or that dock is proper for the discharge of the particular cargo. On the facts, therefore, I hold that the Waterloo Dock was a proper and usual place of discharge for this cargo.

The next contention is that if both these docks are usual and proper places, it is not the consignees that have a right to choose and decide which place of discharge shall be used, but the shipowner. That contention is, I think, not sound in law. The rule on the subject, is thus summarised in the well-known book of Carver on Carriage by Sea, and I think that the passage which I am just about to read was in the editions for which the late Mr. Carver (a very high authority) was himself responsible. The passage is this, at par. 460: "Where there are several places in the port at which the cargo may properly be discharged, the option in the case of a general ship lies with the shipowner unless the matter is controlled by the usage of the port"—That is the general rule. "But where the ship is under charter, it has been held that the ship must obey the directions of the charterer or of the assignees of the cargo, as to which discharging place to go to." Then the authority for that is cited, *The Felix* (1868, 3 Mar. Law Cas. (O.S.) 100; 18 L. T. Rep. 587; L. Rep. 2 A. & E. Cases, p. 273). Mr. Holman says that that decision is as to the right of the charterer; that there, there was one receiver of a whole cargo, and he says that here there were many receivers and that these receivers were not unanimous, nor was a request urged on behalf of all of them, and accordingly, not merely that the request which was urged was ineffective, but the right to make a request, it is contended, never accrued, because there was not one person that could make it; and so, on the principle

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that there must be one person to decide, it is argued that that one person must be the shipowner. There is, in my judgment, no warrant for such a contention. Ultimately, if there were a question of the authority of consignees to make the choice, no doubt the decision must rest with the charterers. I am not going to decide, because the question does not arise for decision, what are the rights of a majority as against a minority. I will merely suggest that in such a case the contract being with the charterer the exercise of the right would seem to rest with the charterer or with those who have the charterer's concurrence in their choice. What I do decide here is this: I hold as a fact that the desires of an increasing number of consignees for discharge in the Waterloo Dock, which was the most usual dock, was made known to the ship's agents from time to time as the arrival of the vessel drew nearer. On the 19th Jan., the day before the arrival or the day before the commencement of the discharge, that desire was crystallised (since opposition on the part of the ship's agent was by this time manifest) in a signed document the purport of which and the signatories to which were made known to the ship's agents; and the effect of that document was that the owners of four-fifths of the cargo concerned made known their desire and request for the vessel to proceed to Waterloo Dock instead of East Langton Dock in quite unambiguous fashion. That action of four-fifths of the cargo interest was not opposed, so far as I have learned in evidence, by a single person interested in one pound or one ounce of the cargo not represented or covered by the signed request. The signed request was concurred in and signed by the agent acting for the charterer, Mr. Cox; and under those circumstances I hold that it was an authoritative request made on behalf of persons who had a right to make the request, that the vessel should proceed to a perfectly proper and usual place of discharge in the Port of Liverpool. It was made in time. The vessel should then have proceeded at that date and that time to Waterloo Dock. There was some small discussion about the incident of expense. That, in my judgment, was irrelevant in this case, because if the vessel or the shipowners were committed to any expense at that date, then I think it was due to the action of their own agents in adopting throughout the attitude that, if they could, they would secure the resort of the vessel to a dock which they suspected, and I think indeed knew, would be unwelcome to the consignees. Under these circumstances I hold that a right subsisted of which the plaintiffs were entitled to avail themselves, that they purported to avail themselves of it, and that the defendants, acting through their agents, denied them that right. I have only to add a word on the authorities, which are not numerous—and I think not numerous because, so far as I know, the principle laid down in *The Felix*, which is a principle, if I may say so, amply

supported by good sense and business convenience, has not been questioned. There is, however, in the case of *Leonis Steamship Company Limited v. Rank Limited* (1908) 1 K. B. 499, recognition in the judgments both of Buckley, L.J. and of Kennedy, L.J., of the principle and its correctness, which was laid down in the case of *The Felix*, to which I have already referred.

So much for the point of law. The third, and I think the last, contention, was that if there were such a rule of law, there was a custom in the Port of Liverpool which excluded the operation of such a rule. To that it will be sufficient to say that the evidence entirely failed to support any such custom; I think indeed it negatived its existence, and that contention therefore fails.

The result is that there must be judgment for the plaintiff company for the amount claimed, which is 37l. 13s. 7d.

I would desire to add one observation as to the position of the Mersey Docks in this case. It appears that, at any rate with grain ships, the desires and wishes of the consignees are conveyed to the agent of the ship through the servants and agents of the Docks and Harbour Board, and that that course was followed out in this case. I am satisfied that that course of business was well known to the defendant company's agents, and was followed in this case with their entire acquiescence, and that nothing that they did or left undone was influenced to any degree by the fact that they were not approached direct by consignees or receivers. Their wishes, as I find, including the fact of the memorandum of the 19th, were made known in a perfectly usual and proper way through the medium of the Mersey Docks and Harbour Board. Those are all the matters that it is necessary to deal with in this case, and I give judgment accordingly and certify for costs on the High Court scale.

Solicitors: *Rawle, Johnstone, and Co.*, for *Laces and Co.*, Liverpool; *Holman, Fenwick, and Willan*.

Nov. 17, 18, and 22, 1926.

(Before ROCHE, J.)

NORTH SHIPPING COMPANY LIMITED v. JOSEPH RANK LIMITED (a)

Bill of lading—Claim by shipowners for freight—Cargo of wheat received in bags at port of loading—Counterclaim by endorsees of bills of lading for short delivery of bags of wheat.

Shipowners are bound to deliver their cargo according to weights and quantities specified in the bills of lading, but where they claim for freight and there is a counterclaim for short delivery, they can avoid the weights and quantities specified in the bills of lading by

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showing that what was shipped was delivered and that no loss occurred in transit other than what can be accounted for by natural shrinkage.

THE plaintiffs were the owners of the steamship *North Anglia*, which under a charter-party dated the 22nd June 1923 carried a cargo of wheat from Karachi to London. The defendants were endorsees of the bills of lading. The wheat was shipped in bags said to contain two cwt. each and the bills of lading quantities showed that some 57,230 bags were so shipped. On arrival at the Victoria Dock, London, the bags as they left the ship were put into lighters and a tally kept of the empty bags after being emptied into the warehouse. On a claim for freight by the shipowners, the defendants counterclaimed for contents of 130 bags which they alleged had been delivered short of the bill of lading quantity.

The bills of lading contained a clause "weight, measure, quality, contents, and value unknown," and the contract was subject also to the conditions and exceptions in the charter-party. The defendants relied on a clause in the charter-party to the effect "that the number of packages signed for in the bill of lading to be binding on the steamer and owners unless errors from frauds be proved and all cargo on board to be delivered and any shortage to be paid for at spot market value on day of arrival of the vessel."

Sir Robert Aske for the plaintiffs.

James Dickinson for the defendants.

ROCHE, J.—The plaintiffs are shipowners and the defendants are holders of a bill of lading, and I will describe them as the cargo-owners. The plaintiff company sue for freight, which is admitted, but the defendants, the cargo-owners, counterclaim for short delivery of cargo. Two points are taken in answer to the counterclaim: the first is that there is no right of suit or counterclaim in the defendants, and the second that there is no foundation for the counterclaim. As regards the first point, I will only state what it is, as in my view of the case it is unnecessary to decide it. It is that although certain rights have passed to the defendants by virtue of their holding and being endorsees of the bills of lading and also being liable for freight, yet, having regard to their position, they are not persons interested in shortage of cargo and their damages, if any, are only nominal. In support of this contention the observations of Bray, J. in *Steamship Den of Airlie Company Limited v. Mitsui and Company Limited* (12 Asp. Mar. Law Cas. 169; 106 L. T. Rep. 451; 17 Com. Cas. 116, at pp. 122-3) have been cited. In the Court of Appeal the case was decided on a point other than that now in issue, and the remarks of Bray, J. also appear to have been *obiter dicta*. I do not mean to imply that any doubt is to be thrown upon them, but I think it would be most unfortunate that I should express an opinion which is unnecessary for my decision. I merely mention

the point in case this case goes further and leave it for decision when a case arises where it will be important in discussing the effect of clause 4 of this bill of lading or other document containing a similar clause. I am not sure that the document before Bray, J. was worded in the same way as that before me.

As regards the facts there are two outstanding features. The first is the small amount of the shortage and the smallness of the claim. The bill of lading quantity was some 57,230 bags of wheat; the claim is for a shortage of 130 bags. As each bag purported to be of two cwt., the claim is for about thirteen tons out of a total of about 6000 tons. I mention those figures for the reason that this case is entirely unlike those where there is a great difference between the bill of lading quantity and the quantity actually delivered, which difference is difficult of explanation and cannot readily be accounted for by shortage or wastage. The second outstanding feature is that the cargo was carried in bags, which are not used to convey the wheat to its ultimate destination. The cargo is discharged out of the bags at the time they leave the ship, and the empty bags are counted and dealt with separately and are of comparatively trivial value. The importance of that factor is this, that the claim is based on the following method of reasoning: there are about 130 bags short of the bill of lading quantity and therefore there are so many quarters or so many tons of wheat short. That method of reasoning is more potent in the case of discharge of the cargo in its original packages such as, for example, bales of jute or bags of flour, than it is in a case where there is a loss of bags of trivial value but not necessarily a consequent loss of the wheat or other contents.

There is another matter which is to my mind of primary importance and I wish to put my finding on the matter beyond all ambiguity or dispute. I am satisfied not merely from the probabilities of the case but from the positive evidence of the mate that every quarter and every ton of wheat which was taken into custody of the ship was delivered on this side, and I so find. A number of cases have been cited to me and I welcome the citation of a moderate number of authorities in a case like this, because, as Lord Dunedin said in the case of *Hain Steamship Company Limited v. Herdman and MacDougall* (11 Ll. L. Rep. 58) the citation of such cases is a guide to the court; they re-inform one of such principles as are laid down or deal with the onus of proof in cases like this. I accept the principle laid down a good many years ago by the House of Lords in *Henry Smith and Co. v. Bedouin Steam Navigation Company* (1896) A. C. 70) and re-declared in *Hain Steamship Company v. MacDougall* (*sup.*). That doctrine or principle I take to be this, that in a case where the documents are in the form which they assume in the present case, the onus is on the shipowner to show that the goods which he has signed for as received have not in fact been received; and that onus is a difficult one to discharge. The

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bill of lading here signed for a certain number of bags; it did not sign for any quantity of wheat or any weight, on the contrary, although the bill of lading stated that the quantity of wheat was so and so, it stated in terms that the weight was unknown.

With regard to the weight and quantity the principle laid down by the Court of Appeal in *New Chinese Antimony Company Limited v. Ocean Steamship Company Limited* (117 L. T. Rep. 297; (1917) 2 K. B. 664) applies. That principle is sufficiently stated in the headnote in the following way. "A bill of lading for antimony oxide ore stated that 937 tons had been shipped on board: in the margin was a type-written clause 'a quantity said to be 937' and in the body of the bill of lading was printed in ordinary type the clause, 'weight, measurement, contents and value (except for the purpose of estimating freight) unknown.'" Substantially the same words occur in the present case. "Held, that the bill of lading was not even *prima facie* evidence of the ore shipped and that in an action against the shipowners for short delivery the onus was upon the plaintiffs of proving that 937 tons had in fact been shipped."

In this case the bill of lading quantities can only be impeached by reference to the tallies which even if inaccurate only diminish the bill of lading quantity by such a small amount as to be for practical purposes the bill of lading of quantity. Where documents assume the form they do in the present case, and the bill of lading is conclusive as regards a matter unless a mistake is shown, it is quite true that the mistake may be shown in either of two ways, by criticising the documents themselves and the persons who vouched to the figures or by other evidence. This principle is stated by Greer, J. in *Sanday v. Strath Steamship Company* (15 Asp. Mar. Law Cas. 280; 125 L. T. Rep. 557) and was approved by the Court of Appeal. He said "The shipowner can discharge the onus which is upon him either by direct evidence showing that a mistake has been made in the tallies from which the bill of lading was made out, or by indirect evidence sufficient to satisfy the tribunal of fact beyond reasonable doubt that none of the goods was lost or stolen after receipt by him and that he has delivered all received."

In this case the point is either the bill of lading quantity had not been shipped or that the bill of lading quantity had been delivered. I find that the bill of lading quantity received at Karachi was delivered at London less the proper allowance for shrinkage on the voyage. The onus therefore is on the counter-claimants, the cargo-owners, and they have failed to satisfy me on the evidence that they have made out their case. As regards the bags, the tallies made on behalf of the cargo-owners are not available, though the cargo was discharged in August 1923 and the claim made in October of the same year. What returns there are, appear to me to have been made up from the shipowners' tallies of the bags passed overboard and I do not suppose,

having regard to human experience, that the same care was exercised with regard to one of these bags as would have been exercised in dealing with a more valuable article. If, however, there was any shortage in the number of bags there remains to consider whether there was any shortage of grain.

On every consideration of the evidence before me, the counter-claimants have entirely failed to satisfy me of the weight which was loaded, the weight which was discharged, or that the amount discharged differed materially, allowing for loss by natural causes, from the amount that was loaded.

Judgment for plaintiffs on claim and counter-claim with costs.

Solicitors: *Botterell and Roche*, for *Botterell, Roche, and Temperley*, Newcastle-on-Tyne; *Thos. Cooper and Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

June 20, 30, and July 1, 1926.

(Before BATESON, J.)

THE STIKLESTAD. (a)

Salvage—S. O. S. wireless messages—Services—Request—No benefit—Moral support.

Where a vessel comes to the assistance of another vessel in distress in response to the wireless signals addressed to her of the latter, and renders services which, in the circumstances, are of no benefit, salvage may nevertheless be awarded. Moral support is also an element in making an award. But the mere response to an S. O. S. signal will not necessarily entitle a vessel to an award.

The Helvetia (1894, 8 Asp. Mar. Law Cas. 264n) followed.

The Dart (1899, 8 Asp. Mar. Law Cas. 481; 80 L. T. Rep. 23) considered.

CONSOLIDATED SALVAGE ACTIONS.

The plaintiffs were the owners, masters, and crews of the steam tug *Zwarte Zee*, and the steamships *Geraldine Mary*, *Flint*, and *Dampfem*. The defendants were the owners of the steamship *Stiklestad*, to whom the plaintiffs had rendered services in Oct. and Nov. 1925, whilst the *Stiklestad* was adrift in the Atlantic in the course of a voyage from Rotterdam to Newfoundland in ballast. The *Stiklestad* was continually sending out wireless messages throughout this period.

The circumstances in which the services of the *Dampfem* were rendered fully appear from the judgment of the learned judge. The circumstances to which the other claimants rendered services are not material to the points reported.

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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Dumas for the *Zwarte Zee*.*Bucknill* for the *Dampfem*.*Digby* for the *Geraldine Mary*.*Balloch* for the *Flint*.*Stenham* for the *Stiklestad*.

BATESON, J.—The figures at which I have arrived are 4000*l.* for the *Zwarte Zee*; 2400*l.* for the *Geraldine Mary*, including 200*l.* for the master and 400*l.* for the crew; 800*l.* for the *Flint*; and 400*l.* for the *Dampfem*. [The learned judge dealt with facts not relevant to this report and continued:] The case of the *Dampfem* is an interesting one. She began by getting into communication with the *Stiklestad* on the night of the 17th Oct., and on the 19th Oct. she came up with her in the evening. On the 20th Oct. she tried to make fast. She got two 5in. wires on board and tried to tow, but the ropes parted, and she ended her services by mutual agreement on the 21st Oct. at 10.45 a.m. She was about three and a half days in communication with the *Stiklestad*; she had to steam something like 120 miles to get to her; and she had to go back on her course to the north and east to do so. She did not actually do any good in towing, because she was only fast for a short time. She got a little damage in the course of her operations. The way in which she came to be engaged was this: Apparently the vessels were in communication by wireless. It began with a message from the captain of the *Stiklestad* to the captain of the *Dampfem* offering 500 dollars a day for towing the *Stiklestad* three or four days "the same way as yourselves." The *Dampfem* would in that case have to renounce her rights to salvage, and the master of the *Dampfem* replied demanding full salvage award. The master of the *Stiklestad* answered "Cannot accept your offer," and later offered compensation according to arbitration, for being towed to St. John's or until receiving assistance from shore. The reply of the *Dampfem* insisted upon a salvage award basis as her previous message. Finally the master of the *Stiklestad* wirelessly: "Accept your offer for assistance." As I read the message that means "Come to my assistance on salvage basis." There was no bargain to tow. There was no bargain, I think, to do more than come to the assistance on a salvage basis. I consider these wireless messages as meaning: "Will you come to my assistance and do what you can, and take a daily rate?" The answer is: "Yes, I will come to your assistance and do what I can, but I will not take a daily rate. It must be salvage terms." Finally the decision closing the matter is the last radiogram from the master of the *Stiklestad*: "Accept your offer for assistance." This is an offer of services to be paid on a salvage basis. That that is the right view is, I think, confirmed by looking at the different documents.

On these facts it seems to me the case is brought more within *The Helvetia* (1894,

9 Asp. Mar. Law Cas. 264*n*) decided by Gorell Barnes, J., than *The Dart* (1899, 8 Asp. Mar. Law Cas. 481; 80 L. T. Rep. 23). In *The Helvetia* (*sup.*) two trawlers which tried to assist the ship, but were really unable to do anything, were given an award for their efforts, Gorell Barnes, J. saying: "It seems to me that if there is in fact a request to render assistance . . . a request to attempt to tow the ship, and the service requested is in fact performed so far as it is possible to do it, and the ship afterwards is saved by other means, then the persons who rendered the services are, as indicated in the passage I have just read, entitled to some salvage remuneration."

Here what really took place was that the *Dampfem* was asked to come some 100 or 200 miles to the assistance of the *Stiklestad*, and she did come. She performed part of the service which she was engaged to do, and for that, I think, all the cases show that she was entitled to be paid something. In *The Dart* (*sup.*) Phillimore, J. says: "If a salvor is employed to do anything and does it, and the property is ultimately saved, he may claim a salvage award, though the thing which he does, in the events which happen, produces no good effect. If a salvor is employed to complete a salvage and does not, but without any misconduct on his part, fails after he has performed a beneficial service, he is entitled also to a salvage award. If a salvor is employed to do a thing and does not do it, and no doubt uses strenuous exertions and makes sacrifices, but does no good at all, then it seems to me he is not entitled to salvage." I think this case comes within the first of these propositions and not the last, as Mr. Stenham contended, and I am glad to think that if a ship in dire distress, as the *Stiklestad* was, asks another ship to go to her help, it is possible to give that other ship some award even though her efforts result in little, if any, good. Of course, there is always the moral support of one vessel to another in these circumstances, and that is an element in a salvage award. At one time I thought the wireless messages were a bargain to tow to St. John's, but I have come to the conclusion that I was wrong. Mr. Bucknill has convinced me that the *Dampfem* is entitled to an award, and I have given effect to that in allowing 400*l.* It is a very small sum, considering that it has to be shared with the master and crew, for trying to help a vessel in great distress, involving the expenditure of time and money in doing what the *Dampfem* was asked to do—to come to the help of the *Stiklestad*.

I do not shrink from this result in other cases where a ship is definitely asked to come to another ship's help. This judgment will not mean that when a ship sends out an S. O. S. message, every other ship on the sea is thereby entitled to go to that ship and then say: "Now I want to be paid a salvage award." I do not think that follows at all. In this case there was a definite request to this particular ship to come to the help of the *Stiklestad*

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and she did come to her help, although as events turned out she was not able to do much good.

Solicitors: for the *Zwarte Zee*, William A. Crump and Son; for the *Geraldine Mary*, William A. Crump and Son, agents for Maclay, Murray, and Spens, Glasgow; for the *Flint*, Lowless and Co.; for the *Dampfem*, Constant and Constant; for the defendants, Thomas Cooper and Co.

House of Lords.

Thursday, Nov. 18, 1926.

(Before Lords CAVE, L.C., ATKINSON, SHAW, SUMNER, and CARSON.)

REDERI AKTIEBOLAGET ACOLUS v. W. N. HILLAS AND CO. LIMITED. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—*Timber cargo*—*Cargo to be loaded and discharged with customary steamship dispatch*—*Custom of the port*—*Charterer's risk and expense as customary*—*"Alongside" the steamer*—*Liability of charterer*.

The plaintiffs, the owners of the steamship *O.*, chartered that steamship to the defendants to carry a cargo of timber from the Baltic to Hull or West Hartlepool as ordered. By clause 3 of the charter-party it was agreed that "The cargo to be loaded and discharged with customary steamship dispatch as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports . . . the cargo to be brought to and taken from alongside the steamer at the charterer's risk and expense as customary." The steamer duly arrived at Hull and was backed alongside a quay in the dock, and one of the usual methods of discharging a timber cargo at Hull at that spot was that a platform should be erected covering the space between the ship's side and a line of rails upon which bogies ran upon which the timber discharged from the ship was placed and run into the timber merchant's yard. The distance from the edge of the quay to the nearest rail on which the bogies ran was about 18ft. Some expense was incurred in building the platform, which consisted of some portion of the cargo, and some expense was also necessarily incurred in conveying the timber from the ship's rail, across the platform, and placing it on the bogies, and the dispute was as to who should pay the expenses of building the platform and of conveying the timber from the ship's rail across the platform and placing it on the bogies. The charterers contended that those expenses ought to be borne by the shipowners under a long-standing custom at Hull, which,

so long ago as 1899, was reduced into writing and published, and that by that custom those expenses were payable by the shipowners. The shipowners contended that in spite of that custom, by the language of the charter-party, those expenses were thrown on the charterers.

Held, that the custom was inconsistent with the terms of the charter-party, and that the shipowners were entitled to recover from the charterers such proportionate part of the stevedore's charges as was attributable to the work of taking the timber beyond the steamer's rail.

Decision of the Court of Appeal (16 Asp. Mar. Law Cas. 565; 134 L. T. Rep. 184) affirmed.

APPEAL by the defendants, the charterers, from the decision of the Court of Appeal (Bankes, Scrutton, and Atkin, L.J.J.) (reported 16 Asp. Mar. Law Cas. 565; 134 L. T. Rep. 184).

The plaintiffs, the owners of the steamship *Oresund* chartered to the defendants, claimed from the defendants 127l. 3s. 9d. which they alleged was the cost incurred by them in doing work which the defendants had undertaken to do by the terms of the charter-party and had refused to do.

By a charter-party, dated the 24th May 1924, and made between the plaintiffs, as owners of the steamship *Oresund*, and the defendants as charterers, it was agreed that the steamer should proceed to Karlsborg and there load from the agents of the appellants a full and complete cargo of mill sawn deals, and (or) battens, and (or) boards and (or) scantlings, including a deck load at full freight, and being so loaded should thenceforth proceed to Hull (Victoria Dock) or West Hartlepool, as ordered on signing bills of lading, and there deliver the same always afloat on being paid freight as thereunder mentioned.

The charter-party contained the following clause:

3. The cargo to be loaded and discharged with customary steamship dispatch, as fast as the steamer can receive and deliver during the ordinary working hours of the respective ports, but according to the custom of the respective ports, Sundays, general or local holidays (unless used), in both loading and discharging excepted. Should the steamer be detained beyond the time stipulated as above for loading or discharging, demurrage shall be paid at thirty pounds per day, and *pro rata* for any part thereof. The cargo to be brought to and taken from alongside the steamer at charterer's risk and expense as customary.

The steamer duly loaded the cargo and discharged at the Victoria Dock, Hull. At that dock there were three different ways in which wood cargoes were dealt with on arrival. They were sometimes delivered into lighters which came alongside the ships; sometimes handed over the ship's rail, carried across a platform which was in the first instance built up out of the deck cargo, and placed in bogies on rails along the quay; and sometimes carried from the ship's rail to a place on the quay at a distance from the ship which might be as much as 60ft. In the case of the *Oresund*,

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(a) Reported by EDWARD J. M. CHAPLIN, Esq. Barrister-at-Law.

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the charterers required the goods in bogies and the second method of dealing with the cargo was adopted.

The plaintiffs contended that when they handed the goods over the ship's rail, or at any rate when they had put them over the rail as far as the ship's tackle would reach, they had performed their duties as to delivery. The goods were then alongside, and it was for the charterers to incur the expense of carrying them to and loading and securing them in the bogies.

The defendants contended that the ship-owners had to discharge the ship according to the custom of the port of Hull; that the custom put upon them the obligation of erecting the staging, carrying the timber across the staging, and piling and securing it in the bogies, and that their obligation to receive the cargo did not begin until all this work was done. The plaintiffs contended that the custom as proved was (1) uncertain, (2) unreasonable, and (3) inconsistent with the express words of the charter-party. The Court of Appeal held, affirming the decision of Greer, J., that having regard to the language of the charter-party, evidence of the custom of the port of Hull was not admissible in order to decide upon whom the expenses in question should rest. The custom was inconsistent with the express terms of the charter-party and the shipowners were entitled to recover. *Palgrave, Brown, and Son Limited v. Owners of the Steamship Turid* (15 Asp. Mar. Law Cas. 538; 127 L. T. Rep. 42; (1922) 1 A. C. 397) and *Holman v. Wade* (*The Times Newspaper*, May 11, 1877) followed.

The defendants appealed.

Stuart Bevan, K.C., C. T. Le Quesne, K.C., and Clement Davies, K.C. for the appellants.

W. Norman Raeburn, K.C. and Sir Robert Aske, for the respondents, were not called upon.

LORD CAVE, L.C.—It is plainly undesirable that where the meaning of a commercial document in common business use has been subject to judicial decision, to draw fine distinctions in construing a similar document. The charter-party, which is here in question was the subject of a decision in the case of *Palgrave, Brown, and Son Limited v. Owners of the Steamship Turid* (15 Asp. Mar. Law Cas. 538; 127 L. T. Rep. 42; (1922) 1 A. C. 397), which was decided in this House in 1922, and after giving full consideration to the arguments offered on behalf of the appellants I have found it impossible, as the Court of Appeal also did, to distinguish the present case from the case of *The Turid (sup.)*. Here as in that case the charter-party provided that the cargo was to be taken from alongside the steamship at the charterers' risk and expense as customary. Here as in that case the charterers pleaded that there was a custom of the port under which the expense in question was to be paid by the ship. The expense in *The Turid* case (*sup.*) was the expense of putting a staging from the ship, which was to lie some

distance from the quay, to enable timber to be carried across it on to the quay. In the present case the sum in dispute represents the cost of putting up the staging from the ship which was alongside the quay to certain railway lines and of carrying the timber across and placing it on bogies on those rails. It was held in the case of *The Turid (sup.)* that the charterers were liable for the expense and I can see no reason why that should not apply in the present case.

It is said that there is a distinction to be drawn between the two cases because in the present case the staging was placed across the land, whereas in the case of *The Turid (sup.)* it was laid across the water, but that seems to me to be no substantial distinction. Then it is said that in the present case no additional expense was thrown upon the ship on account of this staging, because the charge of the stevedores was the same. I do not think that point is open. The claim put forward was for additional expense caused by this operation and the judgment was for any additional expense so caused. That figure has been agreed between the parties, and I think it is no longer possible to maintain that nothing whatever could in any case be recovered in this action.

Finally it is said that with regard to the custom at Hull the word "alongside" which normally connotes contiguity has a special meaning and denotes delivery, if not in lighter, at all events on to bogies, on to rails or on to some space beyond the rails. In my view the evidence falls far short of establishing that meaning. In my view that argument fails like the others. I agree with the sentence in the judgment of Greer, J. where he says: "In my judgment a custom of the kind proved in this case which is not expressly directed to establish a customary meaning of a word, cannot be said to have this effect indirectly merely because the custom cannot be given effect to without giving a special meaning to the word."

For these reasons I am of opinion that this appeal fails and should be dismissed with costs.

LORD ATKINSON.—I concur.

LORD SHAW.—I concur.

LORD SUMNER.—I agree.

LORD CARSON.—I also agree.

Appeal dismissed.

Solicitors for the appellants, *Pritchard and Sons*, agents for *Andrew M. Jackson and Co.*, Hull.

Solicitors for the respondents, *Botterell and Roche*, agents for *Sanderson and Co.*, Hull.

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Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 7, 8, and 9, 1926.

(Before BANKES, SCRUTTON and SARGANT, L.JJ.)

THE CARLGARTH ; THE OTARAMA. (a)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Damage—Tug entering canal and grounding on canal bank so as to engage her propeller with chain placed on bank for use of dredgers—Liability of owners of the canal—Public navigable highway—Obstruction—Nuisance.

The respondents' (plaintiffs') steam tug C., whilst entering the appellants' (defendants') canal by night, grounded with her stern on the bank of the lock entrance so that her propeller became engaged with a chain, one end of which was attached to a "deadman" on shore, the other end being permitted by the appellants to lie on the surface of the bank below the water. The chain was used by the appellants' dredgers for the purpose of dredging the lock entrance. The chain, together with other similar chains, had been so used for about thirty years, but, until about a month prior to the occurrences giving rise to the plaintiffs' claim, the seaward ends of the chains had been during that time secured to small "piggy" buoys floating in the canal. The position of the "deadmen" on the bank, and the existence of the chains were well known to pilots and tug-masters navigating the canal.

Held, reversing Lord Merrivale, P., that the chain was not a nuisance nor an obstruction in a public highway, and did not constitute a trap for the respondents. The respondents were therefore unable to recover damages from the appellants.

Per Scrutton, L.J. : Assuming that the canal was a highway with a public right of navigation, the right to navigate did not include a right to ground unless such grounding was customary in the usual course of navigation (The Mayor of Colchester v. Brooke (1849, 7 Q. B. 339). The tug, in grounding upon the canal bank, was therefore in the position of a trespasser in relation to the appellants. There was no duty upon the appellants to ensure that the bank was maintained free from such obstructions as the chain, which the appellants had placed in position for the purpose of performing their statutory duties.

APPEAL in consolidated actions.

The appellants in the first appeal, the Manchester Ship Canal Company, owners of the Manchester Ship Canal, the management of which was vested in them by their appropriate special Acts, appealed against a

judgment of Lord Merrivale, P., holding them liable for damage sustained in the Manchester Ship Canal by the steam-tug *Carlgarth*, belonging to the respondents, Rea Towing Company Limited.

The appellants in the second action, the owners of the steamship *Otarama*, appealed against the decision of Lord Merrivale, P., dismissing their claim against the respondents, the appellants in the first appeal, the Manchester Ship Canal Company, in respect of damage sustained by the *Otarama* in the Manchester Ship Canal whilst she was being towed by the *Carlgarth*.

On the night of the 15th Nov. 1925 the *Otarama* was entering the Eastham Lock of the Manchester Ship Canal, in order to enter the canal in the course of a voyage to Manchester. The *Otarama* had the assistance of a tug forward, and the respondents' tug *Carlgarth* was assisting her as stern tug. In these circumstances the *Carlgarth* grounded on the bank of the canal and the *Otarama* fell against the lock entrance, sustaining damage. It appeared that the propeller of the *Carlgarth* became engaged with a mooring chain, one end of which was attached to a "deadman" on shore, the other end lying on the surface of the bank below the water. The *Carlgarth* sustained damage to her propeller. The lock entrance formed part of the Manchester Ship Canal, over which the appellants in the first appeal exercised jurisdiction. The mooring chain had been placed in position by the appellants, the Manchester Ship Canal, for the use of dredgers.

The President (Lord Merrivale) gave judgment in the first action in favour of the plaintiffs, the owners of the *Carlgarth*, against the defendants, the Manchester Ship Canal Company, upon the ground that the chain constituted an obstruction or nuisance in a public navigable highway. In the second action the President dismissed the claim of the plaintiffs, the owners of the *Otarama*, and gave judgment for the defendants, the Manchester Ship Canal Company, upon the ground that the damage to the *Otarama* was caused by want of efficient towage by the *Carlgarth* and not by reason of the propeller of the *Carlgarth* being fouled. The defendants in the first action and the plaintiffs in the second action appealed. In the second action the defendants cross-appealed.

[The facts and arguments fully appear in the judgments.]

Sir John Simon, K.C., Dunlop, K.C., Langton, K.C., and Pilcher appeared for the appellants in the first appeal and cross-appellants in the second appeal, the Manchester Ship Canal Company.

Schiller, K.C., Stephens, K.C., and Stewart-Brown for the respondents in the first appeal, the owners of the *Carlgarth*.

Raeburn, K.C. and Balloch for the appellants in the second appeal, the owners of the *Otarama*.

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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BANKES, L.J.—These are two appeals from a judgment of the President, the judgment being in a consolidated action in which the owners of two vessels sought to recover damages against the Manchester Ship Canal Company. One vessel was a large vessel, the *Otarama*, and the other was the tug *Carlgarth*, and each claimed damages upon the ground that the two vessels had been injured owing to the default on the part of the Manchester Ship Canal Company, a default which had occurred not far from the entrance to the Eastham Dock Lock, which is the lock which gives access to the Ship Canal from the Mersey. It is necessary to make short reference to the conditions prevailing at the entrance to that lock in order to explain what I have to say in reference to the appeal. The lock is approached by a dredged channel, which is shown from the plans which were put in in the court below, and to which reference has been made, and speaking of the two sides of the channel as if they were east and west ; on the easterly side of the channel there are a number of fixed dolphins—thirteen of them, and on the westerly side there are, towards the entrance of the channel, three dolphins only, and in the space between the last of those dolphins at the entrance to the lock there are no dolphins, but there have been for the last thirty years, apparently, a number of mooring-chains attached to the shore and leading down to the bank, but not reaching what is shown on the plans as the dredged channels. There are, I think, seven of those mooring-chain extending very near the last of the dolphins, No. 16, close up to the entrance of the lock itself ; and those chains, we are told, were put there for the convenience of mooring the dredging barges, because constant dredging has to be carried out in order to keep this channel clear. It can only take place during certain states of the tide, therefore it is very material that those mooring-chains should be available for the purpose of these dredging barges.

The mishap to these two vessels (I use that expression) took place on the night of the 15th Nov. 1925, and up to the previous September these mooring chains had been attached to small wooden buoys called piggy buoys—they are short, stumpy little buoys—and the seaward end of these mooring chains were attached to these buoys. Each chain had its buoy, and to each chain and buoy there was attached a wire, which is called a preventer wire, for the purpose of keeping the buoy in position. Now whether these buoys were there for the purpose of marking the position of the chains, or whether they were there for the convenience of the barges picking up the chain, I do not know, and we are not told, and it does not seem to me material to consider. But there is this fact with regard to them, that those buoys were never lighted, and that apparently we are not told whether they have always been there or whether sometimes they were there, and sometimes they were not there, but whenever they were there they were not lighted ; and,

therefore, it is pretty obvious that they were not regarded by anybody as a source of danger to vessels, either coming into or out of this lock, or to the docks that were used for the purpose of assisting vessels into or out of this lock ; but these piggy buoys had been removed in the previous September. We are told the reason. The reason was that for the time, at any rate, the dredging of the mud had ceased, that they were using a rock dredger, and for that purpose it was necessary to have a more or less sort of permanent mooring chain right across the channel from one of these dolphins attached to the westerly bank. After those piggy buoys were removed the chain necessarily rested on the bank, and the particular chain complained of in this action was the chain that was attached to the shore at the point marked in Roman numerals No. IV.

The case made for the tug, and in this appeal the really important point, is whether or not the *Carlgarth* succeeded in establishing her claim. The case for the *Carlgarth* was very plainly, and if I may say so from the lawyer's point of view, very completely set out in the statement of claim. Their cause of action was put in four different ways ; but each cause of action rested upon the assertion that the piggy buoy was in position, that the mooring chain was attached to the piggy buoy. With regard to the preventer wire that was not alleged in the statement of claim ; it came later, but in each case it was definitely asserted that each one of the particular causes of action depended upon the existence on the occasion of the disaster of the piggy buoy with the mooring chain attached. I will just read the allegation in par. 5 of the statement of claim because that is an allegation based upon an alleged breach of statutory duty. It is said there that although it was the duty of the Ship Canal Company to keep the entrance in a safe and proper condition (I am only summarising it) they go on to say they allowed it to be in an unsafe and dangerous condition by placing, or keeping, or allowing to be placed or kept, or to remain there, a small unlighted buoy attached to a mooring chain, so that the propeller of the plaintiffs' tug, the *Carlgarth*, became entangled with the buoy. Then in the next paragraph by the alternative cause of action, it is alleged there was a breach of common law duty because the Manchester Ship Canal Company invited the tug to come to this position and that this buoy (because they keep on referring to it as "the said buoy") was in the nature of a trap. The third alternative cause of action was that the defendants were guilty of negligence in allowing the buoy and the mooring chain to remain in that condition, and in that place ; and, in the last paragraph they say that there was a breach of the common law duty, because this buoy and the mooring chain constituted a nuisance, and an obstruction in a public highway ; and when particulars were asked for they were given. Then the additional fact was given that what was complained of was not only the buoy and

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the mooring chain, but the preventer wire, which was attached to the mooring chain.

That was the case and a very large amount of evidence was given on the one side in support of that case and on the other side in attempting to rebut it—and I think that this is an instance of how sometimes when the parties are allowed to depart from their pleaded case and set up at the last moment some alternative and different case to which the attention neither of the witnesses nor of the judge during a long trial has been directed, that some important point, or some important way of looking at the point, is lost sight of, and that appears to me to have been the result of the trying of this case in the way in which it in fact was tried. The plaintiffs called evidence in support of their case as pleaded, and their principal witness was a gentleman named Mr. Little, who was very emphatic in his view in reference to the pleaded case—because everybody must have realised the difficulty in establishing a case against the Ship Canal Company, if this mooring chain was in fact lying on the surface of the bank, and it was sought to establish the case against the Ship Canal Company if it could be shown that the mooring chain and (or) the wire were in some way either suspended above the ground, or, in fact, for some reason protruding themselves above the ground; and, therefore, Mr. Little was very emphatic in his evidence that it was an essential part of the plaintiffs' case that the mooring chain must have been attached to the buoy: he says it over and over again, and that he cannot conceive the fouling of the chain by the propeller if in fact the chain was lying upon the surface of the bank. Therefore, it is not only a pleaded case, but it is a case that is supported in a most emphatic way by the witness who is called, and whose evidence is mainly relied upon as establishing the suggestion put forward as to how this mishap occurred. On the other hand, a witness was called for the defendant, and, of course, it was the defendant's object in answering the case as formulated by the pleading and supported by Mr. Little, to show that it was possible, or might be possible, for the propeller to pick up the chain, although it was lying on the surface. For that purpose a Mr. Young was called, and I think that under the circumstances one may say for him and of him that he did his best, but he failed to convince anybody that it was possible to pick up the chain if it was lying on the surface of the bank. He failed to satisfy the President, and it is quite plain from what Mr. Stephens has told us yesterday, that it is an impossibility if this vessel was anything like upon an even keel, for her, constructed as she was to pick up this chain if it was lying on the surface—and there was nothing there but the chain. Mr. Raeburn has formed that view. When, therefore, the whole of the evidence was closed the learned counsel felt himself in this position, obviously that the defendant had met his case on the facts in a way which made it very improbable that the President would take any other view than that these buoys

had been removed some months before the mishap; and he anticipated therefore, as complete a wreck of his case as unfortunately happened in the case of this unfortunate tug herself. He therefore changed his ground and he presented an alternative, and the alternative founded as he suggested upon the defendant's own evidence. Well, now I can conceive that where there is a pleaded case and evidence has been given for the plaintiff in support of it and evidence of the defendant against it, it is perfectly legitimate and proper for the counsel for the plaintiff to say: "Well, it so happens that the defendant has given evidence in support of my pleaded case which is so strong that I will jettison my own evidence and I will rely on his in support of my pleaded case." But that could not be done here. What had to be done—what was done, was "I will jettison my pleaded case and I will rely on the defendant's evidence to support an entirely new case," and the entirely new case, when it is mentioned, indicates how completely the pleaded case was jettisoned, and to what extent the evidence which had been given failed to touch the point which was then put forward as the alternative case.

The alternative case put shortly was this: "Well, assuming I am all wrong about the buoy and the mooring chain attached to the buoy and the preventer chain not being there; suppose I am wrong about all that, and assume that the defendant is right in saying that the buoy had been removed and the chain was lying upon the bank, yet in that position, somehow or another, in a way I cannot explain, and do not attempt to explain, somehow or another it did get fouled with my propeller, and that fact by itself is sufficient to prove a case of a nuisance in a navigable highway; I need not say anything more than this: that my tug was lawfully where it in fact was: that, somehow or another (I do not attempt to explain how) her propeller fouled this chain. This chain was on the public highway. It had been placed and maintained there by the Manchester Ship Canal Company, and that is quite enough for me, and entitles me to a judgment." It seems to me, reading the learned President's judgment, that that was the way in which the case was really presented to him, and that that was all he directed his mind to; and perhaps that is very natural in considering the number of points which had been taken in fighting the pleaded case and having regard to the fact that this alternative case was only launched in speeches of counsel. Now I will refer to the President's judgment, to the way in which the matter was put to him, and I think that will justify what I have said on that point. The learned President says this: "There being that issue very definitely raised in the case, counsel yesterday claimed on the footing that the chain which is in question and which fouled the propeller of the *Carlgarth* was a chain lying on the bank in the position in which the defendants asserted that it lay, and was a chain which was there without any

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right of the defendants to have it there, that it was an obstruction to navigation and that if the chain in that position without negligence in that particular on the part of those navigating the *Carlgarth* became foul of the propeller of the *Carlgarth*, there was, by reason of the right of His Majesty's subjects and of all persons to navigate upon the navigable waters of the realm and in the navigable tidal rivers, a right on the part of the owners of the *Carlgarth* in the first instance, and of the owners of the *Otarama* in the second instance, to recover in respect of damages caused to them by the fouling of the propeller of the *Carlgarth* by that chain," and I put to Mr. Stephens yesterday, in substance, whether that was not a correct summary of the way in which he put the case to the learned President, and I understood him to say it was; in substance it almost comes to a case of *res ipse loquitur*—"here is a chain and here is the damage: Q.E.D." Then the learned President goes on: "That, of course, is a question of much broader importance and much graver concern to the parties, and to the defendants in particular, than the questions upon which I heard a great deal of scientific evidence—if I may so call it—upon the question of whether the *Carlgarth* could have picked up the chain without first picking up a wire, and how and in what circumstances the *Carlgarth* could have picked up a chain such as the one in question, and many other questions of that kind." Then without reading it I will refer to the summary in which the learned President concludes his judgment, and in substance he there accepts the proposition which is put forward, and which I have read.

With great submission to the learned judge, the way in which the case was put to him was not a sound proposition of law. If the case ultimately submitted was a case either of a nuisance in a public navigable highway or of a trap set before an invitee, whichever it be, it seems to me the question resolves itself into a question of fact, and a question which requires and deserves the minutest consideration of the evidence upon which it is contended that the particular thing complained of is either obstruction or nuisance, or alternatively, trap. Now that the question is one of fact, I will refer, as I did just now, to the case of *Rex v. Betts* (1850, 16 Q. B. 1022), and when one is speaking of nuisance or obstruction in a public highway, it is, I think, useful to remember that in order to establish that you have to establish something which is indictable, a punishable offence. In considering this matter one must consider the various suggestions which have been made as to the picking up of this chain: one must consider whether upon the evidence the reasonable conclusion is that the chain was picked up without any extraneous assistance, if I may use that expression. It is clear, upon the learned judge's finding (and it is a finding which I should certainly accept) that there was no mooring on the occasion in question;

there was no mooring chain attached to a buoy; there was no preventer wire attached to the buoy. That is disposed of. It is not possible that the fouling of the chain occurred, because either the chain or the wire were suspended to a buoy. The next thing is, if there was no buoy and no suspension of the mooring chain or wire in that way, how did the mishap occur? Of course, if that had been the case presented to the witnesses, their attention and the President's attention would have been directed to many points to which their attention was not directed. But Mr. Schiller's case was: "I do not concern myself with that; it is sufficient for me to say that the mooring chain did foul the propeller, and that is sufficient to establish that it was in fact an obstruction and a nuisance." As I have said, in my opinion, that is not a true view of the position of a person who is setting out to establish a cause of action founded either upon nuisance or invitation—trap. Then Mr. Stephens put forward a suggestion which apparently had never even been mentioned at the trial. He said: "If you look at the plan you will see there were three chains—one on top of the other—and somehow or another, which is not for me to explain—the onus is on the other side—it may be those three chains had something to do with it." Again I pass that by because it seems to me it is impossible for the person who has to establish as part of his cause of action the existence of a nuisance or obstruction simply to say: "Well, there were three chains there." Then the argument which we last heard addressed to us by Mr. Raeburn, and which he advances as the preliminary point of his appeal as representing the large vessel, is that the explanation of how this chain got fouled is that there had been a preventer wire attached to the chain when it was attached to the piggy buoy, and that when the buoy was removed that chain was cut, but it was not cut close up to the attachment to the mooring chain, it was cut some substantial distance away from it and that inasmuch as this wire was a single wire from what had been a much more substantial wire, you may assume that when it was cut in this way, instead of lying flat, it coiled up into a position which some part, at any rate, was not lying flat on the surface of the ground, and the reasonable explanation as to how this fouling took place is that the propeller must in some way have cut this wire, and in that way the chain must have been dragged on to the propeller and in that way must have got wound round the boss of the propeller. That suggestion was made in the court below, not in reference to this particular buoy, but in reference to the general inquiry as to how this coiling could have taken place; and the President had before him the evidence of the man who uncoiled the chain, and saw its exact position when the tide went down, and it was possible to see in fact what had happened. This man describes the chain as having, as he says, four turns round the boss of the propeller,

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and the seaward end of it hanging 4ft or 5ft. down.

Mr. Little, the principal witness for the plaintiff, was asked to consider whether or not a loose wire could have accounted for this fouling, and the proposition which Mr. Raeburn has put to us was put definitely to him, and he refused to have anything to do with it. The reason was that he could not understand how, if the wire which was attached to the mooring chain about 30ft. from its seaward end, and, therefore, within 2ft. or 3ft. of the point at which the chain began to foul the propeller boss—he would not accept for a moment that wire could have anything to do with the propeller, because, as he says, and as far as I can understand, it seems to me almost obvious that if that was the way in which the fouling took place, there must have been a bight of the chain on the boss instead of single turns. The President deals with that point in this way : “and I will say this, that the evidence on behalf of the Ship Canal Company was quite plain and distinct, that there was no wire on the propeller at all, and, of course, that fact renders it less unlikely that a wire had anything to do with the fouling—because, of course, no doubt it is possible that the wire may have had something to do with the fouling. It is much more likely, if the wire had anything to do with it, that some portion of it would have been found on the propeller or the buoys. However, the President finds that the wire had nothing to do with the matter, and he finds that there was no wire on the propeller ; and on this particular point which Mr. Raeburn has insisted upon, he says : “I have come to the conclusion in point of fact that part of that wire was left upon that chain. But that does not dispose of this question. Mr. Little is still emphatic that, whether with a buoy or not, the wire was picked up and the chain was drawn up by it. I have discussed that very carefully with the Elder Brethren, both upon the evidence for the plaintiffs and the evidence for the defendants—the evidence of skilled witnesses—and I have come to the conclusion, and definitely come to the conclusion that it was not the wire which was picked up. It is worth while to refer to one manly admission made by Mr. Little. He said : ‘Well, if it had been the wire, as it is put to me in cross-examination, it seems that it must have brought up a bight of chain, and if the folds above the propeller were single folds, that seems, I do not know if he said ‘fatal,’ but he said that it certainly was a very powerful factor against this theory. Now, what is proved beyond all doubt is that the chain round the propeller was in single folds. There were four single folds with a hanging broken end on this side towards the channel” ; so that this particular point was dealt with by the President. He accepts the evidence of the plaintiffs’ main witness on the point. It was the plaintiffs’ own case, and it may have been inconvenient for the plaintiffs at all the stages of this matter to accept the evidence of their

own witness, but surely they cannot complain if what their own witness says is accepted by the President and confirmed by the Elder Brethren. Now that the matter comes before us, it seems to me, as far as I can visualise the thing, that they must be obviously right, and I think our assessors are of the same opinion. It follows, therefore, that all the suggested ways in which this chain could have been fouled by extraneous assistance (if I may use that expression) disappears, and what you have to deal with, and all you have to deal with, is the single mooring chain lying flat upon the surface.

Then the question is, with regard to such a mooring chain, is it a nuisance ? Is there any evidence that it is a nuisance ? Is there any evidence that any reasonable jury would accept it as a nuisance or a trap ? Now with great respect to the learned President, he does not seem to me to have directed his mind to that point, and I can understand why he did not do so, because his whole attention was really directed to points which were the real fight in the case, and upon which the whole of the evidence was directed. Now it emerges that the only case for the plaintiffs can be in the absence of the buoy, and when one comes to that one has to consider the whole of the evidence on the footing that you are dealing with a mooring chain lying on the ground, and nothing else. Mr. Raeburn has very naturally and rightly said in reference to the trap, as I said yesterday, it was a very ineffective trap, that it had been set for so long and caught nothing ; and he says, which is very true, that it only, on the evidence, actually took the position that it occupied at the date of the mishap in September. Yes, that is quite true, but on the plaintiffs’ evidence, it was a dangerous trap until September, because it was attached to the buoy. When they took away the buoy it became something which, on their own case, persisted in up to this moment, a vessel on anything like an even keel and built as this tug was could not pick up. Well, now is such a thing a nuisance or an obstruction, or is there evidence of it ? Is it said “*res ipsa loquitur*—there it was—it did pick up”—yes, but how came it to pick it up ? When you have eliminated all the extraneous causes in connection with the wire or its being somehow or another raised above the surface by other chains, what have you got left ? You have got left the chain which, if left lying flat on the surface and in no wise interfered with, which cannot foul the propeller of a vessel as it fouled it on this occasion. And you have this further fact, that there was at a point in close proximity to which the propeller of this tug must have been, a hole. Now it is only natural to suppose that this tug being in the position in which she was at the time of the tide at which she was and going full speed ahead at the time she did, her propeller would churn up the mud, if I may use that expression, and make some sort of a depression.

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Everybody objects to the word "hole" on the part of the plaintiffs. It seems to me to render it conceivably possible that the chain, being where it was, and this churning up taking place, as and when it did, the fouling might have become possible on the assumption that the chain was wound from the seaward end. One does not know that it was lying straight down the bank; one does not know that at this particular point the end of it might not have been at right angles to the propeller, but until the churning took place not either under the keel of the tug or actually touching the propeller, but the churning of the mud might be such that it altered the position of the chain in such a way that it was possible to become fouled. Now, that seems to me the only possible explanation as to how this fouling took place when you have eliminated all the other suggestions; and that is the view which the President himself took, because he says: "The Elder Brethren tell me that the casualty which has arisen here is the same kind of casualty which would arise in such a case as that, and that if a tug at the state of the tide which existed there, and with the draught of the *Carlgarth* and her position, and with a chain on the bank, as happened to be here, and with a hole formed on the bank," then he says, "whether previously formed or formed by her I do not pause to inquire, but if a tug were in that position it is probable that she would foul her propeller with that chain." So it is the chain plus the hole, if you choose to call it the hole, that in the President's view rendered it possible for the chain to become fouled in the way in which it was fouled.

If that is the state of facts, is it possible for anybody, considering the facts as a whole and from the beginning, to say that any jury would have found that this chain was an obstruction? You start with this: it is a statutory obstruction in this sense; it exists in the area in which the Manchester Ship Canal Company have the statutory right to erect or place moorings; secondly, it is approved apparently by the conservancy authorities; thirdly, it has been there in a much more dangerous form: it was there during the whole time in that form; but it has been there either in the dangerous form as a buoy or in the safe condition in which it was lying on the bank for thirty years, and in a place where apparently I should judge from the absence of dolphins, it is thought likely that tugs may have to go in certain states of the tide in order to assist vessels in or out of this lock. As Mr. Stephens said yesterday, over this place, I think he said thousands, but at any rate, hundreds of tugs must be passing without indication of any danger whatever, or complaint, and that it was there since the time when this lock was opened.

Taking all those things into consideration, and being told that this chain only became dangerous under the very special and exceptional circumstances brought about by the tug herself, I am quite unable to come to the

conclusion either that this was a nuisance or an obstruction in a public navigable highway, or a trap set for the unwary invitee. That is the ground upon which I desire to base my judgment. Sir John has said that he had other points to urge, and, of course, they are reserved to any future proceedings, and in the same way with regard to any points that Mr. Raeburn desires to raise, those were reserved to him, and I purposely avoid dealing with some matters which may be matters of importance and with regard to which possibly a great deal might be said. One is whether this is part of the navigable channel so that it could be said to be a public highway; secondly, whether in doing what it did, making this hole, scouring away this sand, the tug was pursuing a lawful operation, and the question whether or not the tug was negligent in getting where she was, the question whether she was or was not misled by signals which were given from the larger vessel, I have left all those matters out of consideration; they may be very important from some points of view. The point of view I take is that these plaintiffs entirely fail to prove either the case which they set out to prove, or the alternative case which was launched at the last moment, and does not seem to me to have received the attention which the particular point ultimately raised deserves. I think, looked at from all points of view, the alternative case as well as the original fails. I think for these reasons the appeal must be dismissed with costs.

SCRUTTON, L.J.—I have come to the same conclusion as my Lord. As we are differing from the President in a case which has taken rather a curious course, and as it is intimated to us that further discussions of this interesting case may take place before a higher tribunal, I will state shortly the grounds on which I have come to my conclusion, though I do not propose to repeat the careful analysis about the wire rope which my Lord has put into his judgment.

At midnight on the 15th Nov. a large vessel, the *Otarama*, of 6000 or 7000 tons, 400ft. or 500ft. long, was leaving the estuary of the Mersey and entering Eastham Lock in order to go into the Manchester Ship Canal. She had a tug forward, whose movements are immaterial, and a tug aft, whose movements are very material, and in the course of the entrance to Eastham Lock the large vessel, the *Otarama*, ran on her starboard side of the channel astern and hit the Eastham Lock wall, and did damage to her engines; and her stern tug grounded on her starboard side of the channel, and when the tide ebbed, fell over and is said to have become a wreck. Whereupon the owners of the ship and the owners of the tug, casting about as to upon whose shoulders they should place the damage, agreed that they would sue the Manchester Ship Canal Company, and the case which they set out to prove was this: "The ship and tug were in the navigable channel, and floating in

the navigable channel, we found there at midnight an unlighted buoy with a wire attached to it, and that wire was attached to a mooring chain, and the stern tug, the *Carlgarth*, caught its propeller in the wire, proceeded to wind it up, or get fast in some way to the chain, and the chain being fast at the land end, the tug performing this operation pulled itself back and pulled itself ashore by hauling on to the chain and was so pulled out of the navigable channel on to the ground of the bank on the starboard side, with the result that she also pulled the ship ashore on to the bank on the starboard side, and all this disaster to the tug and the ship is therefore due to the fact that you, the Manchester Ship Canal Company, have left in the navigable channel, where we were floating, an unlighted buoy with wire attached to it so that a ship navigating in the ordinary course of events fouled the wire, and then fouled the chain." And that was the case that the tug and the ship set out to make, and proceeded to endeavour to make for five days without any reference to any other case.

But, unfortunately, there was one fact which if established spoilt the whole of that case, and that fact was that there was not any buoy and any wire in the navigable channel, and if that were proved the whole theory that a blameless ship and tug proceeding along caught an obstruction and were fouled, fell, because there was not any obstruction to catch; therefore they did not get there because of any obstruction placed there by the Manchester Ship Canal Company if they got out of the navigable channel. If the President did believe the witness who came and said (1) I ordered the buoy to be removed; and (2) I removed it and put it aboard ship, they would have to cast about for some other case, and so, on the sixth day, on Thursday, the other case was presented. "Assume we are all wrong," say the plaintiffs, "as to there being an obstruction in the navigable channel, there was an obstruction, or nuisance, on the bank bordering the navigable channel, and that, we will say, was an obstruction to the public right of navigation, and you put it there, and as it is a chain which we say was an obstruction to the public right of navigation which wound round our propeller, therefore we say you have caused us damage"; and the President having devoted the greater part of his judgment to sedulously negating every contention put forward by the plaintiffs, at the end of his judgment he adopts the alternative suggestion and says that it was an obstruction on a bank in a public navigable river without notice to those whom it concerns, and, therefore, gives judgment for the tug.

To ascertain whether that is a correct view, the first point seems to me to be to understand where it is that this obstruction is said to have been and what are the rights of the respective parties, and I personally have been very much puzzled to discover from the President's judgment that apparently counsel got through this case in about six days without ever

referring to the Manchester Ship Canal Act. The President makes no reference to the main Act; he only says that there is some evidence that a later Act empowered the canal company to deepen the channel; but there is no other trace in the course of the judgment or the evidence that anybody ever referred to the Manchester Ship Canal Act, or to the powers and rights and duties of ships on the canal. They seem to me to be vital. I am not going to discuss the interesting question, because I think it is immaterial, whether this place was in the port of Liverpool or in the port of Manchester. Undoubtedly in the earlier Act the port of Liverpool went up to Warrington in the estuary of the river Mersey. Undoubtedly in the later Act a portion of the port of Liverpool was taken away and put into the port of Manchester. No evidence was given which will enable me to say—the point did not occur to anybody, and it is not material; that is why it did not occur—looking at the Act of 1911, how much of the port of Liverpool was taken away and put into the port of Manchester, but I rather think that the place where this collision occurred was not put into the port of Manchester. But it does not matter whether it was or was not. What does matter is this: that it is quite clear that the place where the chain was is the bank of an artificially dredged channel constructed by the Manchester Ship Canal Company under the powers given to them in sect. 29 of the main Act. It is equally clear from the incorporation of the Harbours, Docks, and Piers Clauses Act 1847, s. 33, that any ship paying the Manchester Ship Canal dues has the right to navigate that artificially dredged channel.

I very much doubt whether any other ship has any right to use it unless it is going into the Manchester Ship Canal; I do not think people can make private yachting excursions up and down this dredged channel without being promptly moved away by the harbour master under the powers also conferred by somewhere about sects. 58 and 59 of the Harbours, Docks, and Piers Clauses Act. Any vessel (which must itself be grounding in that artificial channel at low water or in time of ebb) would find itself moved away as having no right to be there. I am not at all convinced there is any public right of navigation, in the sense of the right to anybody sailing in the estuary of the Mersey, to use that artificially dredged channel unless they are proceeding into the Ship Canal and using and paying the dues for the canal; but the public right of navigation does not usually include any right to ground. I cannot help thinking that if this question of the public right of navigation had emerged at an earlier stage of the proceedings, and more consideration had been given to it, it would have been seen that the public right of navigation does not include any right ordinarily to ground on the bottom of the navigable river. Some confusion arises from applying cases relative to highways on land to the navigation on water. In a highway on

land, if the land is foundrous, you have a common law right to go on to adjoining land and make your way there. In a highway of water you have no right, unless a special custom is proved, to land on the riparian area of the owner's land. There is a right of towage by land unless you prove a special custom. In the same way, another distinction is this : in a highway by land you proceed by physically touching, but in water you proceed by floating along in the water, and it is only in special circumstances that you have any right to ground or, sit on the bottom of a river, just as you have no right to sit in the middle of a road and say you are exercising a right to use a public roadway. All the authority, as far as I know, is collected on that subject in the great case of the *Mayor of Colchester v. Brooke* (1849, 7 Q. B. 339), where the vessel proceeded to Colchester and sat upon an oyster bed ; and the owner of the oysters, not unnaturally, complained, and it was proved that the ordinary course of navigation to Colchester was this : that you could not get up from the sea to Colchester in one tide, and, consequently, that the ordinary way of proceeding to Colchester from the sea was that you went as far as you could on one tide, then grounded and proceeded when the tide rose again. That is a right of grounding only when you prove special facts of that sort showing that it is the ordinary course of navigation to ground.

It is not the ordinary course of navigation in the Manchester Ship Canal to ground anywhere. You get in at one tide ; there is no need for you to ground. If the ship ran into the bank and knocked a bit out of it, there would be a clear trespass against the riparian owner. If the ship runs into the foreshore and knocks a bit out of it, particularly in a case where there is a navigable dredged channel and where knocking a bit out increases the necessity for dredging the channel, it is not an ordinary right of navigation to ground and knock bits out of the ground of the channel. And that sort of case arose in *Mayor of Colchester v. Brooke* (*sup.*), and has been decided both in *The Oclavia Stella* (1887, 6 Asp. Mar. Law Cas. 182 ; 57 L. T. Rep. 632) and *The Swift* (9 Asp. Mar. Law Cas. 244 ; 85 L. T. Rep. 346 ; (1901) P. 168), and in the case of *The Swift* Sir Francis Jeune dealt with an accidental grounding but not in the ordinary course of navigation, where it was not intended by the master to ground ; the master must judge the depth of water ; he did not know quite where he had got to. Sir Francis Jeune says : " The master of the *Swift* never intended that she should ground. How far he was negligent may be another matter ; but it is clear that this act cannot be justified as an exercise of the ordinary rights of navigation."

What have we got then ? We have got a tug doing a thing which was not justified by the ordinary rights of navigation in a place which, in my view, is only navigable by persons about to enter the Manchester Ship Canal and so

navigable by them in the ordinary way of floating, and not to run into the bank. What, then, is the position ? If I am correct in the view I have put so far, that the tug had no right to ground and was not doing a thing in the ordinary right of navigation, in grounding she was a trespasser, in that she knocked away part of the bank of the foreshore. If she was not a trespasser, she was an invitee. Now I will consider both cases.

Mr. Schiller, not I think for the moment having looked at the authorities, boldly took the view that she was a trespasser, there was a trap, and that you must not set traps for a trespasser. Now that suggestion has been somewhat ridiculed by one of the text-book writers, who asks whether in the case of a burglary you can bring an action against the owner of a house because there is a trap on the staircase which is unsafe for a burglar walking up it. I think it is clear, as was stated by Sir John Simon, the general principle is that he who enters wrongly, enters at his own risk. The only exception is that the statutes have provided that you must not set man-traps or spring-guns for trespassers. But that you may set traps for trespassers is obvious. Everybody puts broken glass along the top of his wall, or puts up barbed wire fences, which provide a very inconvenient time for a trespasser entering by night, who may cut himself on the glass or catch himself in the barbed wire ; but it is quite clear that the trespasser has not right to complain of that because it is an act which the person has a right to do in the defence of his property and which is not forbidden by the statutes which prevent the setting of man-traps or the setting of spring-guns. As far as I know as to trespass, the only limit is that you must not intentionally set a trap which is intended to damage the trespasser.

But when one inquires what sort of trap this is as applies to a trespasser, it seems to me to be an object which the Manchester Ship Canal had a right to put there. There is no doubt that under sects. 28 and 29, to which the President apparently has not referred at all, the Manchester Ship Canal have a right to dredge the bed of the Mersey to make an access to the canal at Eastham from a point which lies below, and therefore includes the place where this dredging was done, and in order to construct these works and works incidental thereto, which include the work for dredging the channel, they have a right to put dolphins, moorings, and buoys, and if moorings are reasonably necessary for dredging of the character which has to be done here, dredging which is only done at low tide, the dredger being removed at high tide, and it is being constantly done from time to time, it appears to me that a mooring on the bank of the channel is a most ordinary and reasonable thing to do, which the canal company has a right to put upon the banks. It may be said that if they have put it there, they must give notice of it. Now I am a little puzzled by the President's finding about that. Here is a perfectly

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plain deadman, a series of deadmen standing in broad daylight along the bank, and attached to that series of deadmen are an equal series of chains leading down into the water ; and the President finds that pilots and tugmasters know that mooring chains are there—he finds it. Quite true he does not find that they know exactly where each mooring chain is in the dark ; but he finds that they know that mooring chains are there, and if, as I think, those are obviously justified by the powers of the Manchester Ship Canal Act under sects. 28 and 29, I find it impossible to see how a chain, so put there on a bank upon which the ship so navigating has no right to ground, can possibly be a trap about which the trespasser (if it is a trespasser) can complain.

The other way which is suggested is this : paying the dues, the tug and the ship are invitees. But invitees to do what ?—invitees to float through the lock in the ordinary course of navigation, not invitees to run into the bank and dig pieces out of it, not invitees to proceed by groping along the bank, regardless of chains legitimately put there for dredging. When you invite a person into your house to use the staircase, you do not invite him to slide down the bannisters, you invite him to use the staircase in the ordinary way in which it is used. In the same way if you invite a person to use a navigable channel, you appear to me to invite him to use it in the ordinary way of navigation by floating along it, and not by backing into the artificial sides of the navigable channel and making holes with your propeller and then complain because in making a hole you find something.

For these reasons, I think that the President, having spent the greater part of his judgment in negating the case which for five days had been set up for the plaintiff, made a sudden jump to finding the defendants liable, on the ground of interference with the navigable right. He had not considered, he had not the advantage of considering the points that would arise if this was put on the ground of nuisance. What the President says is this : “That is the material question in this case, as I regard it, between the *Carlgarth* and the defendants ; was there negligence in respect of the fouling of the propeller—the picking up of the chain—which would amount to contributory negligence so as to disentitle the owners of the *Carlgarth* if otherwise they are entitled to recover ? ” It appears to me before the President got to that stage, he should consider other questions : (1) had the *Carlgarth* the right to be where she was, doing what she was doing, keeping her propeller turning on the bank ; (2) was the chain a thing which the Manchester Ship Canal Company had the right to have there under their foreshore, under the dredging, piers and mooring Act ; (3) was it a thing which might possibly and probably do damage to vessels exercising the proper right of navigation ? Now I think if the President's mind had been directed to those questions, and he had dealt

with them before getting to any question of contributory negligence, he would have found the tug and ship, the tug particularly, was either a trespasser, in which case it would have no right to complain of what it found lawfully placed on the bank where it trespassed, or was an invitee, but not an invitee who had been invited to go on to the bank. He would have consequently no right to complain of what he found on the bank on which he was not invited to go.

I shall add very little to what my Lord has said about this wire and chain. I am afraid prolonged experience of these courts has accustomed me to finding the thing has happened which the witnesses upon each side declared to be quite impossible. There is no doubt the chain did get on this propeller, and I think there is no doubt, on the findings of the President, that it did not get there because the tug had fouled a wire attached to a buoy. I have very great difficulty, as I think the President had and as our assessors had, in understanding at all how if what was happening was that the end of a wire has been caught and the chain folds in to the propeller by the end of the wire, why there is not a double bight on the chain at the end. I cannot understand it. The assessors point out that the President and Mr. Little cannot understand it. If it is said how does the chain get on to the propeller at all, all I can say is, if you set a tug working on a soft bank where there is a chain and there is afterwards a 2ft. 6in. hole found and the chain is found on the propeller, I do not know that it is necessary for me to understand how it gets there (and it does get there) and I do not know enough about what will happen on a soft bank when a tug is turning its propeller on it and there is a chain lying originally on the surface of the bank, to say confidently that it could, or could not, happen. It seems to me it did happen and that it is not necessary exactly to understand why it happened, if it did happen.

For these reasons, thinking the case was unsatisfactorily tried because of this sudden change of front at the end of the case which was opened out by the plaintiffs, who had been beaten on their pleaded case, and thinking that it was not very satisfactorily tried because of the singular reticence of each side in referring to the *Magna Carta*—the charter of the Manchester Ship Canal Company, the Act which gives them their powers, I have come to the conclusion that the President came to a wrong conclusion here, and that the appeal of the Manchester Ship Canal Company should be allowed.

SARGANT, L.J.—I am of the same opinion. We are not differing here from the President on any finding of his with regard to the special facts and the special theories in regard to this case ; we are accepting his view that the only possible default of the defendants, the canal company, lay in leaving this mooring chain lying on the surface of the ground of the water-

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way and that any question of mooring or of a wire which had been used for mooring is not to be regarded in any way as contributing to the accident, and we are only differing from him as to the question of the legal result as between the parties arising from the fact that the canal company left this mooring chain in the position in which it was left.

The President has taken the view that this was a public navigable highway, and as far as I can see a public navigable highway in the same sense as the ordinary waters of the Mersey constitute a public navigable highway. For myself, I am inclined to think that that is not quite the position ; that this was an artificial channel constructed and dredged for the special purposes of the Manchester Ship Canal navigation, and that the question is one rather of whether there is a trap in the artificial waterway so constructed and maintained, of which an invitee using the artificial waterway can complain, than it is a case of a nuisance in an ordinary public highway. But in any case, the question appears to be eminently a question of fact. The attention of the President does not appear to have been called to the question of fact which was on his view of the case, one which had to be determined, namely, whether this chain did in fact constitute a nuisance in an ordinary navigable highway. Still less was attention called to the question whether this was a trap for the purpose of the question of fact, of which an ordinary invitee to the canal was entitled to complain ; and, it seems to me, that in that state of things, we have to form our own judgment, as well as we can, as to whether the facts indicate that this was either a nuisance or a trap. In that state of things, it seems to me of great importance to bear in mind that this was a highway for the purposes of the canal company, artificially constructed and artificially maintained by a necessary process of extensive, and almost continuous dredging, and it has not been shown that the plan which was in fact adopted by the canal company, of keeping these chains in the water ready to be used by the dredger during the comparatively short intervals during which they were able to dredge, and, in regard to the use of the canal by the vessels navigating it was in any way an improper process for them to adopt. The chains and the attachment of the chains to the land were obvious to persons coming for the purpose of using the canal, and the chains lying on the surface of the ground under the waterway, to an ordinary mind, do not seem to me to present the ordinary characteristics of an obstruction. Further, the evidence was quite clear that it was impossible for the propeller of a tug such as this to foul that chain in any ordinary circumstances, and the only way in which, apart from the suggested method which was negatived—certainly the only way in which it was suggested the fouling could take place was through the digging by the propeller of a hole in the bank, such hole being in fact found after the accident, and the possibility that if the chain lay almost parallel with

the vessel it might be caught by the propeller and worked round the boss of the propeller in the way that has happened. Therefore what has happened must, I think, have been the result of a very exceptional set of circumstances, and one which could hardly have been foreseen by any human being. There is also this further circumstance that during the thirty years in which the channel has been used there appears to have been no incident of this kind that is known to have occurred. Mr. Raeburn suggested that we have not to consider the thirty years, we have only to consider about a month, because the special circumstances which were in existence at the time of the accident had only existed for about a month, or so. But, on the very showing of the plaintiffs, the circumstances that had existed during the previous twenty-nine years and eleven months had been very much more dangerous than those which existed during that month, because the whole case of the plaintiffs was based upon the special danger which arose from the way in which these moorings were fixed, as they thought, and as their case was at the time when the accident happened. Therefore, looking at it as far as it may be looked at from the point of view of a jury and having regard to the fact that it is essentially a question for the jury, according to the case to which my Lord has referred, I myself have come to the conclusion that the leaving of such a chain as this in a highway of the kind in question was not, within any reasonable interpretation of the ordinary meaning of the English language, a nuisance or a trap, and I agree therefore that the appeal of the canal company against the *Carlgarth* should be allowed, and the appeal of the owners of the steamship *Otarama* against the canal company should be dismissed.

*Appeal of Manchester Ship
Canal Company allowed.*

*Appeal of the owners of the
Otarama dismissed.*

Solicitors for the Manchester Ship Canal Company, *Hill, Dickinson, and Co.*, Liverpool.

Solicitors for the owners of the *Carlgarth*, *Godfrey, Warr, and Co.*, agents for *Weightman, Pedder, and Co.*, Liverpool.

Solicitors for the owners of the *Otarama*, *Batesons and Co.*, Liverpool.

K.B.]

MANCOMUNIDAD DEL VAPOR FRUNIZ v. ROYAL EXCHANGE ASSURANCE.

[K.B.]

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Thursday, Dec. 2, 1926.

(Before ROCHE, J.)

MANCOMUNIDAD DEL VAPOR FRUNIZ v. ROYAL EXCHANGE ASSURANCE. (a)

Insurance (Marine) — Policy on hull and machinery — "Free of Particular Average absolutely" clause — Damage from collision with any object (including ice), covered by the policy — Stranding on rocks — Contract with a natural feature, whether a collision with an object within the meaning of the policy.

Plaintiffs were the owners of the steamship F., and interested in a time policy of marine insurance to the full value of the hull and machinery. The policy contained a clause as follows: "Subject to the Institute 'Free of Particular Average absolutely' time clauses as annexed but this insurance to include damage received by collision with any object (ice included) other than water." On the 22nd Sept. 1924 the F. stranded on a rocky bottom in Cuan Sound, off the west coast of Scotland, and was not refloated till the 4th Oct. 1924. While so stranded and owing to heavy weather, she received damage to her bottom plates by bumping. The plaintiffs sued defendants for their proportion of the sum due under the policy of which they were underwriters. The defendants admitted their liability for so much of the amount claimed as represented a general average loss, but claimed that the damage done by the bumping on the rocks was a particular average loss which was expressly excluded by the policy as stranding was not a "collision with any object" within the meaning of the policy.

Held, that the words of exclusion were qualified by the words of inclusion. It was not sufficient to say that there was a collision, but it had to be a collision with an object as contemplated by the parties. The words of inclusion were wide; the word "object" included things and one natural object was included, viz., ice, while another, water, was excluded. The stranding, was a contact with a natural object, and was therefore a collision within the meaning of the policy.

THE facts are sufficiently apparent from the headnote and judgment.

Dunlop, K.C. and Harold Stranger for the plaintiffs. — The policy was an ordinary policy of marine insurance containing the clause now in question. As the defendants had admitted liability for charges incurred for general average and salvage, the only question was whether the stranding on the rocks was a collision within the meaning of the collision clause of the policy. He submitted that it was, though damage sustained by water would not come within the policy.

Raeburn, K.C. and McNair for the defendants. — This was a stranding, and the damage was, in the submission of the underwriters, particular

average damage, which was intended to be excluded by the terms of the policy. He submitted that the word collision meant contact with something navigable, and it would be a straining of language here to call this case a collision with the west coast of Scotland.

ROCHE, J. — This case is not free from difficulty and arises from, and depends upon, the construction of a policy of marine insurance. The plaintiffs are the owners of the Spanish steamship *Fruniz*, insured under a time policy underwritten by the defendant company. The policy, amongst other provisions, contained the following clause: "Subject to the Institute 'Free of Particular Average absolutely' time-clauses as annexed but this insurance to include damage received by collision with any object (ice included) other than water." The vessel sustained damage by contact with rocky ground. The question is whether that contact constituted a collision with an object within the meaning of the policy. I wish to make it plain that I am not stating the question to be whether that contact amounted to a collision, but whether within the meaning of the policy it amounted to a collision with an object.

The vessel was proceeding from Glasgow to Methil by the north of Scotland. After laying up in shelter for a few days on account of the weather she proceeded on her way, when on the morning of the 22nd Sept. 1924, while passing through Cuan Sound between the islands of Torsa and Seil off the West coast of Scotland, she took a lurch and struck or came upon ground which was of a rocky nature. The vessel sustained some damage from this contact with the ground. She did not merely touch the ground but remained on the ground so that withinalmost any sense of the word "stranding" as used in documents of marine insurance and similar documents she became and was a stranded vessel. Whilst so stranded the weather became worse and the vessel bumped and more extensive damage was done than was caused by the original contact with the ground. The amount claimed for general average expenses is not disputed. The question is whether the defendant company is liable for other damage. The defendant company say No, because the damage is a particular average which is excluded by the policy as what happened was not a collision with an object within the meaning of the policy. The plaintiffs contend that it was. Some discussion took place whether the damage sustained by the first contact with the ground could be separated from the further damage caused by bumping on the rocks, but in my view Mr. Raeburn took the right course when he admitted that it could not: for it was correct in law that if the initial damage were within the policy then the subsequent damage where on the rocks was also damage within the policy, and on the principle of cases such as *Reischner v. Borwick* (71 L. T. Rep. 238; (1894) 2 Q. B. 548), which is that one must look for the real cause of the loss. I make it plain that if I hold that if the first contact is a collision within the meaning

(a) Reported by R. A. YULE, Esq., Barrister-at-Law.

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of the policy then subsequent damage is due thereto and not that the working of the vessel on the ground constituted a fresh collision within the meaning of the policy.

I now pass to the real question in the case. There is no doubt that for many purposes and in some Acts of Parliament and in many documents the word "collision" has a sense much narrower than could be applicable in the present case. In *The Normandy* (90 L. T. Rep. 351; (1904) P. 187, at p. 198) Sir Gorell Barnes, M.R. defined collision as "not a mere striking against but a striking together: and to me it seems more correct to speak of a vessel stranding, or running, or striking upon or against rocks or the shore, than colliding therewith." In *Hough v. Head* (52 L. T. Rep. 861; affirmed 53 L. T. Rep. 809) Grove, J. said, "Collision appears to me to contemplate the case of a vessel striking another ship or boat, or floating buoy, or other navigable matter, something navigated, and coming into contact with it." In construing the present document I cannot put a similar limitation on the word collision. The whole matter has been reviewed in an American case cited to me in the course of argument on behalf of the defendants, *Lehigh and Wilkes-Barre Coal Company v. Globe and Rutgers Fire Insurance Company* reported in (1926, 26 L. L. Rep. 82). That case quotes all the authorities. I venture to make no comment but I do say that I am unable to say what relation the liability clause bore to the collision clause. It is only necessary to mention that in that particular case a limited construction was put upon the word "collision." Now that being one view or one construction which may attach to the word "collision" in some documents, it is quite obvious that the context may make all the difference; it may be true to say that it must make all the difference. In Arnould on Marine Insurance, 10th edit., at par. 826, the matter is thus described: "Sometimes, however, the clause is wider, so as to include the risk of striking against not only merely floating or navigable objects but also structures such as harbours, wharves, piers and the like, or obstructions such as ice or wrecks." Instances of such clauses have been cited to me. One case is that of *The Munro* (70 L. T. Rep. 246; (1893) P. 248). There the judgment was given by Sir Gorell Barnes, but it does not throw much light on the present case except that the clause was much wider than that with which I have to deal. The next case cited was *Union Marine Insurance Company v. Borwick* (73 L. T. Rep. 156; (1895) 2 Q. B. 279). There the matter was different and requires a little attention because there are some words in the headnote which I think are not strictly warranted by the judgment. The headnote states that the loss was caused by collision and not by stranding. I do not find those words "not by stranding" in the judgment. I do not find anything to show that the words "stranding" and "collision" were regarded by the learned judge as mutually exclusive terms. The case of *Chandler v. Blogg* (77 L. T. Rep. 524; (1898)

1 Q. B. 32) does not call for any comment. These are all the cases mentioned to me with which I find it necessary to deal. The argument for the defendant company is that a collision must be a contact with an obstruction, that is with some artificial object or with some natural object which is outside its proper place, and not merely contact with some natural feature of the landscape. It is also argued that if one looks at the frame of the policy and at the history of policies as gathered from the reported cases, stranding is excluded from the cover granted by the policy and is not brought in by subsequent words of inclusion and, on the facts of this case, the events which happened constituted a stranding.

I will deal first with this question of stranding. From an examination of the policy it is quite certain that particular average damage, whether occasioned by stranding or by collision or by anything else is absolutely excluded. "Absolutely" in my opinion means "altogether"—"unconditionally"—and I do not agree with the argument that the drafters of this policy meant by the word "absolutely" to exclude merely particular average damage arising from special causes such as stranding, sinking or burning. In my view it is an unconditional exclusion of all particular average. If that is so, then there is the further provision which includes some particular average, and it is upon that inclusion that this case seems to turn. I cannot limit the words to exclude matters relating to stranding or sinking, for if stranding is excluded by the word "absolutely," so also is sinking. But I think it is quite clear that if collision is brought in by the subsequent clause and the vessel afterwards sank by reason of the collision, the damage due to the sinking could not be excluded from the protection afforded by the policy. If, then, sinking of the vessel from collision is within the policy, so also must damage from grounding be within the policy because such grounding might also amount to stranding. On the subject of stranding I would refer to the case of *M'Dougle v. Royal Exchange Assurance* (4 Camp. 283) cited to me by Mr. Raeburn. There Lord Ellenborough, in directing a jury, said that stranding means lying on the shore or something analogous to that; to use a vulgar phrase, if it is touch and go with the ship there is no stranding. My reason for mentioning that dictum or direction is that I must regard this case as either within the policy or outside it. In my judgment it is within it. The words are very wide; "collision with any object," and I think that "by any object" is meant "any thing," and one natural object is included, namely, ice, and another natural object is excluded, namely, water. This directs me to the conclusion that in this policy contact with a natural object, such as contact with rocky ground, is included and covered by the policy.

Judgment for plaintiffs.

Solicitors: *Downing, Middleton, and Lewis; Parker, Garrett, and Co.*

ADM.]

THE VALSESIA.

[ADM.]

PROBATE, DIVORCE, AND ADMIRALTY
DIVISION.

ADMIRALTY BUSINESS.

Dec. 9 and 10, 1926.

(Before HILL, J.)

THE VALSESIA. (a)

Salvage—Contract—Agreement to beach vessel in distress—Negligence—Contractors prevented thereby from performing stipulated service—No benefit—Right to sue for the contract price—Liability of owners of cargo.

The plaintiffs claimed salvage remuneration against the owners of the steamship *V.*, and the owners of her cargo, or alternatively they claimed remuneration upon a contract to beach the *V.* in consideration of the sums of 300*l.* and 150*l.* respectively. The plaintiffs failed to beach the *V.* owing to those on board the *V.* negligently failing or neglecting to slip their cable at the appropriate moment. No benefit was conferred upon the *V.*, which became a total loss.

Held, that the plaintiffs were entitled to recover in personam the sums stipulated for by way of damages against the shipowners, since they had been prevented by the negligence of the shipowners' servants from completely performing the contract services; but the plaintiffs were not entitled to recover anything against the owners of the cargo, who were not affected by the negligence of the shipowners' servants.

The plaintiffs, owners, masters, and crew of the steam-tugs *Bantam Cock* and *Prairie Flower*, claimed salvage remuneration against the defendants, the owners of the Italian steamship *Valsesia*, and the owners of the cargo lately laden on board and of the freight due for the transportation thereof. The *Valsesia* had become a total loss, but an appearance was entered on behalf of her owners. The plaintiffs further claimed the sums of 300*l.* and 150*l.* respectively under a verbal contract made with the master of the *Valsesia*. In the further alternative they claimed that if the said contract was to beach the *Valsesia*, they had been prevented from performing it by the negligence or breach of warranty of the plaintiffs or their servants in failing or neglecting to slip their cable at the appropriate moment during the performance of the contract services.

The facts fully appear from the judgment.

Neilson, K.C. and G. H. Main Thompson for the plaintiffs.

Langton, K.C., and Noad for the defendants.

Dec. 10, 1926.—HILL, J.—The plaintiffs' claim is launched against the owners of the steamship *Valsesia* and her cargo and is in respect of services rendered to the ship and cargo on the 25th and 26th Aug. last under a contract. The defendants do not deny the contract, or that the sum payable to the plaintiff tugs was as

the plaintiffs allege, but they say that the condition was different from that set up by the plaintiffs. The plaintiffs say that they were employed to render such services as they performed and, in substance, to do their best, but the defendants say that the condition was that the tugs were employed to beach the vessel. The circumstances under which the services were rendered were these: the *Valsesia* on the morning of the 25th Aug. was approaching Barry when she found herself close to the rocks at Friar's Point. She thereupon dropped her starboard anchor, but grounded on the rocks. During the succeeding ebb tide, while the vessel was in very great danger, she ultimately was got off the rocks, but received great damage. On the flood she floated, and in the evening on the same flood tide the two tugs in question here were engaged to render her assistance. It is common ground—whether expressed or not—that what was contemplated was that they should assist in getting the *Valsesia* on to the beach in Whitmore Bay, which is a little safe bay very close to Friar's Point, and between it and Nell's Point on the other side of the river. That operation was not effective, and in the result, after some hours' work, the *Valsesia* grounded once again after the tide had turned on the same rocks, very nearly in the original position, so that she was in no better position than when the tugs took off. She had not been beached and she was in no better position than she had been before. Therefore, if it had been an ordinary claim for salvage the tugs would have been entitled to nothing because there had been no success.

The first question I have to consider is the question as to what was agreed. There is a direct conflict of evidence as to this. It was all done verbally—the hailing—between the ship and the tugs. The point which is made is, Was it stated that the money was to be paid for beaching the ship, or was it not stated at all? Unless it was stated then the work for which the money was promised was not a definite work at all for any measured service either in point of time or duration. Undoubtedly it was in everybody's mind that the assistance of the tugs was for the purpose of beaching the ship in Whitmore Bay and nobody contemplated anything else. The pilot of the Italian ship and the master had talked it over and they did not contemplate anything else, and having regard to that fact it is feasible that a matter which was in everybody's mind should not be specifically mentioned. On the other hand, there was some independent evidence, and that independent evidence supported the defendants' account of the conversation. The conclusion I come to on the question of fact is that the promise or the contract was for 300*l.* and 150*l.* respectively either for putting the ship on the sands or beaching the ship on the sands.

But that does not, in my view, at all dispose of this case upon the facts as they have come out in the course of the case. If there was nothing else at all the plaintiffs clearly would not be entitled to recover because it was a

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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contract for a lump sum in respect of a completed work, and the work was not completed. But there is the question why the work was not completed? Both parties to the agreement knew that the intended operation which was in the common contemplation of both of them was the beaching of the steamer on the sands of Whitmore Bay, and both of them contemplated that the tugs would be used in that operation. Both knew that the anchor of the steamship was down, and that in order to carry out the intended operation it would have to remain down up to a certain point and then be slipped, and they all knew that unless it was slipped at the proper moment the operation must fail. With that knowledge in their minds they agreed to carry out this operation. In my view there was implied in such an agreement as this the obligation of each towards the other at least to act with ordinary skill and care in carrying out each his part in the combined work. It was the duty of the tugs to obey the orders of those who were in command of the ship and to use skill and care in the handling of the tugs, and it was equally the duty of those in charge of the ship to use ordinary skill and care in carrying out their part of the contract, which in this case was the slipping of the cable at the right time, and, indeed, that was the essential part which the ship was to play in the combined operation. It was in that duty of slipping the cable that those on board the ship completely failed, with the result that the cable was not slipped. The tugs had got the ship into the position contemplated by the pilot as the position when the cable ought to be slipped, but, as I have said, the cable was not slipped. While they were trying to cut the cable—and they ultimately succeeded, after a long time, in doing so—the slack water had passed and the tide had turned, and then it is probable, as there was an exceedingly strong tide, the tugs were no longer able to come up to the ship. But the pilot agreed and the men on the tugs agreed that if the cable had been slipped when the pilot ordered it to be slipped, that then the contemplated operation would have been carried to a successful conclusion and the ship would have been beached in safety in Whitmore Bay.

The effect of these facts upon the legal position has been put in more than one way, and I am not satisfied that, apart from negligence, the failure to slip the cable would inure to the benefit of the plaintiffs or would entitle them to say they could still recover the agreed sum. But I clearly think that if the failure to slip was due to negligence on the part of those on board the ship that then the plaintiffs must be entitled in one way or another to be put in the same position as they would have been in if that negligence had never occurred, and if those in charge of the ship had carried out their duty towards the two tugs. I doubt very much whether the plaintiffs—apart from the ground of negligence and breach of contract by the defendants—can say: "We must be treated

as if we had performed the contract and we are entitled to recover the 300*l.* and the 150*l.*," and I doubt that very much because I find a difficulty in saying that anybody can ever recover a lump sum to be paid in respect of a completed work when, in fact, that work has not been completed. But if they were prevented from completing it by the negligence of those on board ship, and if they were thereby deprived of the right to earn the stipulated sums then they are entitled to damages for the breach of the shipowner through his agents, and in this case the damage would be exactly commensurate with the stipulated sums because the plaintiffs had really, and in substance, completed the whole of what they had undertaken to do. They had probably been saved no expense by reason that they were not able to complete the work. Therefore this issue remains: Has it been established that the shipowner through his agents was guilty of negligence? Such negligence has to be a breach on the facts as I have stated them of the implied undertaking towards the tugs. *Prima facie* it seems to me that the failure to slip was the result of negligence. The pilot contemplated that the cable would be slipped and the tugs contemplated it—everybody contemplated that it would be slipped, and it was not slipped. That seems to me to be *prima facie* evidence of negligence, and the Elder Brethren—as far as it is a matter of seamanship and therefore for them—are of opinion that everything in a well-found ship should be in a position to slip in an emergency, if it is something that can be slipped, but even apart from that, my own view is, fortified as it is by the view of the Elder Brethren, that the fact that the slipping in quite the ordinary way of ship working was not done when ordered by the pilot to be done is some evidence of negligence and puts upon the defendants the duty of showing that the failure to slip arose without any negligence on their part. They have in my view wholly failed to show that it arose without negligence on their part, and, indeed, it seems to me, looking at the evidence of the pilot, that it arose by reason of and in consequence of some negligence on the part of the defendants. Now it being taken that it was an essential part of the operation that the cable at the proper time should be slipped, the cable ought to have been so disposed of that it could be properly slipped. It is said that it was so attached at the bare end that it could not be slipped, or, if slipped at all, only with very great difficulty. If that were the fact then preparations ought to have been made so that it could be slipped some link or so short of the bare end. The Elder Brethren advise me—and I am entirely of their opinion—that at and after the time when the tugs were engaged—up, at any rate, to the time when nearly all the cable had been paid out—preparations could have been made to secure that the cable should be slipped at the right moment. I have asked myself the question, How can it be that the failure to slip should be due to anything else but negligence? I do not think it could be due to anything else but that,

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and I find that it was due to negligence. The result is, assuming the true view of the law to be that the plaintiffs are not entitled to recover the 300*l.* and the 150*l.* under the contract as money earned, they are entitled to recover the same amount as damages in so far as the defendants by the negligence of their servants prevented the plaintiffs from earning those amounts.

The only other question that I have to consider is as to whom the claim is against? In my view, I am not at all certain that the contract can be regarded as having been entered into on behalf of the ship and cargo; I am inclined to think that such a contract can only be regarded as having been entered into by the shipowner. But be that as it may, I cannot find that the negligence of those in charge of the ship was negligence in any other capacity than as servants of the shipowner, and therefore I think I cannot give judgment against anybody except the shipowner, and that must be a judgment *in personam*, because an action arising out of the negligent performance of such a contract as this, in my view, does not give rise to a right *in rem*. Therefore, this is an action *in personam*. A little difficulty arose just towards the end of the case as to whether judgment can proceed against the owners *in personam*, but that only arises from the unfortunate fact of the writ being directed against the owners of an Italian steamship—the *Valsesia*—and to that writ appearance was entered by some of the defendants in this case. But the defence that was delivered in reply to the claim was obviously a defence as far as it went on behalf of the owners of the ship, because it was pleaded by the defence that the statement of claim disclosed no case against the cargo, but did not plead that it did not disclose a case against the shipowner. Although that was the form in which appearance was entered, it was in fact an appearance entered for those who appeared as the owners of the *Valsesia*. The only alternative is to pronounce that no appearance has been entered by the owners of the *Valsesia*, and in that case the plaintiffs would be in a position to obtain judgment in default of appearance, but I do not think that is the real position. The real position is that the defendants appear as owners of the *Valsesia*, and judgment *in personam* can go against them. Therefore I think it will be judgment *in personam* against the owners of the *Valsesia* in respect of the sums of 300*l.* and 150*l.* respectively, and I give judgment dismissing the cargo-owners, and I give the plaintiffs their costs.

Solicitors: *Ingledeu, Sons, and Brown*, agents for *Ingledeu and Sons*, Cardiff; *William A. Crump and Son*, agents for *Gilbert Robertson and Co.*, Cardiff.

Jan. 31, Feb. 2, 3, and 4, 1927.

(Before BATESON, J.)

THE GOULANDRIS. (a)

Salvage—Lloyd's Salvage Agreement—Award—Maritime lien—Arrest in foreign jurisdiction—Saisie conservatoire—No maritime lien in foreign jurisdiction—Sale by syndic (trustee) in bankruptcy of the owner abroad—Arrest of vessel in this country—Lis alibi pendens.

The plaintiffs claimed salvage remuneration for services rendered under the terms of a Lloyd's salvage agreement, providing for "no cure, no pay," and undertaking to provide security, in default of which the plaintiffs were to be at liberty to enforce their maritime lien. By arrangement the vessel, which had been arrested at Constantinople, was permitted to proceed to Alexandria, where she was seized under a saisie conservatoire. A saisie conservatoire confers no maritime lien.

Held, that the saisie conservatoire was not a security.

At Alexandria the vessel was seized by the syndic (trustee) in bankruptcy of her then owner, by whom she was sold to the defendants.

Held, that the sale by the syndic in bankruptcy was not a sale by the court so as to extinguish the plaintiffs' maritime lien.

*The plaintiffs proceeded with arbitration in London under their Lloyd's salvage agreement, and an award was in due course made, in the absence of the owners, awarding to the plaintiffs 1250*l.* Nothing was paid under the award.*

Held, that the rights of the plaintiffs, including their maritime lien, were not merged in such award, and the award afforded no defence to an action in rem.

The plaintiffs lodged a claim for the amount of the award with the syndic in the bankruptcy in Egypt, and the latter recommended that such claim should be rejected.

Held, that the remedy in this country being different from that available in Egypt there was no reason why the jurisdiction to deal with the plaintiffs' claim, which the court possessed, should not be exercised.

The Christiansborg (1885, 5 Asp. Mar. Law Cas. 491; 53 L. T. Rep. 612; 10 Prob. Div. 141) distinguished.

Held, that a writ in rem issued by the plaintiffs claiming salvage remuneration ought not, therefore, to be set aside.

MOTION to set aside a writ in rem and subsequent proceedings.

The plaintiffs, the Ocean Towing and Salvage Company Limited, claimed salvage remuneration in respect of services rendered to the defendants' steamship *Goulandris*, formerly *Carston*, in the Bosphorus in Nov. 1925.

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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The following statement of the facts is taken from the judgment of Bateson, J.

"The facts of the case seem to be that on the 26th Nov. 1925 a vessel, then called the *Carston* and now called the *Goulandris*, left Galatz on a voyage with cargo. Now on the 29th Nov. she grounded at a place called Sil Burnu, when services of a salvage character were rendered to her by a vessel belonging to the plaintiffs, the *Cleopatra III.*, a well-known salvage vessel in those waters.

"The services were rendered on the well-known Lloyd's form. That form is a 'No cure no pay' agreement; that is to say, it is a salvage contract, and provides for security being given by the owners of the ship and cargo. Clause 5 says:—

"... In the event of security not being provided as aforesaid (that is, as arranged in the contract) or in the event of any attempt being made to remove the property salvaged contrary to this agreement the Contractor may take steps to enforce his aforesaid lien.

"That is the maritime lien which he has, of course, on performing the salvage services.

"That contract was signed by the master of the *Carston* on behalf of the owner of the ship and of the cargo, and by the master of the *Cleopatra III.* on behalf of the plaintiffs; and under that contract salvage services were rendered, and those services gave the plaintiffs who rendered them a maritime lien on the ship. They were salvage services rendered under a salvage contract.

"On the 30th Nov. the vessel was refloated and taken to Constantinople. Negotiations then took place with regard to security but that could not be satisfactorily arranged, and on the 7th Dec. the vessel was arrested in the Turkish courts. Further negotiations followed. The owners of the cargo were very anxious to get the cargo to Alexandria, and the owner of the ship no doubt was also very anxious to get her away from Constantinople, because he was on the verge of bankruptcy. What happened was that the solicitors for the plaintiffs, the well-known firm of Catzeffis and Lattey managed to arrange for the arrest at Constantinople to be taken off, and for the ship to proceed with her cargo to Alexandria. The owners of the cargo were going to give security, and the owner of the ship was going to allow the vessel to be seized in Alexandria on what is known as *saisie conservatoire*. The terms are set out in this form:—

"After a number of long discussions with the shipowners and cargo owners and their underwriters, we succeeded in finding the solution to the problem which we telegraphed to you forthwith in our cablegram of the 12th inst., i.e., to obtain an order for the seizure of the vessel here upon her arrival with the consent of the shipowner and at the same time to consent to the release of the vessel at Constantinople.

"That is amplified in a letter from Mr. Paschalis, who was then the owner of the *Carston*. He there says:—

"With the object solely of permitting the immediate departure of the *Carston* from Con-

stantinople and its arrival at Alexandria, as well as the immediate lifting of the embargo placed at present on the said vessel at Constantinople and under formal reservation of all my rights and notably of contesting later both the existence, the nature, the necessity and the extent of the services alleged to have been rendered by the Ocean Salvage Company, and the amount of the remuneration claimed by it, I agree to allow that the steamship *Carston* at Constantinople may be renewed on the arrival of the *Carston* at Alexandria in the form of a new conservative seizure in guarantee of my contributive share of the average in question in the event of its being eventually recognised as founded by the Mixed Tribunal and that up to the maximum sum of 2500l. In consequence I authorise formally and irrevocably by these presents the Ocean Salvage Company to proceed immediately to obtain order authorising it to seize conservatively the steamship *Carston* on its arrival at the port of Alexandria, whither I undertake to bring it immediately and directly from Constantinople, and I debar myself either from taking my ship from the said port of Alexandria before I have furnished an equivalent guarantee, or from demanding the lifting of the above-mentioned conservative seizure under any pretext and notably under the pretext that I may myself be domiciled at Alexandria, the home port of the *Carston* and this until the full settlement of the dispute before the Mixed Tribunal of Alexandria.

"So that the owner was saying that he gave the plaintiffs an equivalent to the arrest in Constantinople by this conservative seizure in Alexandria. That was assented to; and on the 24th Dec. the order so attaching the vessel was obtained from the court, although the vessel had not then arrived. On the 12th Jan.—all this was done by cable—the Ocean Salvage and Towage Company Limited wrote to Lloyd's saying:—

"We beg to inform you that in respect of the salvage services rendered by us to the steamship *Carston* we have now accepted the following arrangement with regard to the guarantee:

1. Messrs. P. Wigham Richardson and Co. Limited, open guarantee.

2. Shippers at Alexandria on behalf of the Hamburg interests, 3000l.

3. Mr. C. D. Paschalis, attachment of ship at Alexandria.

We have, therefore, wired to Constantinople today as follows: 'Carston satisfactory arrangements guarantee settled give captain our written consent to proceed to Alexandria subject to immediate arrest of ship at that port.'

"I take it it is pretty clear from those documents that the arrangement was that the arrest in Constantinople should be lifted on the terms that a similar arrest should be provided at Alexandria and give the same results at Alexandria, so as to protect the plaintiffs for the amount of maritime lien. So the vessel escaped from Constantinople and got to Alexandria. She was released on the 14th or 16th Jan., as appears by a judgment of the Constantinople court. But subsequent to that she was arrested by other creditors and did not in fact get away until February.

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"In the meantime, on the 27th Jan., the plaintiffs' solicitors in Alexandria wired to the plaintiffs :

"*Carston* : shipowner declared bankrupt and order to seize vessels here ineffective as she passes into receiver's hands stop if possible detain vessel Constantinople as question of privilege not certain here."

"I think I am justified in assuming that that is an accurate statement of the facts ; that at that date Mr. Paschalis, the owner, was declared bankrupt, and his offer, which had been accepted, to give similar security by arrest of the ship at Alexandria, became quite ineffective. The result was that the arrangement which the plaintiffs had made to release the ship in Constantinople in exchange for a similar arrest in Alexandria came to nothing.

"The ship in fact did not leave Constantinople until about the 16th Feb. From that cable it appears that the *Carston* had left before it was possible to re-arrest her. It is the 16th Feb., and that is why I say that she left about the 16th Feb. It says : '*Carston* left before re-arrest endeavour arrest Alexandria.' That was hopeless once the owner had gone bankrupt.

"On the 18th Feb. the solicitors for the plaintiffs in England, Messrs. Middleton, Lewis, and Clarke, wrote a letter to Messrs. Catzeffis and Lattey in Alexandria :—

"Our clients were not able to re-arrest the ship before she left Constantinople. There is no doubt our clients have a maritime lien on the ship for salvage services and they propose to exercise that lien irrespective of whosoever hands the steamer may get into, unless in the meantime we are able to get security for the ship's proportion of the salvage and it may be desirable to warn any buyer that that is the position, and you might also let the receiver know.

"So that as early as Feb. 1926 the position which the plaintiffs took and take up was made plain to the gentleman in charge of the bankruptcy. If those orders were carried out—and I have not the least doubt that they would be—the position which the plaintiffs were going to take up had been definitely decided.

"Then on the 21st Feb. the steamer arrived in Alexandria. It is quite true that in Mr. Mathias's affidavit in par. 5 he says that Mr. Paschalis was only declared bankrupt on the 22nd March. There it says : 'Declared bankrupt by definite judgment.' Whether that was some formula that was finally concluded on the 22nd March, though in fact he had gone bankrupt early in Jan., I do not know, but I do not think that there is the least doubt that the bankruptcy began in January.

"On the 8th April Mr. Mathias, who was the syndic, or, as we should call him, I suppose, the trustee in bankruptcy, appointed to carry out the bankruptcy, made an application to the 'juge commissaire' (what exactly his position is, I am not sure ; in some of the documents he is called 'registrar') asking for an order authorising him to object to the

above-mentioned dispute being settled by arbitration. That was the dispute as to the salvage under the agreement that had been made by the master of the ship when he was in trouble in Nov. 1925.

"The attitude of the trustee in bankruptcy representing the bankrupt from that time forward has always been that any arbitration under that 'No cure no pay' agreement was null and void. On the 5th May he wrote to Messrs. Philippides and Co., Alexandria, who were the representatives of the owners of the cargo, sending them certain documents in connection with the negotiations which were going on with regard to the arbitration, and he says : 'Please note that the above-mentioned information is furnished to you for your own defence, for, as I have already intimated to you, I have advised the Ocean Salvage Association that I consider that the arbitration now pending is null and void as far as I am concerned.' And he repeats that in substance in another document. So that it is quite clear that the attitude which the syndic was taking up with regard to settling the dispute by any arbitration was null and void so far as he was concerned.

"An arbitration was in fact held on the 26th Aug. before Mr. Dumas, a well-known practitioner of great experience, and he made his award on that date. The award does not recite who was represented, whether the owners of the ship as well as the owners of the cargo were represented, but I was told by Mr. Dunlop—and I do not think there is any doubt about it, because his client, I understand, has informed him, and he was present at the arbitration—that nobody appeared on behalf of the ship in that arbitration, and only the owners of the cargo and the plaintiffs were present and discussed the case there. The award is made by Mr. Dumas in these terms :

"I find that salvage services were rendered by the contractors to the steamship *Carston* and her cargo, and I assess the amount payable to the contractors by the owners of the *Carston* at the sum of 1250*l.* (one thousand two hundred and fifty pounds) and the amount payable to the contractors by the owners of the cargo of the *Carston* at the sum of 500*l.* (five hundred pounds) and I further award and direct that the owners of the cargo of the *Carston* do pay their own and the contractors' costs of the hearing before me. . . .

"So that the costs of the arbitration were confined to the only persons before the arbitrator, which bears out the statement that there was nobody there on behalf of the ship. But the amount payable to the contractors was stated to be 1250*l.* as far as the ship was concerned.

"Then on the 31st Aug., five days afterwards, there was a creditors' meeting, at which was discussed the sale of this vessel which had been taken by the syndic, who had on the 24th Aug. asked the court for permission to sell the ship. That appears in one of the documents. It does not say whether the plaintiffs were there or not. It does not appear anywhere in the proceedings that they were

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there. The creditors present agreed to a sale in accordance with the deed and formalities put before them. That sale was completed by documents on the 3rd Sept., and finally allowed by the court of the 13th Sept. I say 'allowed by the court' because that is the date on which the confirmation of the sale by court took place.

"Now the sale was a sale by the syndic and was no doubt approved by the court, but it was certainly not a sale after a judgment *in rem*. The trustee in bankruptcy had applied to the court for permission to sell, and he got permission to sell, and it was in accordance with the practice of the court and it was approved by the court; but it was not a sale by the court in the sense that it was a sale on a judgment *in rem*, which would be a sale of the thing as it stood and not merely a sale of such interests as the parties it belonged to had in it. I cannot think that there is any doubt about that. It was a sale such as any other trustee in bankruptcy would make, namely, a sale of the interest of the debtor such as it was. In other words, it was a sale *cum onere*. When you look at the terms of the contract I think that that is made clear.

"First of all it begins in art. 1 with these words:

"Mr. Ferdinand Mathias, acting with the express consent of Mr. Ch. D. Paschalis, sells, cedes and makes over to Messrs. Leonidas Dambassis and Antonios Diapoulis, who accept it subject to the reservations in the following article.

"So that the trustee in bankruptcy sold the ship to the present defendants upon the terms of the articles in this document with the approval of the court. Art. 2 is:

"Mr. Ferdinand Mathias, in his capacity as above, declares that as concerns the buyers the said vessel is free of all charges in general of whatever kind . . . and guarantees it at present and will be handed over to the buyers in the condition as shown in the two certificates from the English Lloyd's at Alexandria.

"Art 6 is:

"Mr. F. Mathias, in his capacity as above, declares that the bankrupt, Ch. D. Paschalis, is the owner of the vessel *Carston*, he having acquired the vessel by his own moneys according to a contract dated the twenty-second of June One thousand nine hundred and twenty-one from the Bathampton Steam Navigation Company Limited of Cardiff. In addition, he declared that as concerns the buyers, the said vessel is free of all charges in general of whatever kind. The vendor, acting in his capacity as above, guarantees the buyers that they will not have to submit to any proceedings on the part of Mr. Paschalis's creditors, undertaking, under penalty of the cancellation of the contract to obtain the withdrawal of any seizure of the vessel.

"Then art. 7 is:

"Mr. F. Mathias, acting in his capacity as above, declares that the present sale is authorised by the 'juge commissaire' (registrar) in the bankruptcy of Mr. Charalambos D. Paschalis, in accordance with a decree dated the twenty-fifth of August One thousand nine hundred and twenty-six. . . He states that the present sale is

subject to the definite confirmation of the Mixed Tribunal of Commerce of Alexandria.

"As I understand it, that is a sale by the trustee in bankruptcy guaranteeing that the buyers will not have to submit to any proceedings on the part of Mr. Paschalis's creditors, and if he fails to make that good no doubt he will be liable to the buyers for breach of his guarantee.

"I ought perhaps to draw attention to the letter of the Sept. 3rd attached to Mr. Hadoulis's affidavit, in which it is made quite clear that the negotiation of the sale was an ordinary negotiation of the sale of a ship, brokers acting on one side and on the other—Messrs. Embiricos, acting for the present defendants and Messrs. Griffiths and Tate and Co. acting apparently for the syndic. Mr. Hadoulis states in terms in his affidavit: 'The sale was made with the approval of the liquidator in the Egyptian bankruptcy proceedings; and I was given to understand that the sale gave to my clients a title to the vessel free of all charges and incumbrances.' And if one looks at the document itself one sees at once that the terms are that the syndic guarantees freedom of claims by creditors. When you look at Mr. Mathias's affidavit with regard to this, he says in par. 6:

"The steamship *Carston* was properly sold to Messrs. L. Dambassis and A. Diapoulis, according to a notarial act executed before the Greffier Notaire of the Mixed Tribunal of Alexandria, the 13th Sept. 1926, for the sum of 10,250l. The said sale was homologated by judgment of the 15th Sept. 1926. The proceeds of sale after deduction of certain expenses were deposited with the cash department of the Mixed Tribunal for subsequent distribution among creditors.

"Then on the 18th Oct., the plaintiffs being unable to enforce their rights except by action in the courts of Alexandria or to get any security at all—they could put forward their claim no doubt in the bankruptcy and be met by the syndic saying that the arbitration contract was null and void—caught the ship in Hull and issued their writ, and claimed, as I think they were entitled to claim, a maritime lien on the property. They caught the *res* and issued their writ, and it is that the defendants are trying to set aside on the ground that they have bought the ship free of all incumbrances. They say that for that and other reasons the writ ought to be set aside.

"On the following day, the 19th Oct., it is said by Mr. Mathias that the Ocean Salvage Company, the plaintiffs, put in a claim in the bankruptcy for the salvage, and as he states, that had been referred to the court. On the 26th Oct. Messrs. Catzellis and Lattey wired to the plaintiffs, saying:

"*Carston*: Receiver disposed settle five hundred pounds stop. If you succeed seizing vessel and purchasers disposed furnish you banks guarantee we recommend you insist payment subject decision English Court as arbitration submission attackable Egyptian Courts.

"If that is right, it seems that not only can the syndic say the arbitration is null and void

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but he can say that the whole agreement to arbitrate may be set aside; and there was some suggestion before me that a point would be taken in the Egyptian court that the master of the ship had no authority to bind the owner, and that the whole foundation of the 'No cure, no pay' agreement had gone. What the position may be in the Alexandrian courts I really do not know; I am not sufficiently informed about the matter; but at any rate it seems quite clear that the plaintiffs have no security of any sort or kind in Alexandria. They have only the claim, which may or may not turn out to be good, against the proceeds of the bankrupt's estate in the hands of Mr. Mathias.

"There is only one telegram that I think I need refer to, and that is one on the 13th Jan. 1927. The warning which the plaintiffs had given to their solicitors in Alexandria to tell anybody that they were going to insist upon their maritime lien on this vessel was conveyed to them to these very defendants in Alexandria in connection with the sale. The telegram is this :

" 'Carston/Goulondris on Sept. 13 Dambassis and Diapoulis personally consulted us upon draft purchase contract and after informing them of possible seizures by creditors including Ocean Salvage they instructed attempt insert clause for indemnification by vendors in event of seizure stop we drafted necessary clause but same refused by vendors and purchasers accepted vendors' terms and contract duly executed and registered same day stop can send affidavit giving full facts if necessary.'

"So that it appears when the present defendants bought the ship they had full warning of the possible claim by the Ocean Salvage Company for their salvage services. They did not get the clauses which their advisers had drawn up for them inserted in the contract, but it looks as if they had something towards that in the terms of the guarantee which I read out some time ago. That—so far as I think it is necessary to go into it—is the order of events in this case."

Balloch for the defendants.—It is contended that this writ and subsequent proceedings should be set aside on various grounds. In the first place the plaintiffs performed their services under the Lloyd's salvage agreement which provided for their remuneration. Such a contract precluded a subsequent action *in rem* in respect of identical subject-matter, as in *The Solway Prince* (8 Asp. Mar. Law Cas. 128; 74 L. T. Rep. 32; (1896) P. 120). It is said that such an agreement depends for its validity upon security being given. Here the security which the plaintiffs required, namely, the *saisie conservatoire* at Alexandria, was in fact obtained, and the fact that it turned out to be a less valuable security than the maritime lien does not affect the matter. In fact it is submitted that the security proved to be good, because it resulted in a fund being brought into court to satisfy the claims of the creditors of the owners. As to the arbitration, it is submitted that, although the defendants are not parties to the

award, the former owners are bound by it, and the effect is that the plaintiffs, having obtained an award which can be made a rule of court, enforceable as a judgment, are now confined to their rights under the award: (*The Sylph* (1868, 3 Mar. Law Cas. (O. S.) 37; 17 L. T. Rep. 509; L. Rep. 2 A. & E. 24; *The Charles Amelia*, 1868, 3 Mar. Law Cas. (O. S.) 203; 19 L. T. Rep. 429; L. Rep. 4 A. & E. 330). Further, the sale by the syndie in bankruptcy at Alexandria was a sale by a foreign court of competent jurisdiction, and it was therefore a sale which was good against all the world and extinguished any interest in the *res* which the plaintiffs may ever have possessed. *Castrique v. Imrie* (1870, 3 Mar. Law Cas. (O. S.) 454; 23 L. T. Rep. 48; L. Rep. 4 H. L. 414) shows that a sale by the court in France is a sale free from all encumbrances. The sale at Alexandria has the same effect, and it is unnecessary to inquire what were the precise legal consequences attending such a sale. Finally, the plaintiffs, having already filed a claim in the bankruptcy in Egypt, have acted oppressively in commencing these proceedings in this country at the same time. The principle of *lis alibi pendens* applies. Therefore, if there is jurisdiction, the court should refuse to exercise it upon equitable grounds: (*The Christiansborg*, 1885, 5 Asp. Mar. Law Cas. 491; 53 L. T. Rep. 612; 10 Prob. Div. 141).

Dunlop, K.C. and *Stranger* for the plaintiffs.—The plaintiffs have a maritime lien in respect of the services rendered, since the existence of a maritime lien does not depend upon the law of the ship's flag or the law of Alexandria. The maritime lien depends upon *lex fori*. Foreign law is only relevant in so far as it takes away the right, and is irrelevant in so far as it merely affects the remedy: (Dicey; Conflict of Laws, 4th edit., pp. 799, 873). The question, then, is whether the lien has been extinguished by what has taken place. As regards the sale by the "syndie," that was clearly something quite different from a sale in an action *in rem*, where any interested party may appear for the purpose of protecting his interest; for that reason the sale is good against all the world: (see *Attorney-General v. Norstedt*, 1816, 3 Price Ex. R. 97). But if the sale is made in proceedings *in personam*, all that is sold is the owner's interest: (Abbott, 14th edit., p. 1011; Parson's Law of Shipping, Bk. II., chap. X., p. 338; *The Brig Nestor*, 1831, 1 Sumner's Rep. 73, p. 85; *The Bold Buccleugh*, 1850, 19 L. T. Rep. (O. S.) 235; 7 Moo. P. C. C. 267; see also Daniel's Chancery Practice, 8th edit., vol. 1, p. 872). In an action *in rem* the proceeds are not held for creditors generally, as in proceedings *in personam*: (*The Saracen*, 1846, 2 W. Rob. 451; *The Wild Ranger*, 1863, 1 Mar. Law Cas. (O. S.) 206, 275; 6 L. T. Rep. 164; Lush. 553). Here the sale at Alexandria was clearly a sale in proceedings *in personam* of the owner's interest in the *res*, and the maritime lien was not affected. The maritime lien not being extinguished, the next question is whether the court, having jurisdiction, ought to exercise it. The court does not stay

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proceedings on the plea *lis alibi pendens* unless such proceedings are clearly shown to be vexatious : (see *The Manheim*, 8 Asp. Mar. Law Cas. 210 ; 75 L. T. Rep. 424 ; (1897) P. 13) ; *The Hagen*, 11 Asp. Mar. Law Cas. 66 ; 98 L. T. Rep. 891 ; (1908) P. 189 ; *The Golua*, 17 Asp. Mar. Law Cas. 35 ; 135 L. T. Rep. 208 ; (1926) P. 103 ; *The Christiansborg*, 1855, 5 Asp. Mar. Law Cas. 491 ; 53 L. T. Rep. 612 ; 10 Prob. Div. 141). There was no arrest at Alexandria. As regards the claim in the bankruptcy, the syndic has refused payment and objected to the claim being made. There is clearly no want of equity in continuing these proceedings, which cannot be said to be vexatious. As regards the salvage agreement and award, the award is unsatisfied, and is therefore no bar to proceedings *in rem* : (*The John and Mary*, 1859, Swa. 471). In any case it cannot extinguish the maritime lien : (*The Bengal*, 1859, Swa. 468 ; *The Sylph*, 1868, 3 Mar. Law Cas. (O. S.) 37 ; 17 L. T. Rep. 519 ; L. Rep. 2 A. & E. 24). *The Solway Prince* (8 Asp. Mar. Law Cas. 128 ; 74 L. T. Rep. 32 ; (1896) P. 120) is clearly distinguishable from this case, since there the plaintiffs, having performed services under the terms of an agreement, were held not to be entitled to recover as salvors when they failed to obtain payment under that agreement. It is submitted that *The Charles Amelia* (1868, 3 Mar. Law Cas. (O. S.) 203 ; 19 L. T. Rep. 429 ; L. Rep. 2 A. & E. 330) is an authority governing the present case, and, unless distinguishable, must be followed.

Balloch replied.

BATESON, J. (having stated the facts as set out above) :

Mr. Balloch for the defendants takes, as I understand, four, or possibly five points, which he says entitle him to have his writ set aside. The first he takes is this. The Lloyd's salvage contract "No cure no pay" prevents the plaintiffs' bringing an action for salvage. He says that it is just the same as in *The Solway Prince* (8 Asp. Mar. Law Cas. 128 ; 74 L. T. Rep. 32 ; (1896) P. 120), where the contract by the salving vessel to save a ship made with the insurers of the vessel excluded them from any right to sue the ship herself when the insurers became bankrupt and failed to pay. I think the two cases are totally different. In *The Solway Prince* there was a contract between the salvors and the insurers to do a particular work at a particular price. It meant, therefore, that the salvors were not volunteers. It was not a "no cure no pay" contract, and inasmuch as they were not volunteers there could not be any salvage. In the present case the contract was a contract to save "no cure no pay" with all the attending consequences if salvage services are performed of there being a maritime lien on the property in favour of the salvors ; and that maritime lien on the property has never been put an end to by any action of a competent court or by any bargain which has been fulfilled between the parties.

Then Mr. Balloch also says that it is a contract by the owner of the ship and no one else for remuneration in a mode specified. Well, it is perfectly true that the bargain of "no cure no pay" Lloyd's form is a bargain to go to arbitration and have the thing settled by an arbitrator out of court, but it seems to me that the contract itself by clause 1 and clause 5 together, is based on the owner of the salved property providing security in terms of the contract, and if he does not provide security then the contractor may take steps to enforce his lien, which would be by the court. There is no other way of enforcing his lien. He cannot enforce his lien except through the court. In the very terms of the contract it is provided that if no security is furnished by the owner of the salved property the plaintiffs may resort to the court to enforce their maritime lien. The truth is that the salvors have a right against the ship which can only be defeated if the whole of the salvage agreement "no cure no pay" is carried out. I think that the real answer to Mr. Balloch's point here is that the owners of the salved property as far as the ship is concerned never put up any security at all in accordance with the terms of the contract. They did not implement the bargain.

It is also said by Mr. Balloch that the plaintiffs did get the security they bargained for, because they only bargained for a *saisie conservatoire*, and that they got. Well, I think they got an order for a *saisie conservatoire*, though they never got seizure. Certainly in my view what they bargained for was not a mere paper *saisie conservatoire*, but an effective arrest of the property equal to the value of the arrest in Constantinople, which would ensure their obtaining payment from any award that was made. I think the terms of their letter show that they only released her in Constantinople on terms of arrest in Alexandria. I think "arrest" there means arrest as we understand it—an effective arrest which would produce security.

Then Mr. Balloch says that the security which they got was good security, because by means of the sale by the syndic the proceeds of the ship were put into court and made available for any claim they might have. I do not think that that was the meaning of what was done or a carrying out of the intention of the parties. No doubt the property of the bankrupt went into a common fund and the plaintiffs would have some rights against it as distinct from their maritime lien. That language itself seems to me to be only giving them a partial remedy instead of a complete one.

Then his point was that the award by Mr. Dumas was a binding award against the owners, or which could be made binding on them, which could be made a rule of court, and that in effect the rights of the salvors were merged in what is equivalent to a judgment. And he cited for that the cases of *The Sylph* (1868, 3 Mar. Law Cas. (O. S.) 37 ; 17 L. T. Rep. 519 ; L. Rep. 2 A. & E. 24), and *The Charles*

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Amelia (1868, 3 Mar. Law Cas. (O. S.) 203 ; 19 L. T. Rep. 429 ; L. Rep. 2 A. & E. 330). I thought *The Sylph* and *The Charles Amelia* were dead against him. It is true that he sought to distinguish them, on, as I thought, slight grounds. He tried to distinguish them on the ground that there was some reservation in each case. But I think Mr. Dunlop was right in saying that really they were on all fours with this case and conclude the matter.

In the case of *The Charles Amelia* (*sup.*) the defendants had given a bill of exchange, and had been allowed to go away with the ship. The ship came to England, and although the bill of exchange had been given it had not been paid, and it was held that the plaintiffs had not lost their lien for damages either by "laches" or by the subsequent sale of the vessel. In the case of *The Sylph* (*sup.*) that was an action for personal injuries. The plaintiff went to arbitration and was awarded compensation. He, however, never was paid, and he sued in Admiralty and it was held that he was entitled to do so. The reservations in both cases I do not think amount to any more than would be implied in law if on a bargain one side failed to carry out or make good their part of the bargain. I think that in this case the owner of the ship distinctly failed to make good his part of the bargain to give security for the plaintiff's claim.

Mr. Balloch further contended that the award in itself was a good defence ; but I think that if the award is not performed, and so far from being performed is contested in every possible way as far as one can see, it is no defence at all to an action *in rem*.

His next contention was that the sale by the syndic under the authority of the court in Egypt was as good as a sale in an action *in rem*. Now my first observation with regard to that is this. It was not a sale in an action *in rem* because the action of the syndic had nothing whatever to do with an action *in rem*. Secondly, the sale does not purport to be by the court ; it is a sale by the syndic with the approval of the court. Nor does it purport to be any decision as to the property in the ship. It transfers such property as the debtor may have had ; but it does not purport to decide the rights in the property.

Then Mr. Balloch said that according to *Castrique v. Imrie* (1870, 3 Mar. Law Cas. (O. S.) 454 ; 23 L. T. Rep. 48 ; L. Rep. 4 H. L. 414), a sale by the court in France is just the same as a sale *in rem*. I do not think that that is the proper result of *Castrique v. Imrie*. I think *Castrique v. Imrie* was a decision that in that case what had happened was the same as a sale in an action *in rem*. I think here that the facts are quite different, and I do not think that the sale in this case has any resemblance to a sale in an action *in rem*.

Mr. Dunlop cited on the other side Abbott (14th edit., pp. 1012 and 1013), and quoted this passage : "In the case of a judgment *in personam*"—and at most that is what this is, if it is anything at all, because according

to the evidence there is no proceeding *in rem* in the Egyptian court—"the court does nothing more than issue process against the property of the defendant, and if the officer of the court should sell a particular chattel as being the defendant's property, there is nothing to prevent a third person impeaching such sale setting up a claim to the chattel. All the court does in such circumstances is to sell the defendant's interest, if any, in the particular chattel. In the case of a judgment *in rem* the court directs that the *res*, and not the defendant's interest in the *res*, be sold. In other words, it determines on the disposition of the *res*. To this extent a judgment *in rem* binds third parties." And so far as I know it is only a judgment *in rem* that does bind third parties.

Then Mr. Dunlop followed that up by quoting Parsons on the Law of Shipping, vol. II., c. 10, p. 340 ; *The brig Nestor* (1831, Sumner's Rep. 85), *The Bold Buccleugh* (1850, 19 L. T. Rep. (O. S.) 235 ; 7 Moo. P. C. C. 267), and Daniell's Chancery Practice (8th edit., p. 939)—all much to the same effect.

He further said he relied on the origin of a maritime lien as shown in *The Bold Buccleugh* (*sup.*), *The Ripon City* (8 Asp. Mar. Law Cas. 304 ; 77 L. T. Rep. 98 ; (1897) P. 226), and in *The Tervaele* (16 Asp. Mar. Law Cas. 48 ; 128 L. T. Rep. 176 ; (1922) P. 259), showing that a maritime lien is something more than a mere right *in rem*. It is described in *The Bold Buccleugh* (*sup.*) as a kind of property ; it is described in *The Ripon City* (*sup.*) as a *jus in re aliena* ; and it is described in *The Tervaele* (*sup.*) as a subtraction from the interests of the owner. But whatever form of words is used, there is no question that it is something more than a mere right *in rem*, and I think Mr. Dunlop was right in saying that in order to get rid of it you must get a decision in an action *in rem* or something equivalent to it. The only other way in which you can get rid of it is by saying that you are impleading the sovereign state of the sovereign of this country or by laches. He says that those are the only ways that you can get rid of a maritime lien ; and as far as I know he is right. *Castrique v. Imrie* (*sup.*) itself draws this distinction between a sale *in rem*, and a judgment *in personam*.

In this connection the law of Egypt was referred to, and I had before me M. Duhamel, who gave me a great deal of assistance with regard to the law of France, and helped in the discussion of the Egyptian code. I think that if a ship is sold by the Egyptian court it must be sold in accordance with the Code de Commerce Maritime. As Mr. Dunlop said, there are only certain privileged claims, salvage not being among them, which are dealt with in the sales by court, and certain formalities must be carried out before they extinguish the privileged claims. Art. 5 sets out what are privileged claims. Art. 7 says how the privileges of creditors are extinguished by a sale, but as that only refers to those privileged claims in art. 5 it has no relation to the extinction of a claim which does not come under art. 5.

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And salvage certainly does not come under art. 5. As he says it is only privileged creditors of the clauses set out in art. 5, which are extinguished. Salvage is not one of those, and therefore a salvage claim is not extinguished by such a sale. Therefore, under art. 4 he has the right to follow the property notwithstanding there has been a sale.

Furthermore, if you have to find some right of salvage in the Egyptian code, it must be under sect. 729 of the Code Civile Mixte; but, as he says, that is only a common law right to work and labour done. It is quite a different right to salvage as we understand it. And there is nowhere to be found in these codes any right *in rem*, or any maritime lien for salvage at all. Therefore his points are that this is not a sale by the court at all; and that if it is a sale at all it does not extinguish the salvor's lien.

Lastly, Mr. Balloch says that under the circumstances in this case, where the plaintiffs have the power of putting forward a claim against the proceeds of this bankrupt's estate in Alexandria, and where they have done what they have in regard to releasing the vessel in Constantinople and arranging for her rearrest, so to speak, in Alexandria, it would be inequitable after the sale to his clients that the plaintiffs should be allowed to follow the ship again here. I do not agree. As the plaintiffs have a maritime lien on the ship, and find her here when they have been kept out—I will not use any other expression—of their security, and when they have not any means of getting their claims secured elsewhere, and find the ship in the hands of somebody else who must have known the danger and risk he ran in purchasing such a vessel, I do not think that there is much want of equity in saying that he should take the consequences.

That really is not a plea to jurisdiction. That is a plea to the exercise of it. The remedy here, it seems to me, would be quite different from the remedy available in Egypt, if any, and therefore it does not come within the cases like *The Christiansborg* (1885, 5 Asp. Mar. Law Cas. 491; 53 L. T. Rep. 612; 10 Prob. Div. 141) of *lis alibi pendens* or double vexation of the defendant. Of course, it cannot be double vexation in a case of this sort, because it is really a different defendant, if and when the defendant appears.

I have tried to deal with all the arguments as well as I could without reserving my judgment.

There is one other matter I ought perhaps to refer to, and that is this: The award of Mr. Dumas is unsatisfied. It is just like a judgment that is unsatisfied. That is at the highest. It could not be put higher than to say that it is just like a judgment that is unsatisfied. If a judgment at common law *in personam* were unsatisfied with regard to the claim for salvage, there would be no question but that the plaintiffs could issue a writ and sue in this court to enforce their maritime lien. I think that is clear from *The John and Mary*

(1859, Swa. 471), *The Bengal* (1859, Swa. 468), and also *The Sylph* (*sup.*).

I think I have covered all the arguments for the defendants.

In my judgment the motion fails, and should be dismissed with costs.

Solicitors: *William A. Crump and Son; Middleton, Lewis, and Clark*, agents for *Middleton and Co.*, Sunderland.

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 15 and 17, 1926.

(Before BANKES, SCRUTTON, and SARGANT, L.JJ.)

REDERIAKTIEBOLAGET TRANSATLANTIC v. LA COMPAGNIE FRANCAISE DES PHOSPHATES DE L'OCEANIE. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Delay or hindrance in shipping—"Lay days not to count during the period of such delay"—"Demurrage not to accrue"—Days not consumed in loading added at charterers' option—Extra time consumed in loading—Claim for demurrage.

In a charter-party which provided that cargo was to be supplied at a certain rate per working day of twenty-four consecutive hours, Sundays and holidays excepted and weather permitting, the exceptions clause as to delay in loading by excepted causes ended thus: "Lay days not to count during the period of such delay or hindrance and demurrage not to accrue." And it further provided: "At charterers' option any days or parts of days not occupied in loading may be added to the time for discharging, and any extra time consumed in loading may be deducted from the time for discharging."

Held, that the expression "extra time consumed in loading" meant time beyond what was expressly provided for in the charter-party as applicable to the whole of that period, that is to say, that Sundays and holidays and non-weather days were excluded from computation.

Decision of Sankey, J. affirmed.

APPEAL from a decision of Sankey, J. upon a special case.

By a charter-party dated the 20th Jan. 1925 the plaintiffs' steamship *Anten* was chartered to the defendants to proceed to Makatea, in the South Pacific, and there load from the agents of the charterers a full and complete cargo, not exceeding 8800 tons of phosphate, and, being loaded, to proceed to certain specified ports in Sweden, at the charterers' option, to deliver the cargo.

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

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Clause 10 of the charter-party, so far as material, provided as follows: "Cargo to be supplied provided steamer can take it in at the average rate of 400 tons per working day of twenty-four consecutive hours, Sundays and holidays excepted and weather permitting, time counting both in loading and discharging from the date of the steamer being in the loading or discharging berths as ordered and ready to receive or deliver cargo and twenty-four hours' written notice given to that effect, and in the event of any delay or hindrance in . . . shipping or discharging cargo by reason of ice, frosts, rain, bad weather . . . or from any other cause whatsoever beyond the control of the charterers . . . or from inability or inefficiency of steamer to load or discharge, the lay days not to count during the period of such delay or hindrance and demurrage not to accrue. . . . At charterers' option any days or parts of days not consumed in loading may be added to the time for discharging and any extra time consumed in loading may be deducted from the time for discharging."

Clause 11 provided that demurrage over and above the lay days so calculated should be paid to the steamer at the rate of 50*l.* per day. By clause 13: "Dispatch money to be paid by steamer at the rate of 20*l.* per day for all time saved in loading or discharging, including Sundays and holidays saved." And by clause 23: "Charterers to have the option of shipping to the island at steamer's ports of outward discharge . . . up to 500 tons weight of goods and for stores (including coal) freight free . . . any extra detention of steamer in loading or discharging the same to be computed as part of the lay days under this charter . . . bills of lading for the stores to be signed by the captain and endorsed with the extra time consumed in loading agreed by him and the charterers' representatives at the ports where the stores are loaded."

The *Anten* arrived at Makatea at 7 a.m. on the 14th Sept. 1925, and the lay days began to run at 9 a.m. on the 15th Sept. The plaintiffs contended that the twenty-two days allowed by the charter-party for loading, after making the allowances provided for in clause 10, expired on the 4th Nov. 1925. Loading, however, not having been completed until 6 p.m. on the 26th Nov. 1925, the plaintiffs claimed to be entitled to demurrage for twenty-two days to six hours being occupied in loading beyond the stipulated lay days. On the other hand, they admitted that the defendants were entitled to dispatch money at the port of discharge in the sum of 259*l.* 3*s.* 5*d.*, which they were prepared to deduct from the sum claimed. The defendants contended that they were not liable for demurrage at all, and, further, that under clause 10 they were entitled to deduct the extra time consumed in loading from the time allowed for discharge, and they said that as the result of this calculation they had saved eleven and a half hours on their time allowance for discharging.

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Sankey, J. having dismissed the plaintiffs' claim, they now appealed.

S. L. Porter, K.C. and W. L. McNair for the plaintiffs.

C. T. Le Quesne, K.C. and W. van Breda for the respondents.

Cur. adv. vult.

BANKES, L.J.—This appeal raises a question on the construction of part of a clause of a charter-party which has obviously been specially framed in the interest of the charterer. As an instance it is only necessary to refer to the language of clause 13, which is framed so as to avoid the operation of the decision of the majority of the Court of Appeal in *James Nelson and Sons Limited v. Nelson Line Limited* (11 Asp. Mar. Law Cas. 1; 97 L. T. Rep. 661; (1907) 2 K. B. 705). Clause 10, dealing with the lay days, is also in a special form, because with regard to certain named exceptions it not only provides that the lay days are not to count during the period of such delay or hindrance, but it also provides that demurrage is not to accrue. Mr. Porter contends that these last words are explanatory only. I do not agree with him. Having regard to the whole tenor of the charter-party I think that they are inserted of set purpose and in order to prevent the operation of the ordinary rule that when once a vessel comes on demurrage the time she is detained is to be calculated by running days or calendar days as opposed to charter-party days.

In the present case the vessel admittedly came on demurrage at the port of loading, and in my opinion had not the charterers exercised the option given to them in the latter part of clause 10 demurrage would have had to be calculated not according to the ordinary rule, but in accordance with clause 10 giving effect to the words "demurrage not to accrue" which I have indicated above. In the present case the charterers did exercise the option, which clause 10 conferred upon them in the following terms: "At charterer's option any days or parts of days not consumed in loading may be added to the time for discharging and any extra time consumed in loading may be deducted from the time for discharging." It is not necessary to decide what the true construction of these words is in a case where the vessel loads in less than the charter time, but it is noticeable that in dealing with this state of facts the clause speaks of "days or parts of days," and not of "time" as in the later part of the clause, and it may well be that the expression "days" is specially used to denote periods of time or calendar days as being easily capable of computation, and avoiding discussion as to weather conditions, &c., after a vessel has left her loading port. If this is the proper construction, and a vessel had, say, ten days for loading and occupied eight days only, the days not consumed would for the purpose of this part of the clause be two days, irrespective of whether they were or were not a Sunday and a non-weather working day. It is not necessary to decide this

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point, but I do not think that this construction is inconsistent with the view I take as to the remaining portion of the clause.

The vessel having occupied longer than her charter time, and the option having been exercised, I pass to consider what time, if any, does the clause allow to be deducted from the time for discharging. The parties are agreed as to the discharging time. No question therefore arises about that. The time to be deducted is not expressed as extra time beyond the time allowed for loading or beyond the lay days, but as "extra time consumed in loading." The time referred to is obviously the time occupied in the loading, in the sense of the time which has elapsed between the commencement of and the conclusion of the loading. What is meant by the application of the term "extra" to this period of time? Taking into consideration the earlier provision in the clause, in my opinion "extra" means beyond what is expressly provided for in the charter-party as applicable to the whole of that period, that is to say, that Sundays and holidays and non-weather working days, &c., are excluded from computation.

This view leads to the same result as that arrived at by Sankey, J., and I think, therefore, that this appeal fails and must be dismissed with costs.

The view contended for by Mr. Porter, namely, that the ordinary rule for computing demurrage after the expiration of the lay days is, in my opinion, excluded by the special language of this charter-party.

SCRUTTON, L.J.—This appeal raises a difficult question of construction on a very special charter-party. The steamship *Anten* was chartered to load phosphate at a French island near Tahiti and carry it to one or two European ports. At the loading port "cargo was to be supplied provided steamer can take it in at the average rate of 400 tons per working day of twenty-four consecutive hours, Sundays and holidays excepted, and weather permitting"; with an exceptions clause, to be referred to later, as to causes preventing the shipping of cargo. In the events that happened, it is agreed that the charterer had twenty-two days to load in, which expired at noon on the 4th Nov. The steamer was not loaded till 6 p.m. on the 26th Nov., being twenty-two running days six hours after her lay days expired. Of these twenty-two running days, roughly twelve were working days, three were Sundays, seven were days when working was prevented by weather. Ordinarily when lay days have expired the exceptions excusing delay do not apply to the demurrage days which are then running or consecutive days, the ship being, in fact, detained, or prevented from sailing. But in this charter the exceptions clause as to delay in loading by excepted causes ends up "The lay days not to count during the period of such delay or hindrance and demurrage not to accrue." This clause was not referred to before the judge below, but it appears to be

intended to excuse the charterer from liability for demurrage in respect of days on which he was, in fact, prevented from loading by exceptions.

It was argued that the last words were only intended to repeat the provision that lay days should not count, but if so, this repetition was quite superfluous, and in fact demurrage could not accrue till the lay days expired. In my opinion the exceptions clause applies to the demurrage days, and days in the demurrage period on which loading was prevented by bad weather did not count in assessing demurrage. This exception, however, does not seem to apply to Sundays and holidays. The result would be that if the port of loading alone were considered, there would be a claim for fifteen days' demurrage. But the charter contains a clause enabling the charterer at his option to "pool" loading and discharging days, or to regard them as a whole fund or source out of which to satisfy the loading and discharging obligations. This process used to be described in charters by the very inappropriate terms of "averaging" or "reversible days," neither of which phrases in any ordinary sense of the words expressed the meaning of the parties. The clause in the present charter is: "At charterers' option any days or parts of days not consumed in loading may be added to the time for discharging and any extra time consumed in loading may be deducted from the time for discharging." This clause appears to contemplate (i.) that if the charterer has not used all his time in loading, he may carry forward the balance unused to the credit of the discharging time which will be thereby increased, and (ii.) that if the charterer has used more than his time in loading, he may, instead of paying demurrage at once, carry forward the excess to the debit of his discharging time, which will be thereby lessened. The result in the latter case will be that demurrage will begin not when the discharging time expires, calculated according to discharging rules, but when the amended time, obtained by deducting from the original discharging time the excess in loading, finishes.

The difficulty comes when you attempt to carry out this calculation, and bear in mind that neither loading time nor discharging time are in this charter running or consecutive days, but that the time the ship is detained may be consecutive days. If you have loaded the ship in five days less than the end of the loading time allowed you, but of those five days one is a Sunday and one a day on which working is prevented by weather, are you to credit the discharging time with five days, or three days? Similarly if you have taken five consecutive days more than the allowed loading time in loading, but one of the days is a Sunday, and one a non-weather working day, do you reduce the original discharging time by five days or three days? The discharging time excludes Sundays and non-weather working days; if you reduce it by consecutive days, including

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Sundays, are you using a day on which the charterer is not bound to work, to deprive him of a working day? It would seem reasonable that if you have saved days from your loading time, you should only add to your discharging time so many of those days as you would be bound to work on, and, therefore, not add such days as were Sundays or non-weather working days. For the days you add to discharging time must be of the same quality as the discharging days, and a Sunday or non-weather working day does not count as a discharging day. To give yourself five extra working days in discharging, because you have not used in loading three working days and two non-working days, does not look right. This, the charterers say, they avoid by treating the "days not consumed" and "the extra days consumed" as the same sort of days as compose the "time for discharging," to which they are to be added or from which they are to be deducted.

This construction agrees with the view taken by the majority of this court in *Nelson's* case. There the charterer loaded in four running days less than the loading time, but that time excluded Sundays and holidays and two of the four days were holidays. The majority held that the charterer was only entitled to two days' dispatch money, not four, on the ground that he could only save days he was entitled to load on. There has been much dispute as to the accuracy of this decision, and the cases are carefully reviewed by Bailhache, J. in *Mawson Shipping Company Limited v. Beyer* (12 Asp. Mar. Law Cas. 423; 109 L. T. Rep. 973; (1914) 1 K. B. 304), who himself would have been of a different opinion. In this case the framers of the charter have obviously intended by clause 13 to exclude the operation of the decision as to Sundays and holidays in cases of claims for dispatch, though they have not dealt with the question of non-weather working days. But the question of demurrage appears to me to be a different question; demurrage does not begin till you have exhausted the lay days; and the lay days are to exclude Sundays, holidays and non-weather working days. It seems to me, therefore, you can only increase or decrease the "pool" of lay days by adding or deducting days of the same character; and cannot use a non-weather working day on which neither the charterer nor the ship is bound to work to deprive the charterer of a day for discharging which he is entitled to require to be a weather working day. This view is supported by the clause that the non-weather working day, after loading time has expired, is not to cause demurrage to accrue in respect thereof. It is also in accord with the principle on which *Nelson's* case was decided on this point. This is, in effect, the view taken by Sankey, J., who says that time to be added or deducted must be not consecutive time, but "time usable in loading," under the terms of the charter as to loading.

For these reasons in my view the appeal should be dismissed with costs.

BANKES, L.J.—Sargant, L.J. is engaged in giving judgment in the other court, but he authorises me to say that he agrees in the result with the judgments that have just been given.

Appeal dismissed.

Solicitors for the appellants, *William A. Crump and Son.*

Solicitors for the respondents, *Lawrance Messer and Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Dec. 8, 9, and 21, 1926.

(Before GREER, J.)

MOLTHES REDERI AKTIESELSKABET v. ELLERMAN'S WILSON LINE LIMITED. (a)

Charter-party—Not amounting to demise—Sub-charter-party—Shipowners' lien on freight earned under sub-charter for hire unpaid and due to them—Notice to charterers' agent to collect freight on shipowners' behalf—Whether agents can claim to deduct their disbursements.

Where a ship is chartered under a contract which does not amount to a demise and the ship is sub-chartered by the charterers for a single voyage, the shipowner has a lien for unpaid hire due to him on the freight earned on such voyage and can intervene and by notice direct the charterers' agent to recover the freight on their behalf. The agent must account to the shipowner for the freight so collected without making any deduction on account of disbursements made on the charterers' behalf.

ACTION tried before Greer, J. in the Commercial list.

The facts appear from the judgment of Greer, J.

Sir Robert Aske for the plaintiffs.

Le Quesne, K.C. and Pritt for the defendants.

Cur. adv. vult.

Dec. 21, 1926.—GREER, J. read the following judgment: The plaintiffs who were the owners of the steamship *Sproit* claim against the defendants, who are the well-known shipowners and shipbrokers at Hull, the sum of 199l. 15s., which they say the defendants received on their behalf, under circumstances which are in some respects unusual.

By a charter-party dated the 23rd Oct. 1924 between the plaintiffs and Maurice Elliff and Co., the plaintiffs agreed to let the *Sproit* to Maurice Elliff and Co. of Middlesbrough for twelve calendar months, on a printed form of charter-party known as the "Baltic and White Sea Time Charter, 1912." By the charter-party it was provided as follows:—

2. That the owners shall provide and pay for all the provisions and wages and for the insurance

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of the steamer and for all deck and engine room stores and maintain her in a thoroughly efficient state in hull and machinery for and during the service.

3. That the charterers shall provide and pay for all the coals, fuel, water for boilers, port charges, pilotages (whether compulsory or not) canal steersman, boatage, lights, tug assistance, consulages (except consular shipping and discharging fees of the captain, officers, engineer, firemen and crew), canal dock and other dues and charges (also pay all dock, harbour and tonnage dues at the port of delivery and redelivery unless incurred through cargo carried before delivery or after redelivery), agencies, commissions, and expenses of loading, trimming, stowing, unloading, weighing, tallying and delivery of cargoes, surveys on hatches and protests (if relating to cargo), and all other charges and expenses whatsoever, except those above stated.

5. That the said charterers shall pay as hire for the said steamer 410*l.* per calendar month, commencing from the time the steamer is placed at the disposal of charterers and *pro rata* for any fractional part of a month . . . until her redelivery to owners as herein stipulated. That the payment of the hire shall be made as follows: In London in cash without discount, monthly in advance.

9. That the captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance with ship's crew. Although appointed by the owners the captain shall be under the orders and directions of the charterers as regards employment, agency or other arrangements, and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain or officers personally or by agents signing bills of lading or other documents or otherwise complying with such orders, as well as from any irregularity in the steamer's papers or for over-carrying goods. Owners shall not be responsible for shortage, mixture marks nor for number of pieces or packages, nor for damage to or claims on cargo caused by bad stowage or otherwise, the stevedore being employed by the charterers.

15. That should the captain require funds for ordinary disbursements for steamer's account at any port, charterers or their agents are to advance the same, such advances shall be deducted from the next hire, but charterers shall in no way be responsible for the application of such advance.

21. That the owners have a lien upon all cargoes and all sub-freights for hire and general average contribution, and for all expenses and damages due under or for breach of this charter and charterers to have a lien on the steamer for all moneys paid in advance and not earned.

23. That the charterers shall have the option of sub-letting the steamer, giving due notice to owners, but the original charterers always to remain responsible to owners for due performance of this charter.

It seems clear, and it was not disputed at the trial, that this charter-party was not a demise of the ship, and that the shipowners throughout the charter remained in possession and control of the ship and its contents. It was in fact a carrying contract, not a lease.

On the 8th Jan. 1926 the agents of the charterers sub-chartered the vessel by a voyage charter in the Scania form to carry a cargo of wood goods to Hull. This charter provided that bills of lading were to be prepared on the form endorsed on the charter and signed by the master, and that the master or owners were

to have an absolute lien upon the cargo for all freight, dead freight, and demurrage. A cargo was put on board the vessel at Riga in accordance with the sub-charter and carried to Hull. Bills of lading were issued to the shippers of the cargo. The freight on a considerable part of the cargo was payable in advance and was so paid to the time charterers' agents at the port of shipment, but the freight on part of the cargo consisting of pit props was not due in advance but was to be paid in Hull on right delivery thereof. After a long troublesome voyage the vessel arrived in Hull early in February and began her discharge. A considerable amount of hire money was in arrear, and Messrs. Sanderson and Co., solicitors, of Hull, received instructions from the owners through their Protection Club to collect the freight. In the meantime the defendants had been appointed by the charterers as agents to attend to the discharge of the vessel, and collect the freight. On the morning of the 10th Feb. while the vessel was discharging, but before any freight had been paid in respect of the pit props, Mr. Sanderson telephoned to the defendants, saying that he had been instructed to collect the freights payable at Hull, and if necessary to have a lien placed on the cargo to secure payment, and asked for an assurance that the defendants would collect the freights on owners' account. This assurance Mr. Lamb, who received the message and dealt with the matter on behalf of the defendants, did not give at the time, but it was arranged that there should be a further interview later in the day. Mr. Sanderson then wrote his letter of the 10th Feb. confirming what took place at the morning interview. There is no doubt whatever that at this interview Mr. Sanderson claimed on behalf of the owners the right to collect the freight, and that if the defendants had refused to accept their orders in the matter he was in a position to give immediate notice to the bill of lading holders to pay the freight to him, or any agents named by him on behalf of the owners. There was a dispute about whether Mr. Sanderson's letter was received by the defendants and read by Mr. Lamb before the interview which took place in the afternoon; Mr. Lamb stated that he did not in fact see it until the morning of the 11th. In my view it is not necessary to decide whether Mr. Lamb is right or wrong on this point. In the afternoon an interview took place between Mr. Sanderson and Mr. Lamb, at which the captain of the vessel was present, and I am satisfied that at this interview Mr. Sanderson repeated his demand that the defendants should collect the freight on owners' account. There was some discussion about the amount of the disbursements that had been made by the defendants, but the evidence failed to satisfy me that Mr. Sanderson agreed that the defendants should have the right to deduct their disbursements from the freight. I do not think Mr. Sanderson said anything which would justify Mr. Lamb in concluding that he was giving up any of the owners' rights whatever they might be, but it

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may very well be that his mind at the time was not clear on the question whether the defendants would, apart from any agreement by him, have a right to deduct their disbursements from the freight. At the interview Mr. Lamb agreed that the defendants would collect the freight on behalf of the owners and proceeded to confirm the same in writing. This he did by letter of the 10th Feb. The greater part of the goods on which freight was payable were discharged from the vessel on the 10th Feb. No freight was paid until the morning of the 11th Feb. Having received the freight the defendants wrote the letter of the 11th Feb., in which they said the freight would be absorbed by their disbursements, and they refused to discharge the balance of the cargo pending definite instructions from the plaintiffs to discharge at their expense. Instructions to this effect were afterwards reluctantly given.

The plaintiffs claim that they are entitled to the freight inasmuch as it was received by the defendants after they had received notice of the plaintiffs' claim, and after they had accepted the plaintiffs' instructions to collect it for the plaintiffs, and they rely on *Wehner v. Dene Steam Shipping Company* (1905, 2 K. B. 92). The answer of the defendants was (1) that they only received the freight for the plaintiffs subject to a promise by the plaintiffs that they would be entitled to deduct their disbursements; (2) that the freight could only be effectively claimed by the owners by notice to the persons liable to pay, before payment, and that therefore when the money reached their hands it was money of the charterers on which they could exercise a lien, or in any event against which they had an effective set-off, and they relied on the case of *Tagart, Beaton, and Co. v. Fisher and Co.* (9 Asp. Mar. Law Cas. 381; 88 L. T. Rep. 451; (1903) 1 K. B. 391), and (3) that before the intervention of the plaintiffs they themselves had a lien upon the freight which was available against the owners.

In my judgment none of the defendants' contentions are entitled to succeed.

(1) As already stated, I find that there was no agreement by Mr. Sanderson that the defendants should be entitled to deduct from the freight the amount of their disbursements.

(2) It might be sufficient in answer to the defendants' second contention to say that as they accepted the plaintiffs' instruction to collect the freight for them, and at the time they received it had not given notice to determine their agency, they did in fact receive the money as the plaintiffs' agents and must account to them for it. But it seems desirable also to consider and answer the question, whether notice from the shipowner to the agent was or was not of itself sufficient to entitle the owners to the money received for freight after receipt of the notice. If the decision in *Wehner v. Dene Steam Shipping Company* (sup.) is correct, it follows that in every case where bill of lading freight is received by the agent

nominated by the charterers, the shipowner can intervene and claim the freight in the hands of the agent as his money. That he can intervene successfully before receipt of the freight by the agent seems to me to be the necessary consequence of holding, as Channell, J. did in the case cited, that the bill of lading contract is a contract between the shipowner and the shipper, and not a contract between the charterers and the shipper. If this be so the legal right to the freight is in the owner and not in the charterer, and the former can intervene at any time before the agent has received the freight, and say to him: "I am no longer content that the charterer should collect the freight; if you collect it all you must collect it for me." If the agent then collects the freight, it follows that the shipowner can sue for it as money had and received. The judgment in *Wehner v. Dene Steam Shipping Company* (sup.) goes beyond this in that it decides that the agent must account for bill of lading freight received by him before notice of the owner's demand that it should be paid to the owner. In so far as the case so decided it seems difficult to reconcile the decision with that of the Court of Appeal in *Tagart, Beaton, and Co. v. Fisher and Co.* (sup.). In that case the plaintiffs, who stood in the shoes of the time charterers, were held entitled to the freight received by the agent appointed by the charterers before they had notice that the owners claimed the freight. The material facts in *Tagart, Beaton, and Co. v. Fisher and Co.* are distinguishable from the material facts in *Wehner v. Dene Steam Shipping Company* in one respect only. In *Tagart, Beaton, and Co. v. Fisher and Co.* the bill of lading was made out to the charterers, and as between the charterers and the owners it operated not as a contract but as a receipt for the goods. There was therefore no bill of lading contract made on shipment. The only contractual document was the charter-party. The freight payable by the consignee was not payable to the shipowner by virtue of a contract to which the latter was a party, he could only become entitled to it under the clause of the charter-party giving him a lien on sub-freights or by some new contract if such could be found between him and the receiver of the cargo. It would therefore be too late for him to exercise his right to a lien after the freight had been received by the charterers personally or by their agents. Though Channell, J. bases his judgment in *Wehner v. Dene Steam Shipping Company* on the fact that the bill of lading contract is with the owner, and therefore the owner in claiming the freight was only claiming what was legally his, he still speaks of the owner's rights as arising out of his lien. It is difficult to understand how a shipowner can be said to have a lien on that which *ex hypothesi* is his own property, and which he is entitled to because it is his own. A lien is a claim by a person in possession of the property of another who has the right to keep possession until the owner pays the debt in respect of which the possessor

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is entitled to the lien. It seems a misuse of words to say that a shipowner has a lien on the debt due to him under the contract made with him by the bill of lading. The lien clause in the charter-party is needed to give the owner a lien in those cases where the sub-freight is due to the charterer and not to the owner, as, where goods are carried on a sub-charter without any bill of lading. In such a case the owner could only become entitled to the sub-freight by virtue of the lien clause, and it would be too late to exercise his lien after the debt had been paid to and received by the charterer personally or through his agent. The actual decision in *Tagart, Beaton, and Co. v. Fisher and Co.* goes no further than this. It only governs a case where the shipowner is bound to rely on a lien, and does not affect the case where he can claim the freight as due to him on his bill of lading contract. Whether the owner in the latter event can claim the freight in the hands of an agent of the charterer after it has been received by such agent without notice of claim by the owner is a question which it is unnecessary to decide in the present case. Channell, J. based his decision that the shipowner could recover on the ground that the charterer's agent was also, though appointed by the charterer, the agent of the shipowner. I do not think he intended by that to hold that in relation to the discharge he was the agent of the shipowner, but only that he received the freight as the shipowner's agent as well as the charterer's agent. Be this as it may, I think it is clear that the defendants in this case in attending to the discharge of the ship were acting solely for the charterer. In incurring the expenses in respect of which they claim a lien or set-off they were acting as the agents of the charterers. They were doing for the charterers what the charterers had undertaken to do by clause 3 of the charter-party. It may be that the agent appointed by the charterer is the owner's agent to receive the freight, and is therefore accountable to the owner for it until he has paid it over to the charterer. However this may be, he is, in my judgment, accountable to the owner if he has collected the freight after notice by the owner that the freight is to be so collected. There is nothing, in my opinion, inconsistent with this view in the decision of the Court of Appeal in *Tagart, Beaton, and Co. v. Fisher and Co.* The present case is distinguishable from the latter case in three respects: (1) notice of claim was received by the agent before collection of the freight; (2) the agents agreed to collect for the owners; (3) here there was a bill of lading contract which vested the legal right to the bill of lading freight in the owners. The defendants' second point therefore fails.

(3) It remains to consider the defendants' third point. In my judgment this point also fails. The agents' expenses were incurred in carrying out the charterers' obligations under clause 3 of the charter-party. Until they stopped the discharge on the 11th Feb., their only principal, so far as the discharge was

concerned, was the charterer. They had not collected any freight for him, and if they had any rights of lien such rights could only affect any property of their principal which came into their possession. They had not reduced the freight into possession, and such rights as they had, if any, to look to the freight to reimburse them for the expenses that had incurred in doing for the charterers that which the charterers had undertaken to do, could give them no lien, equitable or otherwise, on the unpaid freight, the legal right to which was always, according to my finding, in the shipowner. The same considerations prevent them from setting off against the owner's claim the 40*l.* advanced to the captain. This they did on behalf of the charterers. Any advantage arising from that payment accrues to the charterers, and not to their agents. The only legal effect of the payment is to reduce the debt of the charterers to the owners.

The plaintiffs are entitled to judgment for the amount claimed, less the sum of 17*l.* 4*s.* 1*d.* to which the defendants are admittedly entitled for the expenses incurred in discharging the props that were discharged expressly on behalf of the plaintiffs after the defendants' letter of the 11th Feb.

Judgment for plaintiffs.

Solicitors for plaintiffs, *Sanderson and Co.*

Solicitors for defendants, *Botterell and Roche*, agents for *Hearfield and Lambert*, Hull.

Jan. 12, 13, 14, and 18, 1927.

(Before WRIGHT, J.)

BEHNKE v. BEDE SHIPPING COMPANY. (a)

Sale of ship—Ship a specific chattel within the meaning of the Sale of Goods Act 1893—Note or memorandum in writing—Specific performance—Sale of Goods Act 1893 (56 & 57 Vict. c. 71), ss. 4, 52, and 62.

A ship comes within the definition of "goods" in the Sale of Goods Act 1893 being a "chattel personal" within the meaning of sect. 62, and therefore sect. 4 must be complied with on a contract for its sale.

A ship is a specific chattel within sect. 52 of the Act and specific performance is the proper remedy.

THE defendant company were the owners of the steamship *City* which they were desirous of selling. Messrs. J. and S. were ship-brokers and brought the vessel to the notice of the plaintiff, a German subject, who, on the 17th Nov. 1926, made a firm offer for the vessel provided the boilers would satisfy the requirements of German law. All negotiations were conducted through the medium of the brokers. On the 27th Nov. 1926 (a Saturday) the plaintiff wired "*City* confirmed send contracts." In the meantime the defendants had sent, on the 24th

(a) Reported by R. A. YULE, Esq., Barrister-at-Law.

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Nov., a *pro forma* contract to the brokers which was sent to the plaintiff by air-mail and did not reach him till the morning of Sunday, the 28th Nov. On the morning of the 25th Nov. the defendants telegraphed to the brokers expressing a doubt whether the boilers would satisfy the requirements of German law and added "we cannot allow later than Saturday for definite acceptance of steamer on terms of contract posted yesterday." The brokers obtained an extension of time till the afternoon of Monday, the 29th Nov., and on that day telegraphed to the plaintiff: "Owners must have your telegraphic acceptance of contract sent our letter 25th before four o'clock to-day otherwise will accept an offer by others who are waiting your reply telegraph instantly whether you agree contract which please sign and post to-day sure to us along with deposit." The plaintiff received this telegram at 1.40 p.m. German time and in reply at once sent the following telegram: "*City* accept contract deposit posted," and sent by post the same day the contract duly signed together with a cheque for the deposit. The brokers communicated the contents of plaintiff's reply by telephone to the defendant company about 2.50 p.m. The defendant company, however, had accepted a firm offer elsewhere though in law there was no contract between them and the other buyers. They therefore refused to give any instructions regarding the deposit and repudiated the contract with the plaintiff. The plaintiff issued the writ in the action on the 24th Dec. 1926 and claimed specific performance of the contract by delivery of the ship to him. The defendants pleaded that no binding contract had been reached and alternatively that if there were a binding contract it was not enforceable by reason of sect. 4 of the Sale of Goods Act 1893, inasmuch as there was no sufficient memorandum, that a ship was not "goods" and even it were so held there could be no specific performance on the sale of a ship under sect. 52. In reply it was contended on behalf of the plaintiff that the deposit was a part payment within sect. 4 of the Act and also that the correspondence formed a sufficient note or memorandum for the purposes of the section.

The facts and arguments appear sufficiently from the headnote and judgment.

Langton, K.C. and Carpmael for the plaintiff.

Miller, K.C. and Sir Robert Aske for the defendants.

Cur adv. vult.

Jan. 18, 1927.—The following written judgment was delivered by

WRIGHT, J.—This is an action tried before me on the 12th Jan. 1927 without pleadings under an order of the vacation judge, dated the 5th Jan. last. The plaintiff, a German shipowner, claimed against the defendants, the owners of the British steamship *City*, a declaration that he purchased the *City* by contract from the defendants, and an order for specific performance of that contract, and an injunction,

and in the alternative damages. The defendants deny the contract, and in the alternative say that it is not enforceable by reason of sect. 4 of the Sale of Goods Act 1893; and in any event say that it is not a case in which specific performance ought to be decreed.

The negotiations between the plaintiff and defendants were conducted through the intermediation of Mr. Sloan, of Sloan and Jackson Limited. I find that he acted throughout in his capacity of a broker for sale and purchase, that he was not specifically or peculiarly the agent of either party, with any authority to bind either party or to accept a communication for either party. He was in turn the agent of either party "for the purpose of receiving and transmitting propositions": (see *Story on Sale*, sect. 87). This is the true function of such a broker whose duty and interest are to do his best to bring the parties together. In the events which happened, it is important to define this position. Commission would be paid by the sellers out of the gross price. The deposit was to be paid to the brokers as stakeholders. The plaintiff, who was at Rostock, communicated by letter or telegram with Mr. Sloan, who in turn communicated with the plaintiff in the same manner. Mr. Frew, on behalf of the defendants, whose office was at Newcastle-on-Tyne, spoke on the telephone with Mr. Sloan, who was at Glasgow, and letters and telegrams also passed between them. On the 17th Nov. 1926 the plaintiff wrote to the brokers with a firm offer of 7650*l.* for the *City*, but he made it a condition that the design of the boilers should be such as to satisfy the German boiler authorities; he also stated other conditions. On the 19th Nov. the brokers wrote in reply, after a long conversation with the defendants, that the business might be considered as a fixed sale, subject to the boilers being in accordance with German law requirements and to the adjustment of details and contract. It was contended by Mr. Langton that the contract was complete at that date, subject to the question of the boilers and to the preparation of a formal contract. I decide against this contention. In my judgment the agreement of the precise terms of the contract was no formality, but an essential part of the bargain, so that no contract could be concluded till the terms had been adjusted and agreed between both parties. On the 27th Nov. (a Saturday) the plaintiff, who had obtained the design and plan of the boilers and submitted them to the German authorities, who were satisfied, telegraphed to the brokers, "*City* confirmed send contracts." Mr. Langton contended that this closed the bargain and concluded the contract. For the same reasons as stated above, I do not accept this contention. The final stage, namely, the submitting of the contract by the defendants as sellers and its approval by the plaintiff as buyer, was still not reached. The preparation of the contract had been proceeding. On the 19th Nov. the brokers, after telephone conversation with the defendants, wrote to them,

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enclosing a *pro forma* contract for the defendants to amend so that a clean copy could be drafted and sent to Rostock. The defendants replied with various suggestions, all of substance, such as amount of deposit, inspection, &c., and on the 23rd Nov. the brokers, having sought to embody those suggestions on a clean draft, sent it by letter to the defendants for their approval. On the 24th Nov. the defendants, having made various amendments, returned it to the brokers. On the following day they telegraphed to the brokers referring to the doubt that the German authorities would pass the boilers and added: "We cannot allow later than noon Saturday for definite acceptance of steamer on terms of contract posted yesterday." They confirmed this by letter. Mr. Sloan, on receipt of this telegram, telegraphed and spoke to Mr. Frew, pointing out that the contract could not reach the plaintiff till Saturday afternoon and suggested further time, say, till Monday afternoon. There was some dispute in evidence as to what was actually said. I find that Mr. Frew said he would do nothing till Monday, and suggested the contract should be sent by air mail, as indeed it was sent by Mr. Sloan. The reason of Mr. Frew's urgency was that another set of brokers, Wait and Dodds, had approached him with offers from another buyer, which were not indeed at that stage very satisfactory. Mr. Sloan sent a clean copy of the contract as altered by Mr. Frew to the plaintiff with a letter saying that he was only allowed till Saturday to say whether he accepted the steamer on the enclosed form of contract. He also sent another copy of the contract to the defendants. On the same day Wait and Dodds wrote, offering on behalf of their clients to buy the steamer for 8000*l.*, payment by certain instalments, or 7700*l.* cash, and the defendants replied that a meeting of directors would be held on the Monday, the 29th Nov.

The plaintiff did not receive the brokers' letter sent on the 25th Nov. till the morning of Sunday, the 28th Nov. Having regard to the early date fixed for the trial he was not present at the trial, but there is no ground for suggesting that he was not anxious to buy the steamer if the boilers would satisfy the German authorities, and he wired on the 27th Nov., as already stated, as soon as he ascertained that fact. He may have been puzzled to receive on the Sunday a letter limiting his time to reply to the previous Saturday and seems to have waited till the Monday to hear further. The position on the Monday morning, the 29th Nov., was that the offer, whether open for Saturday or up to noon Saturday, had lapsed. About 10.30 a.m. Mr. Sloan spoke to Mr. Frew on the telephone and told him of the telegram from the plaintiff, "*City* confirmed send contracts." Mr. Frew was willing to close with the plaintiff if it appeared that the plaintiff accepted the contract sent him, but it was obvious he had not received it. What was said at the conversation is disputed, and I

have to decide what version to accept. I have seen both Mr. Sloan and Mr. Frew in the witness box, and I am satisfied I ought to prefer the evidence of Mr. Sloan. I do not question the honesty of either witness, but Mr. Sloan appears to me to be more accurate and precise in recollection. Immediately after the interview he sent a telegram to the plaintiff: "Owners must have your telegraphic acceptance of contract sent our letter 25th before four o'clock to-day otherwise will accept an offer by others who are waiting your reply telegraph instantly whether you agree contract which please sign and post to-day sure to us along with deposit." The telegram was signed with the brokers' telegraphic name. I find that that telegram was despatched by Mr. Sloan with the authority of Mr. Frew given on the telephone. Mr. Frew denies that he gave any such authority, but apart from the personal impression I have formed of the two witnesses I cannot think that so careful a person as Mr. Sloan would have sent such a telegram without clear authority to do so. The telegram reached the plaintiff at 1.40 p.m. (German time) and he at once sent in reply the following telegram to Mr. Sloan: "*City* accepted contract deposit posted," and he in fact the same day sent by post the contract signed and a cheque for the deposit of 1500*l.* Mr. Sloan passed on to Mr. Frew by telephone about 2.50 p.m. the contents of the telegram. I hold that the contract was thereby concluded. I do not think that this result is affected by certain intervening circumstances. Mr. Frew saw Mr. Dodds at 11 a.m. just before his directors' meeting and after the directors' meeting informed Mr. Dodds (about 11.30) that he could have till three p.m. to conclude the purchase of the *City* on the proposed cash basis. At the same time he telegraphed to Mr. Sloan that as other buyers were insisting on immediate reply therefore negotiations with the plaintiff must be subject to steamer being free. The latter phrase means, I think, not being under firm offer elsewhere. Mr. Sloan at once telegraphed this to the plaintiff, and at the same time telegraphed in reply to Mr. Frew protesting that he was entitled to five o'clock as arranged. Mr. Frew, I think, realised, after the firm offer was given to Mr. Dodds, that he had put himself in a difficult position and sought to revoke his offer to the plaintiff, as he might have done if the revocation had reached the plaintiff before the plaintiff sent off his acceptance. It did not, however, do so. Having regard to the view I have expressed as to the position of the brokers, it seems to me upon well-known principles applying to contract by correspondence that the revocation did not affect the plaintiff till it actually reached him, whereas his acceptance was effective when it was despatched. Mr. Dodds, for the other buyers accepted the firm offer before three p.m. Some excited and strained passages occurred on the telephone between Mr. Sloan and Mr. Frew. There was still in law no contract between the other buyers and the defendants,

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because various terms of the contract had to be settled, but this was done a few days later. The defendants refused to give any instructions regarding the deposit of 1500l. received by Mr. Sloan for the plaintiff, and repudiated any contract with the plaintiff who, on the 24th Dec. last, issued the writ in the action.

I have found that a contract for the sale and purchase of the *City* was concluded between the defendants and plaintiff, but it is contended that it is not enforceable by reason of sect. 4 of the Sale of Goods Act 1893. It is curious that it has not been decided whether a ship comes within the description of goods under that section. Sect. 62 of the Act defines goods as "All chattels personal other than things in action and money." A ship is clearly a chattel personal. It is true that some provisions of the Act do not apply to it, for example, the rule as to market overt. A British ship is also a chattel which is subject to special rules as to registration and transfer under the Merchant Shipping Act, though a British ship sold to a foreigner would come in a different category. But sect. 4 of the Act relates to the antecedent contract, not the actual transfer, and ought logically to apply to so valuable a chattel as a ship. A contract for the building of a ship was held by Mr. Justice Romer to be a contract for the sale of goods within the Act in the case of *Re Blyth Shipbuilding Company* (134 L. T. Rep. 643; (1926) 1 Ch. 494). (Compare *Laing and Sons Limited v. Barclay, Curle, and Co. Limited* (97 L. T. Rep. 816; (1908) App. Cas. 35). I hold that sect. 4 of the Act applies.

Mr. Langton contended that the section was satisfied by the payment of the deposit which was sent by the plaintiff to the brokers. But to constitute part payment not only must the money be sent by the buyer, but also either accepted or in some way acknowledged by the sellers so as to constitute a recognition by the sellers that there is a contract: (*Davis v. Phillips*, 24 Times L. Rep. 4; *Parker v. Crisp* 121 L. T. Rep. 598; (1919) 1 K. B. 481). The contract here provided that the deposit was to be held by the brokers pending completion of the contract: hence the brokers received it, not as agents for the defendants, but as stakeholders, and the defendants expressly declined to give any instructions with reference to it. I hold there was no part payment within the section. But I hold there was such a note or memorandum in writing of the contract as the statute requires. The form of contract which the defendants altered in order that it (or a clean copy) should be sent to the plaintiff as the final offer for his acceptance was headed with their name as sellers; they instructed the broker (by letter dated the 25th Nov. 1926) to inform the buyer that he must accept the vessel on the terms of the *pro forma* contract they had prepared or altered; the brokers sent on a copy under these instructions. I think it must be held that either the *pro forma* contract so headed and adopted and altered by the defendants or the letter in terms referring to it

as their offer, or both, constitute an offer in writing, which, if accepted, either orally or in writing, would constitute a written note or memorandum. But Mr. Miller contended that the offer of the 25th Nov. lapsed and is immaterial. But I have found that the first telegram sent to the plaintiff on the 29th Nov. was sent with the defendants' authority, and thereby the offer was reinstated. The telegram is signed by the brokers, who at this stage, in my opinion, were the defendants' agents and signed the telegram which in terms refers to the *pro forma* contract. Indeed, I think the mere delivery of the *pro forma* contract created or recognised by the defendants in the way I have indicated, would constitute delivery of a note or memorandum in writing signed by the defendants. The signature may be constituted by a written or printed heading if adopted or recognised by the party to be charged: (*Scheider v. Norris*, 2 M. & S. 286; *Evans v. Hoare*, 66 L. T. Rep. 345; (1892) 1 Q. B. 593).

I think the contract is enforceable. It remains to consider what is the proper remedy. The plaintiff claims a decree of specific performance; this claim is strongly contested on behalf of the defendants. It is curious how little guidance there is on the question whether specific performance should be granted of a contract for the sale of a ship. Sect. 52 of the Sale of Goods Act gives the court a discretion, if it think fit, in any action for breach of contract to deliver specific or ascertained goods, to direct that the contract shall be performed specifically. I think a ship is a specific chattel within the Act. In *Fry on Specific Performance*, p. 37, note 4, it is said a ship is probably within the general principle—see *Claringbould v. Curtis* (1852, 21 L. J. Ch. 541)—which, however, is the case of a barge and contains no distinction of principle. *Hart v. Herwig* (29 L. T. Rep. 47; L. R. 8 Ch. App. 860), seems to imply that a man who has contracted to purchase a ship is *prima facie* entitled to have it—that is, by an order for specific performance. In the present case there is evidence that the *City* was of peculiar and practically unique value to the plaintiff. She was a cheap vessel, being old, built in 1892, but her engines and boilers were practically new, and such as to satisfy the German regulation, and hence the plaintiff could, as a German shipowner, have her at once put on the German register. A very experienced ship valuer has said that he knew of only one other comparable ship, but that may now be sold. The plaintiff wants the ship for immediate use, and I do not think damages would be an adequate compensation. I think he is entitled to the ship and a decree of specific performance in order that justice may be done. What is the position between the defendants and the other buyers, whose contract was later in time than that of the plaintiff, is irrelevant in this action.

I have not overlooked the argument of Mr. Miller, based on the clauses in the contract which provide that before completion of

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WALLEM'S REDERI A/S. v. WILLIAM H. MULLER AND CO. (BATAVIA).

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payment of the balance of the purchase price the buyer was to have the option of inspecting the vessel afloat and of requiring the sellers to place her in dry dock for inspection, and of requiring the sellers to repair certain damage, if any were found. Mr. Miller contended that as the court will not decree specific performance of a contract to do work or perform services, these clauses constitute a bar to a decree here. But I think this contention is not sound. The defendants are neither dry-dock owners nor ship-repairers. All they could be required to do would be to give the appropriate orders to a dry dock owner or ship repairer if necessary. But the plaintiff may not require inspection or dry-docking (which, if no damage be found, will be at his own expense), and no damage requiring repairs may be discovered. Thinking, as I do, that justice can only be satisfied by an order for specific performance, I do not find in the clauses referred to, the only ones relied on by Mr. Miller, any ground why I should not make the decree. There will be judgment, therefore, for the plaintiff, with a declaration that he purchased the *City* from the defendants—I do not make the declaration exactly in the terms stated—and a decree that the contract shall be specifically performed, and costs.

Solicitors for the plaintiffs, *Stokes and Stokes*, for *Bramwell, Clayton, and Clayton*, Newcastle-on-Tyne.

Solicitors for the defendants, *Botterell and Roche*, for *Botterell, Roche, and Temperley*, Newcastle-on-Tyne.

Friday, March 11, 1927.

(Before MacKINNON, J.)

WALLEM'S REDERI A/S. v. WILLIAM H. MULLER AND CO. (BATAVIA). (a)

Charter-party—Dead freight—Failure of the charterers to load a full and complete cargo—Implied term that shipowner can minimise loss to the charterers by shipping other cargo—Voyage delayed for the purpose—Deviation.

Where the charterer fails to fulfil his duty in shipping the cargo that he is bound to ship, there is an implied term in any charter-party that the shipowner is at liberty to fill up the space, provided he acts reasonably in doing so; that is, if he diminishes his own loss due to the fault of the charterer and so diminishes the damages for which the charterer might be liable. The time reasonably taken in loading the substituted cargo is not a delay amounting to deviation in the sense of an unauthorised delay in carrying out the voyage.

ACTION tried before MacKinnon, J. (Commercial List). The facts are taken substantially from the judgment of his Lordship.

The plaintiffs, a Norwegian company, were the owners of the steamship *Storviken* and the

defendants, a trading company with headquarters at Batavia, were the charterers of the whole vessel under a charter-party dated the 27th July 1922. By the terms of the charter-party the defendants agreed to load not less than 6460 tons or more than 7140 of sugar in bags at not more than four ports in geographical rotation on the north coast of Java, and they bound themselves to ship the same. When loaded the steamer was to proceed to Port Said for orders and thence to proceed to not more than three safe ports in the United Kingdom in geographical rotation; the rates of freight varying according to the number of ports at which the steamer would be called upon to discharge. There were also clauses under which the steamer could assist other vessels in distress or deviate for the purpose of saving life. The vessel went to Batavia for orders and was directed to proceed to Sourabaya where the charterers loaded 5600 tons of cargo only, as they were unable to get more. It was agreed that this was not a full and complete cargo of sugar and it was also agreed that 6850 tons was the full carrying capacity of the vessel and therefore *prima facie* there was a breach by the defendants in respect of 1250 tons which they did not load. It was agreed that the 5600 tons should be discharged part at Madras, part Aden, part at Alexandria, and part at Bristol. It was also agreed that Madras should be treated as though it were one of the safe ports in the United Kingdom, and thus the rate of freight for three ports—34s. per ton—less the expenses of earning the freight on 1250 tons was the measure of damages for breach of the charter-party. When it became evident at Sourabaya that no more cargo could be obtained, it was agreed between the shipowners and the charterers that the vessel be at liberty to take in other cargo at Madras and the freight so earned was to be shared between them, the charterers nevertheless remaining liable for the full dead-weight. No cargo was available at Madras and the vessel proceeded on her voyage. On arrival at Alexandria an opportunity offered to load 1000 tons of oil cake. This was brought to the notice of the charterers, but without asking for or obtaining their assent, the shipowner loaded this cargo on which they made a profit. The loading of this cargo occupied some three days.

Clement Davies, K.C. and *Sir Robert Aske* for the plaintiffs.

Somervell for the defendants.—It is admitted that the charterers failed to load 1250 tons of cargo. But on the authorities delay was deviation; a delay had occurred at Alexandria without the assent of the charterers and therefore the shipowners were deprived of their rights to dead-freight.

MacKINNON, J. [His Lordship stated the facts and continued].—The plaintiffs now bring their action for damages for the defendants' breach of the contract in not loading the 1250 tons. The defendants set up, so far as I know, an entirely novel defence, namely, that the

(a) Reported by R. A. YULE, Esq., Barrister-at-Law.

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action of the shipowners in loading 1000 tons of cargo at Alexandria involved a delay of the ship for the period of loading; that that delay constituted a deviation, that is to say, a breach of their obligation to fulfil the charter-party voyage with reasonable dispatch; and that by reason of that deviation or radical breach of the charter-party the shipowners are deprived of the benefits of the terms of the charter-party, and, among other things, are deprived of their right of action which had already accrued to recover damages for the charterer's failure to load the 1250 tons. So far as I know it is a novel form of defence—and at first sight it sounds a somewhat bold attempt. But it has been argued with great ability and complete logic by counsel for the defendant because he did not shrink from carrying his contention to the point, in answer to my suggestion, of saying that supposing that proceedings in court could be ideally hastened, supposing that when the ship left Sourabaya the plaintiffs sued for their then accrued claim for damages for dead-freight and the action came on before the completion of the voyage, it would have been a defence to the charterers to say: "This action is prematurely brought, you have no cause of action because it does not follow that you will not deviate before the voyage terminates, and if you deviate you will then destroy and be deprived of your right of action." The action of the shipowners in loading the cargo at Alexandria, although they may not have intended it at the time, must be taken, I think, as an act done in mitigation of their claim for damages for getting a short cargo at Sourabaya, and there are certain cases in which the duty of a shipowner who has not been furnished with the contractual cargo, to mitigate damages by securing other cargo, has been spoken of. I doubt whether in a sense there is any such duty.

The real point is that in answer to a claim for damages by the shipowner for the whole freight which the charterers have not shipped, it is open to the charterer to say: "The whole freight is not really your measure of damage because the pecuniary loss would not have been imposed upon you by our action or fault since you could have mitigated the pecuniary loss by taking other cargo in the space which we left vacant. If you had taken other cargo you would have diminished your damages, perhaps wiped them out altogether, and it is only to that more limited extent, by reason of such diminution or possible diminution, you have in fact suffered pecuniary loss." But whether this desirability or duty of taking in cargo and filling up space that is left vacant is or is not to be called a duty arising under the charter-party, obviously it is regarded as a matter which the shipowner is entitled to do, and whether he is bound to do it or not, he is bound in his own interest to do it because otherwise he would not be able to recover the damages he claims. It is not necessary in this case to decide various points that are involved in the arguments put forward for the defence.

In the first place I will assume, without deciding it, that the delay at Alexandria during the three days while the other cargo was being loaded would constitute deviation and have the effects upon the rights of the parties under the charter-party that a deviation has. Secondly, I will assume, although I do not decide it, that one of the effects of such a deviation would be to destroy an existing cause of action that had accrued to the shipowner guilty of the deviation previous to its taking place. But I think that the real position here and the point on which the defence fails, is upon the question whether there was a deviation at all in the circumstances. Deviation, it is logically obvious, means a departure from the agreed *via* by which the ship is to carry out the charter voyage. It has been extended to include not merely its proper meaning but to extend to delay in the carrying out of the voyage beyond the agreed period of time—usually the shortest reasonable time in which the voyage can be carried out—for which the parties have stipulated the voyage shall take place. In both of these cases the deviation or delay is of course a breach of that which is expressed or implied in the contract as the route or the period of time by which or during which the voyage is to be accomplished. If, for instance, there is an express liberty to deviate to certain ports in the charter-party then it becomes part of the agreed route, and so as regards delay: if there is (as there is here for instance) an express liberty to tow vessels in distress, then the time occupied in towing such a vessel which would obviously be longer than the time occupied in doing the same distance without a vessel in tow, becomes part of the agreed time within which the shipowners stipulate that he shall be allowed to perform the voyage. Besides the express directions as to route and time contained in any charter-party there may be implied stipulations. Obviously if it were not expressed there is in any charter-party an implied liberty to deviate for the purpose of saving life, and that involves the implied liberty to delay the voyage while engaged in this task. Whether or not it is really proper to analyse this supposed duty of mitigating damages by taking other cargo when a claim for damages has arisen—whether it is strictly logical to put that as a duty imposed upon the shipowner—at any rate it is, one may call it, a moral duty, and the carrying out of such an action is for the benefit of the charterer, because it goes to mitigate the amount of damage that he otherwise would be responsible for by his failure to ship the full cargo.

Applying the principles which were laid down in *The Moorcock* (6 Asp. Mar. Law Cas. 373; 60 L. T. Rep. 654; 14 Prob. Div. 64), and cases like that which one has to apply in order to ascertain whether there is or is not an implied term of the contract, I think that it is an implied term of this or any other charter that if the charterer fails to fulfil his duty in shipping the cargo that he is bound to ship, the shipowner is at liberty to

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fill up that space if he is acting reasonably in doing so; and the best test of the reasonableness of that is, if to do so will diminish his pecuniary loss from the fault of the charterer and so diminish the damages that the charterer will be liable for, and if he has (as I think he has by implication) that liberty to take in other cargo, acting reasonably, to fill up the space left vacant, there then must be also an implied liberty to him to delay the charter voyage by the period of time reasonably and necessarily occupied in taking in that substituted cargo. If that be so, and I think that is the true way of looking at it, there was not by this delay in order to take in this cargo at Alexandria any deviation in the sense of any unauthorised delay in carrying out the voyage because it was only a delay that was impliedly authorised by this implied term of the charter-party. I hold that there was no deviation and that this defence fails.

Judgment for the plaintiffs.

Solicitors: *Hutchinson, Sons, and Gomm; R. H. King and Co.*

March 23 and 24, 1927.

(Before MACKINNON, J.)

HEYN AND OTHERS v. OCEAN STEAMSHIP COMPANY LIMITED. (a)

Carriage of goods by sea—Bill of lading—Loss of and damage to goods by theft while being discharged—Independent contractors employed as stevedores for discharge of cargo—Agent or servant of the carrier—Liability of the shipowners—Carriage of Goods by Sea Act 1924 (14 & 15 Geo. 5, c. 22), schedule, art. III. (2) and art. IV. (2) (q).

Both at common law and under art. III. (2) of the schedule to the Carriage of Goods by Sea Act 1924, the duty of the carrier is to "discharge" the goods carried. The Act does not alter the common law and unless the defendant can bring himself within some exception, he will be liable for a loss which cannot be explained. If he employs an independent contractor to carry out the discharge of the goods, such contractor becomes his "agent or servant" within the meaning of art. IV. (2) (q) of the schedule to the Act.

ACTION tried before MacKinnon, J. in the Commercial List.

The plaintiffs were the owners of a number of cases of cloth shipped in the defendants' steamship *Eumaeus* in Dec. 1925 for carriage from Liverpool to Shanghai. By the bill of lading the defendants were to have the protection of the Carriage of Goods by Sea Act 1924. The steamer arrived at Shanghai in the second week of January 1926 and commenced discharge on the day after her arrival. The work of discharge was carried out by stevedores who were

independent contractors. At night the ship was brilliantly lighted and a strict watch was kept. In the dark hours of the morning of the 13th Jan. 1926 the quartermaster on watch saw some Chinese coolies dragging cases of cotton across a barge at the side of the steamer towards a junk. The alarm was given and it was discovered that six cases of cloth were missing. Investigation showed that the preparations for the theft were elaborate and could only have been made by persons conversant with the interior structure of the steamer. The police recovered three cases the contents of which were badly damaged, but the other three were not traced. The plaintiffs sought to recover 82% the value of the goods lost and damaged. The defendants pleaded the protection of the Carriage of Goods by Sea Act 1924. Art. III. (2) of the schedule provides: "Subject to the provisions of art. IV. the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried." Art. IV (2): "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from. . . (g) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage." It was contended that the stevedores were not the agents or servants of the defendants, and that the evidence showed that the ship's officers and crew had taken every precaution to guard the property.

Raeburn, K.C. and H. Atkins for the plaintiffs.

Miller, K.C. and James Dickinson for the defendants.

MACKINNON, J.—In this case the plaintiffs as endorsees of a bill of lading sue the defendants for the loss of or damage to two cases of cloth. There were eight cases of cloth consigned to the defendants each case containing six rolls of cloth, and it is in respect of two of those that this action is brought.

The defendants rely by way of defence upon the Carriage of Goods by Sea Act 1924 and upon rule 2, sub-sect. g, of art. 4 of the schedule to that Act.

This vessel was discharging cargo at Shanghai on the 12th Jan. with her starboard side alongside the quay. At 3 o'clock on the morning of the 13th Jan. the quartermaster on watch on deck happened to look over the port side, which is the river side, and saw some men upon a lighter, which was lying alongside the port side of the vessel, dragging or carrying something across that lighter to a native junk which was lying outside the lighter. Suspecting some thieving from the ship he raised an alarm, and the men made off in the junk and were pursued by the police. They escaped, but eventually one or other of them was found by the police, and three bundles of cloth were

(a) Reported by R. A. YULE, Esq., Barrister-at-Law.

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discovered in their possession. Investigation having been made, the following facts were discovered. These cases of cloth had been stowed and carried in the ship in the deep tank underneath what is called the after centre castle. It was apparent from traces of their operations that what had happened in the course of the night was that a man or men had, down in that deep tank, opened some of these cases of cloth and had then lifted or pulled the rolls of cloth up the ladders to the space, called the after centre castle, above this deep tank. They had then taken them through a door which goes from that after centre castle into the starboard coal bunker, they had dragged them across the saddleback into the port coal bunker, and they had then dragged them to a door in the side of the ship on the port side of that port coal bunker, and so lowered three of them into the lighter, and at that point they were discovered and their plot frustrated. I am satisfied on the evidence that the door between the after centre castle and the starboard coal bunker was securely fastened when the ship ceased discharging at 5.0 or 5.15 on the 12th Jan., and also that the door at the side of the port bunker opening out to the side of the ship was also securely fastened. The door between the after centre castle and the starboard coal bunker is fastened on both sides, that is to say, in order to open it there must be some men working on both sides of the door, and it is a necessary inference from what I have found that these people who were engaged in this robbery were at least two or more, and that one or more of them must have been on each side of the door, that is to say, someone remained concealed on the cargo side of the bunker and someone remained on the bunker side of the door when the discharge had ceased on the evening of the 12th Jan.

The stevedores of course had been at work in this hold during the 12th Jan. There was evidence, and I accept it as accurate, of the careful precautions taken by the defendants to guard against anything in the way of pilfering. There was a member of the English crew down in this cargo space watching the coolies at work, and when work finished for the day he told me, and I accept it, that he went through his usual duty to the best of his ability, seeing that all the stevedore workmen went ahead of him up to the ladder, and he then saw that the door into the starboard coal bunker was properly shut. Further precautions were also taken for guarding the ship during the night. There was an officer on watch and a quartermaster on watch. The ship was brilliantly lit by arc lights, and that the precautions taken on deck during the night were proper and efficient is, I think, shown by the fact that at the critical moment when these depredators were on the eve of the most successful part of their enterprise, namely, taking the stuff away in their native craft, they were at that moment detected and stopped.

In these circumstances the question arises whether the defendants are liable in respect of

this loss. I should have said the nature of the loss is this. The thief or thieves, probably thieves, cut up a considerable amount of this cloth in order to use it as ropes to haul up the other bundles out of the deep tank, and then to haul them for this considerable distance through the starboard bunker and over the saddleback. They had hauled up altogether sixty-six bales, which were found on the port bunker ready to be taken away in the junk, but there were missing from the cases down in the hold six more, a total of seventy-two bundles of cloth. Three bundles were recovered by the police from the men, who fled, which left three bundles unaccounted for, and those three bundles probably are equivalent to the amount of cloth that the thieves tore up to use as ropes to assist them. It is really in respect of the damage to the plaintiffs' property by the cloth being torn up and soiled by being dragged through the bunker and so forth, damage to the cloth rather than its actual disappearance, in respect of which this claim arises.

It is agreed that the amount of damage sustained by the plaintiffs, if the defendants are liable is 82*l.*, a not very important amount; but it is said this case is to be treated as a test action.

Now the whole question depends upon, firstly, the interpretation of this clause in the Schedule of the Carriage of Goods by Sea Act, and secondly, whether upon the facts that clause properly interpreted relieves the defendants. That provides this: "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . (g) any other cause arising without the actual fault or privity of the carrier or without the fault or neglect of the agents or servants of the carrier." It is admitted that this loss or damage arose without the actual fault or privity of the defendants; and upon the clearest meaning of words in the English language that would appear to provide, and in my judgment does provide, a defence to the defendants, because these words are: "Any other cause arising without the actual fault or privity of the carrier or without the fault or neglect of the agents or servants of the carrier"; and it says: "or," and does not say "and." It has been suggested—it is suggested, I see, by Mr. Porter and Mr. McNair in the last edition of *Scrutton on Charter-parties*—that the word "or" must mean "and," and they add: "It is inconceivable that a carrier, whose fault or privity caused a loss, should escape liability because his servants had not been negligent"; and reversing that to apply to this case, they would say: "It is inconceivable that a carrier, whose servants or agents have been negligent, should escape liability merely because there has been no actual fault or privity on his part." The truth is, the suggestion is not that "or" must mean "and"; it is quite impossible for "or" ever to mean "and." The suggestion really is that "or" was printed or used by mistake for "and," and that the terms of the

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Act of Parliament ought to be amended by substituting the word "and" for the word "or." Now I am not at all satisfied that it is at all the duty or the right of any judge to alter the words of an Act of Parliament, more particularly when that alteration arises, not by reason of the necessity of making sense of the defective language used in the Act, but by reason of a consideration of what is supposed, or may be supposed, to have been the policy of the Act; and this suggestion that "or" was used by mistake where "and" is meant, is really a suggestion based upon the supposed idea as to the policy of the Act. I am not at all satisfied that it would be right to make this alteration and to treat this section as though "or" should have been printed "and." But this point was not argued before me and was not in argument relied upon by the defendants. I observe that the defendants, having set up the rule, allege as grounds for bringing themselves within it that the cause of the said loss arose without the actual fault or privity of the defendants, and (or) without the fault or neglect of their agents. The whole case has been argued before me on the assumption that this clause ought to be read as though "and" was substituted for "or." In those circumstances, I propose to deal with the case upon that basis, though I desire to add that so far as I am concerned I do not regard this as any decision upon my part, and if the point were raised again before me and were taken and argued, I should feel myself at liberty to reconsider the question that I have indicated, namely, whether it is possible for a court to amend the words actually used by the Legislature so as to alter the word "or" and substitute the word "and," it being in my view quite impossible for "or," a disjunctive word, ever to mean "and," a conjunctive word.

Upon that basis there is this further to be noticed. Mr. Raeburn, for the plaintiffs, relied very strongly upon the fact that this section goes on: "But the burden of proof shall be on the person claiming the benefit of this section to show that neither the actual fault or privity of the carrier, nor the fault or privity of the agent contributed to the loss or damage." I do not think really those words add anything to the position that would exist without them. In any case, quite apart from express provision, this *prima facie* is a loss or damage which, if unexplained, would be a liability of the defendants, and if the defendants are to escape from that liability they must show that they come within the statutory exception, and, therefore, even if these words about the burden of proof had not been inserted in that clause at all, I think the common law would impose that burden upon the defendants. Therefore it is not necessary to say any more about that.

Now have the defendants established that this loss through the action of these thieves occurred without the fault or neglect of the agents or servants of the carrier? I have said, and I think it is established, that to the best of their ability the ship's officers and the

English crew took all reasonable precautions that they could to guard against what in Shanghai unhappily is notorious, namely, the extreme pertinacity and ingenuity of native thieves. But there is this aspect about it, whoever were the people engaged in this theft they must have had a considerable knowledge of the inner workings and geography of this vessel. To begin with, presumably they knew that there was this cargo down in this place which was the sort of stuff worth taking and capable of being taken. They must have known of this rather difficult and tortuous passage from that lower hold where the cargo was, up through the hatches into the centre castle space, through the door again of the starboard bunker and over the saddleback and out through the door in the port side of the ship, and the people who seem to be most likely to have that knowledge and be concerned in it were some of the stevedores who were working in the hold. Furthermore, in accordance with the account that was given of the precautions that were taken one or other of these stevedores, either as actual wrongdoers or as confederates, seem to be the most likely to have been able to conceal themselves in the way I have described which was necessary to carry out this elaborate plot. On the facts I am inclined to draw the inference that probably the people who were doing this were some of the stevedores, or, at any rate, were in confederation with them, but it certainly is not established that they were not. The stevedores were the actual servants of an independent Chinese stevedore contractor. Some sort of agreement was made by the shipowners with a firm or company called the Chop Dollar Stevedores, 71, Hwa Kee-road, Hankow, and that firm did the work through their workmen, and rendered an account which is before me, for discharging the cargo.

I think the further question then arises whether those stevedores are to be treated as the agents or servants of the shipowners within the meaning of this clause. It is perhaps an arguable point, but I think that they are. It was suggested by counsel for the defendants that the agents or servants of the carrier did not include the employees of an independent contractor who was doing this work of discharging the ship. But I think that is putting too narrow a meaning upon these words "agents or servants of the carrier." The discharging of the cargo out of the ship so as to be delivered to the consignees is part of the duty of the carrier at common law and part of the duty which is referred to in the earlier part of this schedule as the duty of the carrier, namely, sect. 2 of art. III. "Subject to the provisions of art. IV., the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." It is, therefore, one of the duties of the carrier to discharge the goods on which this art. IV. imposes a limitation of his liability and if he employs an independent stevedore contractor to carry out that part of his duty,

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namely, the duty of discharging the cargo, I think the workmen of that independent stevedore contractor are the agents or servants of the carrier within the meaning of this provision.

The result is that I think the defendants have failed to discharge the onus of proving that this damage occurred without the fault or neglect of their servants or agents in the sense that they have not proved that it did not occur without the fault or neglect of some or other of the stevedores. In the result I think that there must be judgment for the plaintiffs for the agreed amount of 82*l.* with costs.

Solicitors: *Denton, Hall, and Burgin; Stokes and Stokes, for Cameron, MacIver, and Davie, Liverpool.*

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 3, 4, and 9, 1927.

(Before Lord HEWART, C.J., BANKES and SCRUTTON, L.JJ.)

ALBERT E. REED AND CO. LIMITED v. PAGE, SON, AND EAST LIMITED AND ANOTHER. (a)

Seaworthiness — Barge — Implied warranty — Doctrine of stages — Renewed warranty at commencement of new stage — Unfitness of barge after completion of loading stage — Overloading — Liability of lightermen.

The plaintiffs, who were cargo-owners, had employed the defendants, a firm of lightermen, to lighter 500 tons of wood pulp which had been brought by the steamship *B.* from Oslo to Erith Buoy. The defendants were to provide barges to convey the cargo of wood pulp from Erith Buoy to Nine Elms, on a journey to Farncombe, which was near the river Thames. For that purpose, the defendants sent three barges named the *Jellicoe*, the *May*, and the *Jessie*. The total carrying capacity of the three barges exceeded 500 tons. The first lighter to be loaded was the *Jellicoe*, which had a capacity to carry 170 tons of cargo and no more. In the result, 193 tons of wood pulp were loaded on the *Jellicoe*, and the learned judge found, and it was admitted that that quantity was excessive. That made the barge so low in the water that certain cracks in her upper structure admitted water, and during the night after loading her, she sank while still alongside the *B.*, and the cargo of 193 tons of wood pulp which was on her was lost.

Held, that the contract in this case was to collect and carry the cargo of wood pulp; that the

warranty of seaworthiness had been complied with so far as the loading stage of the adventure was concerned; but that the loading stage had been completed and a new stage of the adventure had begun; that at the beginning of the new stage there was a renewed warranty of seaworthiness of the barge for the next stage which was either to lie in the river or be towed; and that this warranty was broken by the overloading of the barge so as to render it unfit either to lie in the river or to be towed. The defendants were, therefore, liable to the plaintiffs for the loss of the cargo because the overloading which made the barge unfit to undergo the perils which might arise at that stage of the adventure was a breach of the warranty of seaworthiness.

Decision of Roche, J. (*infra*) affirmed.

APPEAL from a decision of Roche J.

The plaintiffs claimed to recover damages from the defendants for the loss of a cargo of wood pulp sunk in a barge in the river Thames. The plaintiffs had employed the defendants, who were a firm of lightermen to lighter 500 tons of wood pulp from the steamship *Borgholm*, on its arrival at Erith Buoy from Oslo to Nine Elms, on a journey to Farncombe. The defendants sent three barges having between them a total carrying capacity of over 500 tons.

The first barge to be loaded was the *Jellicoe*, which had a carrying capacity of only 170 tons of cargo. But about 193 tons of wood pulp was placed on board this barge. Water continuously entered through cracks in her upper structure, and she sank with the cargo of 193 tons of wood pulp while waiting in the river Thames to be towed to Nine Elms.

The facts are fully stated in the judgment of Roche, J. (*infra*).

ROCHE, J.—This is a claim by cargo owners against two sets of defendants, and the claim is a claim for damages for loss of the plaintiffs' cargo. The action is brought against the first defendants, who are lightermen and who were using, for the purpose of lightering of the plaintiffs' goods, a barge or lighter called the *Jellicoe*, which was hired by them from somebody else, but who for temporary purposes may be regarded as the owners or persons responsible for its condition. The second defendant is the stevedore who was engaged in discharging the plaintiffs' goods from the ship and stowing them in the lighter, which was under the management and control of the first set of defendants. The goods in question consisted of about 193 tons of wood pulp. What happened with regard to the wood pulp in question was this. It was part of a consignment of about 500 tons, which came in a ship called the *Borgholm* from a Scandinavian port to the river Thames. The plaintiffs employed the first defendants, whom I will afterwards refer to as the lightermen, to lighter the 500 tons in question from the

(a) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

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Borgholm when it arrived at Erith Buoy to some other place, namely, Farncombe, on or in the neighbourhood of the river Thames. The lightermen sent for the purpose three barges, the *Jellicoe*, the *May*, and the *Jessie*, which between them had more than sufficient carrying capacity to carry 500 tons. The persons engaged in discharging the cargo from the ship were in the employment of the second defendant, Mr. Jarrold. The persons responsible for stowing the cargo in the lighters were the persons in the lighters, but they in their turn employed the second defendant, Mr. Jarrold, to stow the goods in the lighters on their behalf. The first lighter which was filled or loaded with the wood pulp in question was the *Jellicoe*. The *Jellicoe* was a barge which was fitted for the carriage of 170 tons of cargo, and no more: when I say "no more" I mean no substantial quantity in excess of 170 tons. The man Arnold was sent with two barges, which were the *Jellicoe* and the *May*. Parenthetically, let me say that I find that a witness called Newman, whose evidence I otherwise accept, was entirely mistaken in thinking that the other cargo which was under the charge of Arnold was the *Jessie* and not the *May*. Arnold was instructed, when he was sent in charge of these two barges by means of a loading note, and that loading note specified that the *Jellicoe* was meant to take 170 tons, and the *May* was to take, so the note said, 130 tons. The note did not refer to the *Jessie*, and I do not think that Arnold had any really clear idea as to what arrangements were made or were going to be made for the balance of 200 tons which obviously, out of the 500 tons had to be taken in some barge or barges other than those two which were under his charge. The loading of the barge *Jellicoe* was in progress on the 17th Dec. 1925. I have said that Arnold was sent in charge of the two barges. There was nothing wrong in that but for the fact, as it turned out, that the *Jellicoe* and the *May*, on the afternoon of the 17th Dec., were being loaded with cargo from the *Borgholm* at the same time and in different parts of the side of the *Borgholm*. They were not far apart, about 50ft. he said, but still, they were apart, and Arnold could not be on both of these barges at once; and accordingly he did not, and was not, tallying the amount of the cargo that was going into either one or the other of those barges. That fact had a good deal to do, in my judgment, with what subsequently happened. But what subsequently happened was this, that more than 170 tons and rather more than 190 tons—namely, 193 tons—were put on board the *Jellicoe* and that was too much. The consequence of that was that ultimately, somewhat before midnight on the night of the 17th Dec. 1925, the *Jellicoe* filled and sank with the cargo on board of her, the 193 tons of wood pulp were lost, and that is the loss complained of in this action.

The action as framed against the first defendants, originally depended on a charge of unseaworthiness. The plaintiffs did not rely on

negligence on the part of the lightermen for the very good reason that they were aware of a matter which has not been contested here, that the contract was, in the course of dealing between the parties, subject to the terms of the London Lighterage Clause. The London Lighterage Clause in the form that it at present assumes, is from henceforth attached to my copy of the pleadings as if it were set out therein. That clause may be summarised by saying that it does excuse the lighteragemen from risks in general to which the goods may be subject, even though those risks are brought into operation or caused by the negligence of the lightermen's servants. But I should also say that it is not really disputed that the clause in question does not include among its exceptions anything excusing the lightermen from the consequence of the unseaworthiness of craft. The action accordingly was framed against the first defendants for breach of contract that the barges supplied should be seaworthy. The unseaworthiness relied upon was until yesterday as set out in the particulars of the points of claim, namely, various defects in the upper part of the barge itself. By amendment at a later stage of the proceedings yesterday the plaintiffs also sought to rely on the overloading of the vessel, that is to say, of the lighter, the *Jellicoe*, as a cause of unseaworthiness. That amendment I allowed, and that claim as amended is that on which I have now to give judgment.

The matter of the overloading had always been a fact alleged on the case. It had been the ground upon which the case against the second defendant, Mr. Jarrold, rested. The case against Mr. Jarrold always was, and is, that his servants or servant were the person or persons at any rate partly responsible for the overloading of the barge *Jellicoe*; that that was a breach of duty and negligence, and that the damage resulted therefrom.

It is now necessary that I should, before considering the law, deal more particularly with the facts as I find them. The plaintiffs, of course, were not there, and they are not able to contribute any personal knowledge or evidence of what happened. The evidence emanates from Arnold, the lighterman in charge of the first defendants' lighter, and from Newman, the man who was acting as foreman, or chief worker, on behalf of Jarrold. Broadly speaking, I accept the evidence of Newman where it conflicts with the evidence of Arnold. Arnold, I think, is mistaken about several points with regard to the stage when he and Newman were both there. Newman is right about those matters.

With regard to what happened on the night of the 17th Dec., when Arnold was alone on the barge, I am satisfied that Arnold did not tell me all he knew about the matters, and particularly about the source from which water was entering the barge. In that state of circumstances, so far as I am able to ascertain the facts, I find them to be as follows: There was a discussion between Newman and Arnold

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before the loading of the *Jellicoe* began, with regard to how much she could take, and from that Newman derived no very clear idea of what she would take. I think he was told, in general terms, that Arnold would see whether she could take as much as 180 tons, or as much of the cargo as was in a certain part of the ship as possible, and that he, Arnold, would, of course, say when he thought she had enough.

During the afternoon Arnold, when the loading into the *Jellicoe* was still going on, had proceeded on board of the *May*, he moved the *May* forward, and he stayed on the *May*, simply from an idea, I suppose, that he might as well be in one place as in another, and that it was easier to stay where he was than to go back to the *Jellicoe*. It was unfortunate, as the *Jellicoe* was in a very much more important stage of her loading than the *May* was, but still Arnold stayed there.

When the loading of the *Jellicoe* had gone nearly as far as Newman thought it ought to go, I am satisfied that Newman consulted Arnold from the deck of the ship, and I disbelieve and reject the story that Arnold shouted to Newman on the *May* to stop loading; on the contrary, I think that it was Newman who consulted Arnold and asked for his opinion with regard to what had better be done, and I find, as a fact, that in consequence Arnold went back on board the *Jellicoe*, and that having got there, so far from disagreeing with the amount that had been loaded, or trying to stop any more being put on board, he accepted what had been done, adding that for the better trimming of the vessel he would like a little more, not that he wanted a larger load, but he wanted a differently distributed load on board of his lighter. He could, of course, have rearranged what he had got, but he saw no reason apparently to think that he had got too much, and he did approve and order the putting of several more sling loads amounting to four or five tons in weight on board the *Jellicoe*. The consequence of that was, although nobody realised the fact, that there were 193 tons on board the *Jellicoe* instead of 170 tons. I say that nobody realised it because Arnold had not tallied any of the cargo that had been put on board the *Jellicoe*. Newman was not tallying at all. The only persons who were tallying it were the ship's officers, and it was not till after all the matters had been attended to and arranged which I have hitherto dealt with in my finding, that Arnold went to the ship's officers, who were tallying, in order to find out how much he had got, and all he was doing and did was in ignorance, self-imposed ignorance in one sense, that he had that quantity before ordering the four or five more tons—ignorance of how much he had on board. He went to the ship's officers, not thinking that he had too much, but to make good the deficiency which existed in his note, namely, the deficiency of the ability or the material to make the return of how much he had on board. When he went to the ship he found that he had got 968 bales.

I am not sure that he even then did the necessary arithmetic so as to appreciate that he had got as much as 193 tons, but that is where he got the information about the load, and that is the purpose for which he sought the information. He was not then at all apprehensive of the result. He left the ship when the loading finished for the night and darkness came on. He left the ship for the ordinary purpose of getting his tea and communicating with his employers' office. He came back at six o'clock and found that there was water in the *Jellicoe*. He said that before he went ashore he took the measurements with his hand as to where the water line was. I doubt that very much. I do not think he had any apprehension in the matter, and I do not put any great confidence in his evidence on that point; but when he came back he found that there was water in the *Jellicoe*. It may be, I know not, that since the *Jellicoe* must, at any rate, on one side of her have her deck awash from the very beginning, or rather from the very end of the loading, it may be that there had been a wash from some passing craft which caused water to get into the *Jellicoe* in the first instance; but that cannot have been the only cause why the water continued to come, and for this reason what Arnold says, and I have no reason to doubt him, that having come on board again about six o'clock, he pumped and pumped hard, because it must have been apparent to him that something was very wrong, and that attention and diligence was very urgently required, and I am sure that he gave it. He was not a man who at all desired not to be vigilant, and he attended to the pump as well as he could, but he says that the water gained. Not only does Arnold not speak to there being any wash in the reach, but it is quite obvious that there cannot have been a continuing cause. As this was due to wash the fact must have been that on one side or the other the decks of this vessel were awash, and that certain cracks which I find were there were exposed, as they ought not to have been, to the presence and action of river water let in, and it was that water which was gaining on Arnold and defeating his efforts with the pump. I am not prepared to find that the presence of those cracks or openings in the decks of themselves constituted unseaworthiness in the lighter *Jellicoe*. I do not accept Mr. Sparks's view that those cracks could not have let in water, and that they did not open till the process of lifting the barge, which took place, of course, some days after her sinking, in the ordinary way by raising apparatus. I think it is probable, indeed I find, that the process of wreck raising opened those cracks further. They were in the actual deck between the gunwale and the coaming and the waling on the side of the ship. Those places on the deck were exposed to further strain when the raising wires came in contact with the coamings, which coamings were attached to the planks in which the cracks existed; but those cracks, I am satisfied, must have been open to some

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extent, though not to so large an extent—one or other of them must have been open at the time when Arnold was pumping.

I am not prepared to find that, of themselves, the presence of those cracks on the upper part of the deck of this lighter constituted unseaworthiness. The test applied, and I think rightly applied, by Channell, J., in *McFadden v. Blue Star Line* (10 Asp. Mar. Law Cas. 55, at p. 60; 93 L. T. Rep. 52, at p. 56; (1905) 1 K. B. 697, at p. 706), I think if and when put to myself here must be answered in a sense favourable to the lighter. "If the defect existed the question to be put is, would a prudent owner have required that it should be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking."

Applying that to this case, in my view a prudent lighterman would not have refrained from sending his lighter to do this job of work had he known and realised that the cracks on the deck were open to the limited extent to which I find they were open. The truth is that those parts became of that importance owing to the overloading of the *Jellicoe*, which they had never assumed before. It was the overloading which was the real cause of the loss of the *Jellicoe*, and it was the overloading which made the cracks significant as they would not otherwise have been.

Just to finish the facts, when the water gained upon Arnold in this way the vessel between seven and eight o'clock became waterlogged, no more could be done, and he tried to get the tug, but the tug came too late and about eleven o'clock the *Jellicoe* and her cargo disappeared to the bottom of the river Thames.

First let me deal, and it is a short matter, with the defendant Jarrold. It is sufficient, I think, to say that inasmuch as, in my view, Newman did not know what the burthen of the *Jellicoe* was, having regard to what he was told, as I have found, before loading began by Arnold, and having regard to the fact that he had not got a tally as to exactly how much was put on board, having regard to his consultation with Arnold when the loading was approaching its completion, and having regard to the request he received from Arnold to load some more slings of pulp on board the *Jellicoe*, I am unable to find that Newman was negligent. I am not deciding that if a stevedore insists on stowing too much cargo in a lighter and over persuades the lighterman to take more cargo than the lighterman ought to take, the fact that the lighterman consents and the fact that the lighterman is negligent too. I am not holding that those facts would in any way excuse the stevedore or prevent me or any court from holding that the stevedore was negligent in such circumstances. I find that those were not the circumstances. The circumstances I have already stated, and I hold that the conduct of Newman did not constitute negligence. I may only mention in support of that view that the plaintiff's own

surveyor, for what reasons I know not, in reporting on this matter reports in a survey which has been put in on behalf of the defendants, that they, the firm of Messrs. Wallace and Co., surveyors, reporting through a gentleman named Trimming, "do not consider 193 tons to be an excessive amount of cargo for a barge of this tonnage." I hold that that view is in fact an erroneous view, the view that 193 tons is not an excessive amount of cargo. I think it was; but if the surveyor, with the full facts before him, can think that, it seems to me an additional reason why I should not blame the stevedores, who had very insufficient information about the facts, or very much less information about the facts, than Messrs. Wallace had for arriving at a conclusion or failing to arrive at the conclusion that he ought to stop putting cargo on board the barge. For these reasons I give judgment for the defendant Jarrold. The question of costs I will deal with later. Jarrold must have his costs, but the incidence of those costs I will deal with later.

It remains to dispose of the really interesting question that has been argued this morning with regard to the liability of the first defendants, Messrs. Page, Son, and East. I have said that owing to the operation of the London Lighterage Clause they are not liable in negligence, although Arnold may have been negligent. I have also said that I was not prepared to hold that there were defects in the hull of the *Jellicoe* sufficient to cause unseaworthiness. It remains to consider whether the overloading which I have found constituted a breach of any warranty or contract on the part of these defendants. In my opinion it did. The matter is a difficult one. It has been very well argued, and I have arrived at a conclusion, and propose to give my reasons now without further consideration. The principles applying to the question of stowage in connection with the question of seaworthiness have been recently and authoritatively dealt with by the House of Lords in the case of *Elder, Dempster, and Co. Limited v. Paterson, Zochonis, and Co. Limited* (16 Asp. Mar. Law Cas. 351; 131 L. T. Rep. 449; (1924) A. C. 522). I do not propose to restate them, but I think it is sufficient for the purpose of my judgment to say that it seems to me to be established by that case and by earlier authorities that although all bad storage does not constitute unseaworthiness, and although some bad stowage does not constitute unseaworthiness, nevertheless, bad stowage and excessive stowage, that is to say, the loading an excessive amount of cargo, may and can constitute a vessel or a lighter unseaworthy, and do constitute her unseaworthy if they render her unfit to undergo the ordinary perils and incidents of the task or voyage which is the subject-matter of the contract. Now here, the *Jellicoe* was fit to load 170 tons of wood pulp and was fit to lie with it till the rest of the barges were loaded, which were to go to make up the fleet, and then to take it to its place of destination. But

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when and so soon as the cargo had been increased to 193 tons, the *Jellicoe* became, in my judgment, and I so find, unfit to lie in the river Thames, at Erith, and to undergo the ordinary perils and vicissitudes of so lying in the river, and the fact that she was so unfit was the cause of her loss and the loss of the cargo.

A number of cases have been cited to me, and I think I should shortly refer to them. I think I can best do so by dealing with the points made by Mr. Wilfrid Lewis in his very clear argument before me this morning. The first point he raised is the point that the warranty did not extend further than a warranty that fit barges would be supplied to carry the contract quantity which was assigned to them, and that the only reason that anything happened was that one of the lightermen made a mistake or was negligent. In my view that is too narrow a statement of what the warranty is. In my view the warranty is that such barges shall be supplied, and that they shall be fit to undergo the ordinary vicissitudes arising and the incidents arising in the course of the various stages of the employment which form the subject-matter of the contract. One of those stages is that until the fleet was completed by the loading of the other barges, the loaded barges had to lie in the river awaiting the completion of the loading. It was during that stage that the incident happened to the *Jellicoe* which is the cause of this action.

The *Jellicoe* was not so fit for the reason that I have described, but that such part of the contract of employment is the subject-matter of the contract of seaworthiness, is, I think, sufficiently evidenced by the case of *The Galileo* (12 Asp. Mar. Law Cas. 461; 110 L. T. Rep. 614; (1914) P. 9; affirmed in House of Lords, *sub nom. Wilson (Thomas) and Sons v. Gallileo (cargo ex)*, 12 Asp. Mar. Law Cas. 543; 111 L. T. Rep. 656; (1915) A. C. 199). There, it is true, the lighter sank, not because she was overloaded, but because her sides were rotten; but as regards the stage of the accident, the stage was that which is now under consideration. I think that inasmuch as wrong loading, excessive loading can amount to unseaworthiness and constitute unseaworthiness, if the vessel is at the end of the loading stage so overloaded as to be a danger to herself and her cargo, then there is a breach of the warranty which I find exists, that she shall be fit to complete or enter upon and carry out the next stage of the contract.

That, I think, here constitutes the difference between this case and *Wade v. Cockerline* (10 Com. Cas. 115), a case which was rightly and naturally very much relied on by Mr. Wilfrid Lewis on behalf of the defendants. That case was the foundation of the second point which was taken on behalf of these defendants. It is said, and the argument is supported by the authority of that case, that there was no breach of warranty here. Even assuming that such a warranty existed, as I have found to have existed, that is to say, assuming that the first

point taken on behalf of the defendants is overruled, yet there was no breach of any warranty in regard to what I call the further stage of the employment for this reason. It is said that the loading was never finished safely, and that just as in *Wade v. Cockerline (sup.)*, where the cargo went on board and damaged the ship in the course of the loading, so that was what happened here. On the facts, I do not think that is so. I think this case differs from *Wade v. Cockerline (sup.)* in two respects. In *Wade v. Cockerline (sup.)* no more cargo was ever put on the ship than the ship could safely carry. That is one of the reasons why it was found that there was no unseaworthiness in fact. Further, the accident happened, as I understand the facts in *Wade v. Cockerline (sup.)*, as soon as the wrong stowage was effected, and the ship simply rejected the excessive or wrongly placed cargo. Here that was not so. The cargo was safely put on board. It was left by everybody with the idea that the lighter was perfectly safe. What happened afterwards was what I have already described. After the man Arnold had gone ashore this trouble began, in other words, the loading was, in my view, finished, and the second stage, the lying in the river, was begun, and when one stage finished and the other began the vessel was overloaded and overloaded to such an extent as to constitute unseaworthiness.

In that respect the case seems to me on the facts to very much resemble the facts in the case of *Kish v. Taylor* (12 Asp. Mar. Law Cas. 217; 106 L. T. Rep. 900; (1912) A. C. 604). The main part of the matters dealt with in that case have no bearing whatever on the present case, but the cause of the unseaworthiness, the effects of which were debated in *Kish v. Taylor (sup.)*, was the overloading of the ship, and it was not in dispute or argument in that case that for the consequences, whatever they were, of that overloading, the shipowner was answerable. The matter which we are not concerned with here, and that was dealt with in *Kish v. Taylor (sup.)*, was as to how those circumstances extended. Now that, I think, is all I need say about this case, except that there are other matters having a bearing on the present case, which are dealt with in the judgment in *McFadden v. Blue Star Line (sup.)*, to which for another purpose I have already referred.

The last point made on behalf of these defendants is that the London lighterage clause covered and protected the defendants. In my judgment that is not so. The only words that could be really relied upon as covering them is the broad statement that the lightermen will not be liable for any loss or damage to the goods entrusted to them for lighterage or for any loss, damage or expense, howsoever, whensoever or wheresoever such loss, damage or expenses be occasioned. I hold, as was held in the case of *The Galileo (sup.)*, to which I have already referred, that as there the imposition of all risks upon the goods owner so here the imposition upon them of responsibility, or rather the bearing of all loss or damage to the

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goods, is not sufficient or effective to obliterate the responsibility on the part of the lightermen for the underlying or overriding obligation on them to provide a vessel or lighter when the various stages of the contract of employment are entered upon, which shall be fit and seaworthy for the purpose of the work, the subject-matter of the contract.

For these reasons, I give judgment for the plaintiffs for damages for breach of warranty against these defendants, Messrs. Page, Son, and East Limited, the lightermen.

The defendants appealed.

Porter, K.C. and Wilfrid Lewis for the appellants.

A. T. Miller, K.C. and Harry Atkins for the respondents.

LORD HEWART, C.J.—This is an appeal from a judgment of Roche, J. delivered on the 23rd July of last year in a claim by cargo owners, against two sets of defendants, for damage for the loss of the plaintiff's cargo. The learned judge, in the result, found in favour of one set of defendants, namely the stevedores, but against the other set of defendants, namely the lightermen. It is those defendants who now appeal.

The facts of the case, so far as they are material, may be briefly stated. The plaintiffs employed the lightermen, the present appellants, to lighter 500 tons of wood pulp from the steamship *Borgholm*, when it arrived at the Erith Buoy, to Nine Elms, upon a journey to Farncombe, which is in the neighbourhood of the River Thames. For that purpose the appellants sent three barges, named respectively the *Jellicoe*, the *May*, and the *Jessie*, and it was established that those three barges between them had a carrying capacity of 500 tons and more. The persons actually engaged in discharging the cargo from the ship were in the employment of the second defendant, Mr. Jarrold. The persons responsible, as the learned judge found, for stowing the cargo in the lighters were the persons in the lighters, but they in their turn employed the second defendant to stow the goods in the lighters on their behalf.

The first lighter to be filled was the *Jellicoe*. She had a capacity to carry 170 tons of cargo and no more; and the loading of that barge was in progress on the 17th of Dec. 1925. In the result, in circumstances into which it is not necessary to enter in detail, more than 170 tons were put upon the *Jellicoe*, in fact some 193 tons were put on board her, and that quantity was, as the learned judge finds, and as I think is common ground, excessive. What followed was that some time before midnight the *Jellicoe* filled and sank, and the cargo of 193 tons of wood pulp which was upon her was lost. That was the loss of which the plaintiffs complained and in respect of which they sought to recover, and recovered damages.

It was made clear by the evidence, nor is it disputed, that the *Jellicoe*, at all material times, exhibited certain cracks, and as the process of loading went on and became completed, those cracks became, through perhaps more causes than one, both larger and more dangerous; and the learned judge in the course of his judgment says this: "Certain cracks which I find were there were exposed as they ought not to have been to the presence and action of river water let in." Then the learned judge adds: "I am not prepared to find that the presence of those cracks or openings in the decks of themselves constituted unseaworthiness in the lighter." But he says: "Those cracks, I am satisfied, must have been open to some extent though not to so large an extent at the time when the pumping was going on." There follows this passage: "I am not prepared to find that of themselves the presence of those cracks on the upper part of the deck of this lighter constituted unseaworthiness. The test applied, and I think rightly applied, by Channell, J. in *McFadden v. Blue Star Line* (10 Asp. Mar. Law Cas. 55, at p. 60; 93 L. T. Rep., at p. 56; (1905) 1 K. B., at p. 706), I think if and when put to myself here must be answered in a sense favourable to the lighter: 'If the defect existed the question to be put is, would a prudent owner have required that it should be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking.' Applying that to this case, in my view a prudent lighterman would not have refrained from sending his lighter to do this job of work had he known and realised that the cracks on the deck were open to the limited extent to which I find they were open. The truth is that those parts became of that importance owing to the overloading of the *Jellicoe* which they had never assumed before. It was the overloading which was the real cause of the loss of the *Jellicoe*, and it was the overloading which made the cracks significant as they would not otherwise have been."

In those circumstances, the conclusion at which the learned judge arrived was as follows: "I think, inasmuch as wrong loading, excessive loading, can amount to unseaworthiness, and constitute unseaworthiness, if the vessel is at the end of the loading stage so overloaded as to be a danger to herself and her cargo, that then there is a breach of the warranty which I find exists, that she shall be fit to complete or enter upon and carry out the next stage of the contract." And yet again, in another passage, the learned judge says: "I hold, as was held in the case of *The Galileo* (12 Asp. Mar. Law Cas. 461, 543; 110 L. T. Rep. 614; (1914) P. 9; 111 L. T. Rep. 656; (1915) A. C. 199) to which I have already referred, that as there the imposition of all risks upon the goods owner so here the imposition upon them of responsibility, or rather the bearing of all loss or damage to the goods, is not sufficient or effective to obliterate

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the responsibility on the part of the lighter-men for the underlying or overriding obligation on them to provide a vessel or lighter when the various stages of the contract of employment are entered upon, which shall be fit and seaworthy for the purpose of the work the subject-matter of the contract."

The question is whether, in so holding upon those materials, the learned judge came to a right conclusion in law. In my opinion he did. The doctrine of stages is of course familiar, and was explained in a sentence or two in the well-known case, now more than sixty years old, of *Bouillon et Cie v. Lupton* (1 Mar. Law Cas. (O.S.) 347; 8 L. T. Rep. 575). Willes, J. said: "Let us see, therefore, what the assured undertake by the policy. In the first place they undertake that the vessel shall be seaworthy. Now, that means different things on different parts of the voyage; a vessel that was seaworthy for the voyage down the Rhone, would not be seaworthy when she left Marseilles. And, indeed, there is an intervening part of the voyage which gives rise to a third set of considerations, namely, that between Arles and Marseilles; you are here not in the river, but you are still not on the open sea. The question, therefore, arises—inasmuch as change was necessary, where was the proper place to make it? That is a question of evidence."

It is urged in the present case on behalf of the respondents, the successful plaintiffs in the action, that in the true sense of the term, that is at the commencement of a stage, this vessel was, and was rightly found to be, unseaworthy. As was said by Lord Sumner in the House of Lords in the case of *Atlantic Shipping and Trading Company v. Louis Dreyfus and Co.* (15 Asp. Mar. Law Cas. 566, at p. 569; 127 L. T. Rep. 411, at p. 414; (1922) 2 A. C. 250, at p. 260): "Underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability—namely, that the shipowners shall have provided a seaworthy ship. If they have, the exceptions apply and relieve them; if they have not, and damage results in consequence of the unseaworthiness, the exceptions are construed as not being applicable for the shipowners' protection in such a case."

Now here there has been much argument—I do not say too much—upon the question whether it is true to say that there is an intervening stage between the stage of loading on the one hand and the stage of setting sail with the cargo on the other hand. A contrast, or a suggested contrast, has been pointed between the language of Channell, J. in the case already referred to (*McFadden v. Blue Star Line, sup.*), and the language of at any rate two passages in the judgment of Vaughan Williams, L.J. in the case of *Wade v. Cockerline* (10 Com. Cas. 115). It does not seem to me, with great respect, to be necessary to pursue that controversy upon the facts of this case. Here the contract was to collect and to carry, and after the evidence had

been given, I think it was clearly open to the learned judge to come to the conclusion that the stage of loading had been completed, and a moment had been reached when the next stage was commenced. Whether that next stage is truly to be described as the stage of lying in the river, or whether it is more accurately to be described as the stage of being towed, seems to me for the present purpose to be comparatively immaterial. The next stage had begun the moment the loading stage had been completed; and the learned judge, if I follow his judgment, finds that at the beginning of that stage—not in the midst of some stage, but at the beginning of that stage—this vessel was unseaworthy. In my opinion he was entitled so to find, and there is no error in law in the conclusion which, upon these facts, he has expressed. I think, therefore, that the appeal of these appellants ought to be dismissed with costs.

There is a cross-appeal by the present respondents, the successful plaintiffs in the action, about certain costs. Those were that portion of the costs of the defendants successful in the action, that is to say the stevedores, which, by the judgment of the learned judge, the present respondents were ordered to pay. It has been urged before us that it is right that the respondents should not bear the burden of those costs, but that the present appellants, in paying the costs of the respondents, should pay those costs, increased as they are by that portion of the successful defendants' costs which these respondents were ordered to pay.

Looking at all the circumstances of the case and at the lateness of the amendment made, I think that the learned judge exercised his discretion on this question of costs, and that there is no reason for interfering with the way in which he exercised it. Indeed, I am not sure that upon a true view of what took place, after the action had gone a considerable way, it would not be accurate to say that it was an implied term of the making of the amendment that the learned judge should make some such order about costs. One thing is abundantly clear: if the amendment had not been granted, it may well be that the respondents would have failed in the action, and would have had to pay the costs of both defendants.

In those circumstances, I see no reason to interfere with the discretion exercised by the learned judge on the question of costs, and I think the cross-appeal here ought to be dismissed with costs.

BANKES, L.J.—I agree with the conclusion at which my Lord has arrived, and I would just express my view of the case in my own words quite shortly.

There does not appear to be any dispute about the facts in this case. The plaintiffs complaint was that their goods had been lost owing to a breach of warranty on the part of the defendants. The facts were that a contract had been entered into between the parties under which the defendants agreed to supply barges

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to proceed to Erith, and there take delivery of the plaintiffs' cargo from a vessel lying there and, having taken delivery of it, to take it by barge to Nine Elms, and thence to dispatch it by rail to its destination at Farncombe. What happened was that this particular barge was sent, she was loaded and she was overloaded, and because she was overloaded she sank while lying alongside the vessel, and before the tug came to take her away.

The complaint of the plaintiffs in their action as originally formulated was that there had been a breach of the warranty of seaworthiness in that this barge was defective; and in their particulars they gave particulars of the defects of which they complained, and they alleged that the vessel had sunk because of those defects. At the trial, the learned judge, having heard the evidence, found that the vessel was not unseaworthy in that sense at all or for that reason, but he found that she was rendered unseaworthy because she was overloaded to a substantial extent; and in those circumstances, and at a late stage, he allowed an amendment to the effect that the unseaworthiness complained of was defects in the barge, but was due to the fact that she was overloaded; and he then proceeded upon the facts to hold that the vessel was unseaworthy because of the overloading.

Upon that, the questions of law arose. The defendants contended that the warranty of seaworthiness attached to the barge only at the commencement of the voyage, and that it was not a continuing warranty. That was not disputed as a matter of law. The defendants then went on to allege that the voyage of this barge commenced—this is as I understand the argument—when she was sent to Erith in order to take delivery of this cargo under this contract, and the learned judge has found that she was seaworthy at that time, and in those circumstances the plaintiffs have failed to prove any breach of that warranty. Then it was contended on the other side, that this is a case in which there were stages in this voyage, and that she was not seaworthy at the commencement of one of these stages. The answer to that was: "Oh, but, assuming there were stages, and assuming that one of the stages was the loading stage, she was seaworthy at the commencement of the loading stage. Unfortunately she sank before that stage was completed, or at any rate before the next stage began; and in those circumstances, there is a failure to prove any breach of this warranty of seaworthiness." I understand that that was the case on the one side and on the other.

I think it assists one very much in the determination of this question of law to look at the contract as a whole and to realise that in this particular contract, even if there are not stages, there are a number of different operations to be performed; and in my opinion it really is misleading for the purpose of determining when the warranty of seaworthiness attached to this barge to talk about the voyage commencing when the barge was dispatched to

Erith to load. I agree entirely with what Vaughan Williams, L.J. said in the case of *Wade v. Cockerline* (10 Com. Cas. 115, at p. 120), that it is a much more correct way to look at the matter to ask oneself what were the stages in what he calls the transaction, or what I would prefer to call the contract undertaken; and when one considers this contract undertaken, which was to send the barge from wherever she was lying to Erith, to place her in a position in which she could load, and to look after her in a proper way while she was being loaded, and again to do whatever was necessary while she was lying there before the tug came to pick her up, and then when you consider that she had to be taken and towed to Nine Elms, and having arrived at Nine Elms, the proper steps had to be taken to moor her in position to unload her—when one considers that all those operations were covered by this contract, it seems to me that it assists one in taking a clear view of the liability of a person who enters into a contract such as that, to speak of the stages of the contract undertaken rather than the stages of a voyage. And from that point of view I think that Channell, J.'s judgment in *McFadden v. Blue Star Line* (10 Asp. Mar. Law Cas. p. 55, at p. 60; 93 L. T. Rep., at p. 56; (1905) 1 K. B., at p. 706) and Vaughan Williams, J.L.'s judgment in *Wade v. Cockerline* (10 Com. Cas. 115) are in no conflict, because they both point out that there are stages in such a contract undertaken, and that in many of those stages it seems more appropriate to talk about the fitness of the vessel than the seaworthiness of the vessel; and that, in considering whether or not a vessel is fit to load, one has to take different matters into consideration from when one is considering whether she is fit to proceed to sea, because as Channell, J. points out, there may be many things that would have to be done to a vessel that was fit to load before she would be fit to proceed to sea. But no difficulty of that kind arises here because it seems to me to be quite plain that in this contract undertaken there was a stage in which it was necessary that the vessel should be fit for loading, and if she was fit for loading when the loading commenced and she sank before the loading was completed, I agree with what Vaughan Williams, L.J. pointed out in the case of *Wade v. Cockerline* (*sup.*), that it becomes immaterial to consider whether she would or would not be fit when the next stage commenced.

But there is no doubt about the matter here. The learned judge has found, upon what was the clearest evidence, that the loading was completed before the barge sank. He finds it in terms, and he had before him the evidence of the lighterman who said that he had gone ashore for his tea because the loading was completed, and in order to telephone to his superior officer that the vessel was ready to be towed to Nine Elms, clearly indicating that the loading was in fact completed.

If it was in fact completed, it seems to me that there cannot be any intermediate stage

which was not for this purpose a stage at all. The next stage must be either a separate stage of lying ready to commence her voyage in the ordinary sense, as the learned judge seems to treat it, or, as it seems to me, almost more accurate to say, the moment when this particular barge was loaded the stage commenced, when she must be seaworthy in the sense of being ready to be towed to Nine Elms. And whichever way you treat the matter—whether you treat it as a stage of lying in the river ready to be picked up by a tug, or whether you consider that the stage of actually starting the voyage in the ordinary sense had commenced, is immaterial, because it seems to me that when once you come to the conclusion that the stage of loading was completed and that the vessel sank in the next stage of this contract undertaken, whatever it was, you must come to the conclusion that the learned judge took the right view in law and that he decided rightly in awarding the plaintiffs the damages that they claimed.

Upon the question of costs, I have nothing to add to what my Lord has said. I think that the learned judge had discretion in the matter and that he exercised it wisely.

SCRUTTON, L.J.—I agree that the cross-appeal as to costs should be dismissed. In view of the importance of the amendment, and the late stage at which it was made, I think the order that the learned judge made was well within his discretion and that this court cannot interfere.

I also agree that the appeal as to the merits should be dismissed, and substantially I am in agreement with the very careful judgment of Roche, J. I only add some words of my own as to the law, in deference to the careful and elaborate argument that has been addressed to us by counsel for the appellants.

There is some confusion in the authorities as to the warranty of seaworthiness, due, I think, to two causes: First, the word "seaworthiness" is used in two senses, (1) fitness of the ship to enter on the contemplated adventure of navigation; and (2) fitness of the ship to receive the contemplated cargo, as a carrying receptacle. A ship may be unfit to carry the contemplated cargo, because, for instance, she has not sufficient means of ventilation, and yet be quite fit to make the contemplated voyage as a ship. Secondly, the fact that there are these two meanings of seaworthiness, and that there may be different stages of seaworthiness according to different stages of the adventure, has led to some confusion in statements.

As the court of King's Bench said in *Cohn v. Davidson* (3 Asp. Mar. Law Cas. 374; 36 L. T. Rep. 244; 2 Q. B. Div. 455, at p. 461), "seaworthiness is well understood to mean that measure of fitness which the particular voyage or particular stage of the voyage requires." A ship, when she sails on her voyage, must be seaworthy for that voyage, that is, fit to encounter the ordinary perils which a ship would encounter on such a

voyage. But she need not be fit for the voyage before it commences, and when she is loading in port. It is enough if, before she sails, she has completed her equipment and repair. But she must be fit as a ship for the ordinary perils of lying afloat in harbour, waiting to sail. She must, in my view, be fit as a ship, as distinguished from a carrying warehouse, at each stage of her contract adventure, which may, as in *Cohn v. Davidson* (sup.), commence before loading. And she may as a ship after loading be unfit to navigate because of her stowage, which renders her unsafe as a ship. The case of *Kopitoff v. Wilson* (3 Asp. Mar. Law Cas. 163; 34 L. T. Rep. 677; 1 Q. B. Div. 377) is a good example of this; there armour plates were so stowed that there was danger of their going through the ship's side, and they did. As Lord Sumner says in *Elder, Dempster, and Co. Limited v. Paterson, Zochonis, and Co. Limited* (16 Asp. Mar. Law Cas. 351, at p. 365; 131 L. T. Rep. 449; (1924) A. C., at p. 561): "Bad stowage, which endangers the safety of the ship, may amount to unseaworthiness of course, but bad stowage, which affects nothing but the cargo damaged by it, is bad stowage and nothing more, and still leaves the ship seaworthy for the adventure, even though the adventure be the carrying of that cargo." *Wade v. Cockerline* (10 Com. Cas. 115) illustrates the latter part of the quotation. The ship was quite fit as a ship to carry the cargo she had on board if properly stowed; the bad stowage did not make the ship unfit as a ship, but did endanger the cargo. Looked at from the point of view of a ship to sail the sea, the highest measure of liability will be when she starts on her sea voyage, and this is often spoken of as the stage when the warranty attaches, but what is meant is that it is the time when the highest measure of liability attaches. There are previous stages of seaworthiness as a ship, applicable to proceeding to loading port, loading, and waiting to sail when loading is completed.

On the other hand, the highest measure of liability as a cargo-carrying adventure, that is, of "cargoworthiness," is when cargo is commenced to be loaded. It has been decided that if at this stage the ship is fit to receive her contract cargo, it is immaterial that when she sails on her voyage, though fit as a ship to sail, she is unfit by reason of stowage to carry her cargo safely. Thus, in *The Thorsa* (13 Asp. Mar. Law Cas. 592; 116 L. T. Rep. 300; (1916) P. 257), when the ship sails with chocolate and cheese stowed together, so that the chocolate was damaged, the Court of Appeal declined to hold the ship unseaworthy. This case was approved in *Elder, Dempster, and Co. Limited v. Paterson, Zochonis, and Co. Limited* (sup.) in the House of Lords, where stowage of oil in casks, so that it was damaged by the weight of cargo on top, the stowage not affecting the sailing of the ship, was held not to be unseaworthiness for sailing. This limitation of the warranty of cargoworthiness is expressly made because negligent stowage of

a seaworthy ship is something happening after the warranty of cargoworthiness has been complied with, and, so long as the negligent stowage does not make the ship unseaworthy as a ship, does not affect a warranty which has already been complied with. It was argued that the doctrine of stages was only a question of difference of equipment, and that overloading was not equipment. But damages unrepaired at the commencement of a new stage, collision during loading, and starting on the voyage with that damage unrepaired, may obviously be unseaworthiness at the commencement of the voyage stage. I see no reason for defining stages only by difference of equipment.

Applying the above statement of the law to the facts of the present case: the barge was sent to the ship's side to carry 170 tons, and she was fit to carry that quantity. The warranty of cargoworthiness was complied with when loading commenced. But then 193 tons were put into her, some 14 per cent. more than her proper load. With that cargo in, she had a dangerously low freeboard in calm water. I think at any rate one of her gunwales was awash, and water could continuously enter through cracks, which would be only an occasional source of leakage if she were properly loaded. She had to lie so loaded for some unascertained time in the river till a tug came. The ship was not bound to let the barge lie moored to the ship's side. She might have to navigate under oars to a barge road. She was exposed to all the wash of passing vessels, and the more water she took on board, the more dangerous she would become. It is clear that she was quite unfit to lie in the river for any time exposed to the wash of passing vessels and the natural "send" of the water. It is still clearer that she was quite unfit to be towed, and that she was in such a condition that she would soon go to the bottom. I am clearly of opinion that the barge was unseaworthy as a barge from the time loading finished, unfit to be in the river, and still more unfit to be towed. I observe with surprise the suggestion that the surplus of 115 bales might be put back on the ship. What possible obligation the ship, which had delivered to a barge cargo which the barge-man said she could take, and had got a receipt, was under to hoist back by ship's steam and labour 115 bales, or twenty tons, and leave them about on the ship's deck, I cannot understand.

I accept the view of Channell, J. in the case of *McFadden v. Blue Star Line* (sup.) that the warranty of cargoworthiness, if complied with at the commencement of a stage, is not continuous during the stage, but this view does not negative the position that at the commencement of a new stage of the adventure there is a renewed warranty of seaworthiness as a ship. It seems to me clear that there would be a renewed warranty when the towing started, and that this overloading would be a breach of the warranty. If the three leaks found by Channell, J. in the *Blue Star Line* case (sup.) had admitted so much water that

the safety of the ship was endangered, and if the leaks were incapable of being remedied on the voyage, there would clearly have been a breach of the warranty of seaworthiness as a ship, on sailing on the voyage. It seems equally clear that if an overloaded barge, seaworthy in the calm waters of a dock, went out into the river to wait for a tug, there would be a renewed warranty of fitness to navigate and wait, which would be broken by overloading rendering the barge unfit to lie waiting in the river. And I think in the present case, when the loading was finished and the man in charge, apparently in the ordinary course of his business, left her unattended in the river waiting for a tug, and unfit in fact either to lie in the river or be towed, there was a new stage of the adventure, a new warranty of fitness for that stage, and a breach of that warranty which prevented the exceptions from applying.

Appeal dismissed.

Solicitors for the appellants, *J. A. and H. E. Farnfield.*

Solicitors for the respondents, *Constant and Constant.*

Wednesday, Jan. 19, 1927.

(Before BANKES, SCRUTTON, and ATKIN, L.JJ.)

KOSKAS v. STANDARD MARINE INSURANCE COMPANY LIMITED. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Insurance (Marine)—Goods consigned c.i.f.—Certificate of insurance—Sale of goods on arrival—Goods found to be damaged—Right of action against insurers—Notice of loss condition precedent—Small print—Liability of insurers.

The defendant company issued a certificate of insurance in respect of a quantity of shoe leather shipped c.i.f. from New York to Tunis. That certificate stated: "This certificate represents and takes the place of the policy and conveys all the rights of the original policy holder. . . . as fully as if the property were covered by a special policy direct to the holder of this certificate." And by clause 11 of the policy: "In case of loss or damage to the property insured hereunder the same shall be reported to the representative of the company, or if there be no representative of the company at the place to Lloyd's agent, as soon as the goods are landed or the loss is known or expected." On the day after the arrival of the goods at Tunis they were sold by the consignee who upon examination found that they had been damaged by sea water. In an action by the plaintiff under the certificate the defendants pleaded that the notice required by clause 11 of the policy had not been given.

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

Held, that taking the contract as a whole it was not established that the parties intended that clause 11 of the policy should operate as a condition precedent. The plaintiff was therefore entitled to recover.

Decision of Sankey, J. affirmed.

APPEAL from the decision of Sankey, J. (reported 162 L. T. Jour. 75). By a certificate of insurance dated the 16th May 1919, the defendants insured 281 bales of sole leather for \$10,000 for a voyage from New York to Tunis. The bales were taken on board the steamship *Eole* from New York to Algiers where they were transhipped on board the steamship *Nice*, which carried them to Tunis. Both steamers met with bad weather. The bales arrived at Tunis on the 9th July 1919, where they were consigned c.i.f. to a firm named Medina, who, on the following day sold the goods to the plaintiff. The latter examined the consignment and found that the leather had been damaged by sea water. The plaintiff claimed under the certificate, but the defendants refused to pay, putting the facts in issue and raising two points of law: (1) that the plaintiff was not the right person to bring the action and (2) that notice of claim had not been given as required by clause 11 of the policy.

The certificate of insurance stated as follows:

This certificate represents and takes the place of the policy and conveys all the rights of the original policy holder . . . as fully as if the property were covered by a special policy direct to the holder of this certificate.

Clause 11 of the policy which was in small print was in the following terms:

In case of loss or damage to the property insured hereunder, same shall be reported to the representative of the company or if there be no representative of the company at the place, to Lloyd's agent as soon the goods are landed or the loss is known or expected.

Sankey, J. held on the evidence that damage to the property insured had occurred and that from the very wording of the certificate it inured to the benefit of the plaintiff who therefore had the right to sue and maintain an action on the policy. This was a case of a company disputing its own document and not a case of buyer and seller, and therefore the principle of *Diamond Alkali Company v. Bourgeois* (15 Asp. Mar. Law Cas. 455; 126 L. T. Rep. 379; (1921) 3 K. B. 443) and *Scott and Co. v. Barclays Bank Limited* (129 L. T. Rep. 108; (1923) 2 K. B. 1) had no application. As regards the notice-of-claim clause, the point was one of construction, and as Buckley, L.J. said in *Re Coleman's Depositories* (97 L. T. Rep. 420; (1907) 2 K. B. 798) authorities were of little or no value on such a question. Was this clause a condition precedent, and even if it were, was the plaintiff bound by it? The clause was printed in the smallest possible type, much smaller than in other parts of the policy, and was not such a clause as a reasonable man reading the document with reasonable care would regard as forming

part of the contract: (*Roe v. Naylor*, 119 L. T. Rep. 359, C. A.; (1917) 1 K. B. 712). He held, therefore, whether it were a condition precedent or not, the plaintiff was not bound by it. The defendants appealed.

Sir W. Greaves-Lord, K.C. and R. K. Chappell for the appellants.

S. L. Porter, K.C. and J. St. C. Lindsay, for the respondent, were not called upon.

BANKES, L.J.—This is an appeal from a judgment of Sankey, J. in an action which was brought by a person claiming to be entitled to policy money because he was the holder of a certificate of insurance. In the court below the defendants raised three defences. First of all they said that the loss was not one which was covered by the insurance. That point was decided against them, and there is no appeal on that point. The second point which they took was that, having regard to the form of the document, the plaintiffs were not in a position to sue because the certificate had not been assigned to them, and it was not sufficient for them to say that it was in their possession at the time they put forward their claim. Although there was an appeal on that point it has not been persisted in, and I therefore express no opinion upon it. The third point was that by the terms of the certificate notice to Lloyd's agent was a condition precedent to any right of action.

This certificate contains, among other things, on the back of it a list of places at which there is a Lloyd's agent. The clause in the policy which is relied on is in these terms: 11. "In case of loss or damage to the property hereunder insured same shall be reported to the representative of the company (see list on back hereof), or if there be no such representative at the place, to Lloyd's agent, as soon as the goods are landed or the loss is known or expected, and in the event of claim arising, all documents in connection therewith are to be submitted for approval." There being no representative of the company at Tunis, notice under this clause had to be given to Lloyd's agent, and the question on this part of the case is whether or not this clause properly construed creates a condition precedent, and if unfulfilled, deprives the insured of a right to recover. In order to determine that point it is, I think, necessary to consider this contract as a whole. I do not wish to be unduly critical of these documents, but when this contract is considered as a whole it seems to me to present some really remarkable features. The certificate is said on the face of it to represent and to take the place of the policy and to convey all the rights of that policy. What does that really mean? The defendants are not content with using one expression to indicate what the certificate is, but they go out of their way and use three separate expressions in order to indicate what the effect of the document is. First they say that it represents the policy. I can understand that as meaning in a vague sort

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of way that if you have got this you are as safe as if you had the policy, but then they say, "and takes the place of the policy." Does that mean that it wipes out the policy? And, lastly, they say: "And conveys all the rights of the original policy holder." Does that mean that it gives to the holder of the certificate all the rights of the original policy, even though some of those rights appear to be inconsistent with some of the special conditions set out on the certificate? It seems to me to be impossible to put upon those words a meaning of which one can be certain. Under certain circumstances one would endeavour to put a construction upon them in favour of one party or the other following the decisions given in some of the cases, but in the present case the defendants are setting up this condition as being in their favour, and there seems to be no reason why the court should endeavour to put a construction on these words which would be in their favour. If the contract is dealt with as a whole I find this initial difficulty in understanding what the contract means because I have read what the certificate says about itself. Having proceeded in this careful way to say that it does all these things and is to represent the policy, and is to give to the holder all the rights of the policy, it carefully refrains from saying anything about the risk which is insured and therefore, notwithstanding the language of the certificate, you have to go back to the policy to ascertain what the risk was. From that it follows that you have to read the two documents together and to make sense of them if you can, and when you are considering whether a particular clause in the one document or the other is a condition precedent you must be certain that the parties, by the language they used, intended that it should be. After all, the policy is the governing document, because it specifies the risk and says nothing about a condition precedent. The obligation to give notice being a condition precedent, nothing is said about it, and the certificate says that the policyholder is to have all the rights of the original policy.

In these circumstances all I say about this particular document in endeavouring to put a construction upon it is that I am not satisfied that it was the intention of the parties, when these documents came into existence, that the giving of the notice should be a condition precedent. Upon that ground and without expressing any opinion to govern any other case, or any case where there is a clause such as this expressed in clear language, although it does not say that it is to be a condition precedent—what the right view ought to be in such a case I express no opinion upon; I am merely dealing with the documents in the present case—I say that I am not satisfied, taking the contract as a whole, that the parties intended that this particular clause should operate as a condition precedent. I only desire to add this. Although the effect of our decision is that this appeal fails, I desire to say that I should not have been

able to agree with Sankey, J.'s view that because the clause which is relied upon appears in such small print it must not be taken to be part of the contract, and binding upon both parties. It is quite true that it is in small print, but I think the print is sufficiently distinct and comparing it with many bills of lading and other documents which have come before me, it seems to me to be much plainer than a great many documents about which a similar criticism has never been suggested. For these reasons I am of opinion that the appeal fails and must be dismissed with costs.

SCRUTTON, L.J.—I agree. The plaintiff brought an action in the Commercial Court apparently based upon what is sometimes called an American certificate of insurance, alleging that certain leather goods which were insured thereunder had been damaged by perils of the sea upon the voyage insured, and that he was therefore entitled to be paid by the defendant underwriters, an English company having agents in the United States, where the certificate in question was issued. The defendants put forward three defences. The first was that there was no loss by the perils insured against. The evidence before the learned judge consisted mainly of documents and of evidence, contradictory in its nature, taken on commission, and the learned judge, having considered that evidence, has found as a fact that the goods were damaged by perils of the sea while insured. It would take a strong case to make the Court of Appeal upset that finding, and the appellants, recognising that, do not press the appeal upon that point. Thus *prima facie* there has been a loss by perils insured against. The next point taken was that, in order to enable a person to sue upon the certificate, it must be endorsed by him, and that, although the plaintiff was the holder of and in possession of the certificate, and although he appeared to have bought the goods which have been lost from the person who was the original assured, he could not recover because the original assured had not endorsed his name on the back of the certificate. Now the language of the certificate is extremely puzzling. It is expressed to convey all the rights of the original policyholder as if the property were covered by a special policy direct to the holder of the certificate. The loss is payable to the order of the assured or order. It looks rather tautological in itself, and, in my view, the English underwriters have very properly decided not to press that point. They have issued a very ambiguous document and have been beaten on the merits as to whether there was a loss, and I cannot think that it would be consistent with the high standard of business honour with which English underwriters usually carry on their business that they should take a point based upon the ambiguous language of a document which they themselves have prepared, and a point which could have been cured by a signature immediately before the issue of the writ. I think the underwriters did

quite right in not pressing that point on the appeal.

Then comes the last point, which I gather is of importance to underwriters. They say that on the face of the certificate there is this clause: "In case of loss or damage happening to the property insured hereunder, if there be no representative at the place," which is presumably where the loss is discovered, "same shall be reported to the representative of the company (see list on back hereof), or, if there be no such representative at the place, to Lloyd's agent as soon as the goods are landed or the loss is known or expected, and in the event of claim arising, all documents in connection therewith are to be submitted for approval." They then say to the plaintiff: "That clause is a condition precedent to your suing; you did not report this loss to Lloyd's agent, and consequently you cannot recover."

Whether any clause in a contract is or is not a condition precedent to liability under the policy depends upon the construction of the contract in the light of evidence given as to the subject-matter of the contract. Therefore, the first step is to ascertain what is the contract between the parties in order that by the construction of that contract in its entirety you may consider and determine whether a particular clause is or is not a condition precedent to the liability under the contract. One therefore starts in the Court of Appeal by ascertaining what the contract is, but, oddly enough, the parties seem to have got along quite cheerfully in the court below without any reference to the policy which is supposed to embody the contract between the parties. The result of our endeavours to ascertain what the contract is seems to me amply to justify those judges of the King's Bench Division and of the Court of Appeal, who have said that ordinarily American certificates are not good tender under a c.i.f. contract. The certificate produced here certifies that the company insured under Policy No. 10397 certain goods described and proceeds: "It is hereby understood and agreed that in case of loss such loss is payable . . . to the order of assured or order. . . . This certificate represents and takes the place of the policy and conveys all the rights of the original policyholder . . . as fully as if the property were covered by a special policy direct to the holder of this certificate. . . ." If then, the certificate represents the policy, one has to look at the certificate in order to see what risks are covered, and there are none. There is a clause dealing with war risks, but no clause showing that the perils of the sea are insured against. It is therefore quite obvious that the certificate cannot be construed without reference to the numbered policy mentioned therein, which is said to have been issued and which the certificate is said to represent, and documents have been produced to us which are said to represent that original policy. First of all, then, there is a voyage policy, then there is something which appears to me to be an open policy, in which the agent of the company is

described as "assured, for whom it may concern"; then there is a statement of conditions said to be incorporated containing a number of conditions which regulate both the relations between the agent of the company and the company and the relations between the assured and the company; and these clauses contradict and vary and differ from the clauses printed on the certificate in all sorts of ways. I have gone through them, and I find that there are any number of matters in which the certificate differs from the conditions, and they both differ from the form of the policy. In these circumstances it is, in my view, almost impossible for the court to see what conditions govern or limit the right of payment for a proved loss by perils of the sea, or to ascertain whether those conditions are such that compliance with them is a condition precedent to the liability under the policy. The ground upon which I decide this case is that, if an underwriter who draws up a policy wants a particular condition for the purpose of limiting his liability so that if it is not complied with, although the goods are lost by perils insured against, he will not be obliged to pay, he must make that clear in reasonably plain language. In my view this certificate does not make it clear in reasonably plain language that it is a condition precedent that this particular notice shall be given.

There is another clause relating to the same matter, in the body of the policy which differs from it. In the schedule there are clauses differing both from the certificate and the policy, and I am quite unable, in endeavouring to construe the policy and the conditions contained therein, to be satisfied that this clause was intended to be a condition precedent. I understand that as a matter of business these certificates are very common in America, and that English companies transacting business in America must comply with American business requirements, and must be prepared to issue certificates. It is not for me to lecture American underwriters as to the forms in which they put their documents, but I think I may say to English underwriters of whom I do know something, that if they are going to issue documents in America which will come before English courts, they might take a little more pains to make them intelligible. But in this case the whole form of certificate and policy obviously needs a thorough overhaul and putting into intelligible terms, and as I have already said, I decide this case upon the ground first of all, that the underwriters have not satisfied me what their contract was, and secondly, that the condition of the documents is such that it is impossible for me to be satisfied that this clause is or was intended to be a condition precedent.

I will only make one more observation, and that is that I am not at present disposed to agree with the view of Sankey, J. that one way of getting out of the difficulty as to the meaning of clause 11 is to say that it is printed in illegible print. With a long experience in

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these matters I can only say that both underwriters and shipowners have given me clauses which are much more illegible and much more difficult to read, and I can read the present one with comparative ease. I am rather afraid of the doctrine that you may avoid the construction of clauses by saying that they are difficult to read. There may, of course, be extreme cases. I am not saying that in no case can you get out of it on the ground of illegibility; but the present case is, in my opinion, not one to which that doctrine ought to be applied. For these reasons I think that the appeal should be dismissed.

ATKIN, L.J.—I agree. In this case the plaintiffs upon an admission that their contract contained an agreement by the underwriters to insure them against damage by sea perils, and on the finding of the learned judge that the goods in respect of which the claim was made were damaged by sea perils, recovered judgment, and they had a right to recover that judgment unless the defendants were right in their contention. The only contention now put forward, and the only one I am considering, is whether there was a breach on the part of the plaintiff of the condition precedent in the contract of insurance that he should give notice of the loss as soon as the goods arrived.

The first question is whether that clause was a contractual term at all. The learned judge has found that it was not because he says that it forms one of a number of clauses all printed in small type, and that reasonable men acting reasonably would not notice it as a contractual term. Upon that I can only say that, judging by one's ordinary eyesight, a reasonable man could not reasonably ignore the fact that this condition was set out as a contractual term, and, therefore, has to be dealt with as forming part of the contract. The only question, therefore, is whether it is a condition precedent or not. In the first place it appears to me that in the circumstances the onus is upon the person proffering the condition precedent to show that it is in fact a condition precedent, and in order to do that he has, I think, to place the whole contract before the court in order that, if there is a dispute, the court may determine from the whole of the context whether this particular clause is a condition precedent or not. When he seeks to embark upon that task it seems to me that he fails in this particular case to satisfy me what the contract really was. At the present moment I do not myself know what the contractual documents really were. To begin with, the certificate which is the document originally produced merely certifies that the company insured under a numbered policy a named firm in England in respect of a specified quantity of sole leather heads. That does not help at all, because you are not told what it insured from or against or what the conditions of the insurance were. It then proceeds to say: "This certificate represents and takes the place of the policy, and conveys all the rights

of the original policyholder." Those certainly are very difficult words to construe; one thing, however, seems to me to be quite plain, namely, that the certificate is not a complete contract of insurance in itself because the first things you ought to ascertain are what are the risks insured against, and if I look at the certificate only, I find endorsed on the back of it a condition which states that there is no insurance against war risks, whilst on the face of the certificate I find a statement that the insurance covers also the risk of capture and seizure, the word "also" meaning in addition to some other risks which are undefined. It is perfectly obvious, therefore, that in order for the plaintiff to succeed he must make out that the policy to some extent, at any rate, is incorporated in the contract of insurance. Looking at the documents which have been handed in on behalf of the underwriters, the original policy is in its form a voyage policy on cargo, containing a great number of warranties and conditions. Then we have typewritten copies dealing with matters which it is very difficult to fit in with this certificate and which may give rights to the persons interested in a shipment when it is declared or may only give rights to the agent who has accepted proposals for insurance made to him by a third person. Whatever they are it seems to me that the clauses and the warranties and conditions in the policy must be read as part of the contract of insurance together with the clauses and warranties in the certificate. The net result of that in this particular case is that what can only be described as a jumble of documents and of clauses, is put before us, and we are asked to infer from that that the underwriters have established sufficiently clearly that one particular clause is a condition precedent. In that state of the contractual documents and clauses, all I can say is that I am not satisfied in this case, upon the evidence, that this clause was a condition precedent. Therefore, dealing with it simply upon that view of the facts and without expressing any opinion as to what the construction might be of a document framed in a different way, I think that the defendants have failed to make out that this clause is a condition precedent, and that, therefore, although the learned judge was wrong in holding that it did not form part of the contract, the defendants do not succeed in defeating the claim which the plaintiff has in other ways substantiated.

I can only say that I also entirely agree with what has been said by my Lord and by my brother Scrutton as to the importance of these documents being put as soon as may be into a form which is intelligible to commercial people.

Appeal dismissed.

Solicitors for the appellants, *Finch, Jennings, and Tree*, agents for *Weightman, Pedder, and Co.*, Liverpool.

Solicitors for the respondents, *Waltons and Co.*

APP.] *Re ROPNER SHIPPING CO. & CLEEVES WESTERN VALLEYS ANTHRACITE COLLIERIES.* [APP.]

Tuesday, March 15, 1927.

(Before BANKES and SARGANT, L.JJ., and AVORY, J.)

Re ROPNER SHIPPING COMPANY LIMITED AND CLEEVES WESTERN VALLEYS ANTHRACITE COLLIERIES LIMITED. (a)

Charter-party—Demurrage—Steamer withdrawn by owners for bunkering—Liability for demurrage during non-working hours of bunkering time.

By a charter-party dated the 15th Oct. 1925 between the Ropner Shipping Company, the shipowners, and Cleaves Western Valleys Anthracite Collieries, the charterers, it was agreed that the steamer *L.* should proceed to King's Dock, Swansea, to load a cargo of coal. The charter-party provided (*inter alia*): "(3) The cargo to be loaded in 150 running hours, excluding bunkering time, Sundays, &c. . . ." The shipowners claimed 92½ hours demurrage, amounting to 92l. 16s. 8d. Loading hours began to run at 9 a.m. on the 10th Nov. 1925. The 150 hours allowed for loading expired at 9 a.m. on the 18th Nov., and the *L.* then came on demurrage. After the 150 hours had expired the shipowners moved the ship from the exact position in which she had been taking in cargo into a position in which they could put bunkers into her, a very large amount, about 2000 tons, which they considered necessary for a long voyage. The steamer was engaged in taking in bunkers during parts of six days, and during the whole of that time, with the exception of a few hours of loading which intervened between one of the last stages of the bunkering, the steamer was withdrawn from the occupation of the loading of cargo. The question was whether the shipowners were entitled to be paid demurrage during the whole or some part of the days which were occupied in bunkering.

Held (affirming the judgment of Roche, J. on a special case stated by an arbitrator), that the steamer having been withdrawn by the shipowners for bunkering in their own interests, the shipowners were not entitled to be paid demurrage during the non-working hours of the period occupied in bunkering.

APPEAL from a decision of Roche, J. (*infra*), on a special case stated by an arbitrator.

By a charter-party dated the 15th Oct. 1925, made between the Ropner Shipping Company, the shipowners, and the Cleaves Western Valleys Anthracite Collieries, the charterers, it was agreed that the steamer *Levenpool* should proceed to the King's Dock, Swansea, and there load a cargo of coal for carriage to Vancouver. The charter-party provided (*inter alia*): "(3) the cargo to be loaded in 150 running hours (excluding bunkering time, Sundays, and certain holidays), and if detained longer the charterers to pay demurrage at a fixed rate for every running hour. With this exception the

charter contained no provision relating to bunkering.

Working hours at Swansea were from 6 a.m. to 10 p.m. on weekdays, other than Saturdays, on which days the hours were from 6 a.m. to noon. No work was done on Sundays.

The shipowners claimed ninety-two and three-quarter hours demurrage, amounting to 92l. 16s. 8d. Loading hours began to run at 9 a.m. on the 10th Nov. 1925. The 150 hours running time for loading expired at 9 a.m. on the 18th Nov. 1925, and the *Levenpool* then came on demurrage. After the 150 hours running time had expired, but before the loading had been completed, the shipowners moved the ship from the position in which she had been taking cargo to a position where she could take in bunkers, and she was engaged in bunkering during parts of six days, during the whole of which time, with the exception of a few hours of loading which intervened between two of the last stages of the bunkering, the steamer was withdrawn from the occupation of the loading of cargo. The shipowners contended that demurrage ran continuously from the expiry of the 150 running hours until the completion of the loading. But as a concession, they made no claim in respect of the time that bunkering was actually proceeding. Their claim was consequently limited to the non-working hours of the bunkering days, or, what were referred to as the night hours of the bunkering days.

The charterers contended that during the whole of the time the vessel was used solely for bunkering, and was not shifted back so as to be available for loading cargo, she was not at their disposal, and therefore that they were not liable for demurrage during that period.

The umpire rejected the charterers' contention, upheld that of the owners, and awarded that the charterers were liable to pay demurrage in respect of the night hours of the bunkering days.

ROCHE, J.—This is an award stated by an umpire in the form of a special case. The point is a small one, and so is the amount at stake, but the point emerges out of a charter-party in general form described as the Chamber of Shipping Welsh Coal Charter, 1896, and in a sense raises a point that must occur not infrequently, and is therefore of a certain general importance.

The point can be best described for the purpose of my decision by stating the actual facts in broad outline. The dispute is between the owners of the steamship *Levenpool* and a colliery company who were the charterers of that ship in Oct. 1925, to load a cargo of coal at Swansea for carriage to Vancouver. The charter-party provided that 150 hours should be allowed for loading. After that time demurrage began to run. After 150 hours had expired the shipowners moved the ship from the exact position in which she had been taking in cargo into a position in which they could put bunkers into her, a very large

(a) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

APP.] *Re ROPNER SHIPPING CO. & CLEEVES WESTERN VALLEYS ANTHRACITE COLLIERIES.* [APP.]

amount, some 2000 tons, which they considered necessary for a long voyage. The vessel was engaged in taking in bunkers during parts, at any rate, of six days, and was so engaged during the whole of that time, with the exception of a few hours of loading which intervened between one of the last stages of the bunkering. With that exception the vessel was withdrawn from the occupation of the loading of the cargo.

The question was whether the shipowners were entitled to be paid demurrage during the whole or some part of the time which was occupied in bunkering. Apparently in Swansea the loading of cargo and bunkers can take place only during sixteen hours of the ordinary working day. During eight hours no loading is done at all. The shipowners conceded before the arbitrator that they were not entitled to claim demurrage during the actual time during which loading of the bunkers was proceeding, or perhaps it would be more correct to say that they did not claim any demurrage in respect of the time of the actual loading of the bunkers, but they said that during the idle hours of the bunkering days the vessel was on demurrage because time was running.

The umpire heard arguments, upheld the contention of the shipowners, and gave them demurrage in respect of what I may describe as the night hours of the bunkering days. The question is whether that decision is right. The umpire, not unnaturally—there is no reason why he should—did not give any reasons for his decision in favour of the shipowners. The reasons advanced at the hearing on behalf of the shipowners are set out in the case, and they, or some of them, have been relied on here. I will deal with those which have been relied on here.

The main contention relied on by Mr. McNair, who argued the case very well on behalf of the shipowners, was that bunkering during demurrage time was a lawful thing which the shipowners were entitled to do, which involved no breach of contract on their part, and consequently that since demurrage time was continuous after it had once begun, the fact of bunkering did not interrupt or break or diminish the demurrage time. Mr. McNair recognised that logically and necessarily that involved the proposition that at the shipowners' wish they could charge the charterers with the actual hours or time employed in bunkering. That proposition is based upon this, that there are authorities, one of the earliest of which is the case of *Budgett and Co. v. Binnington and Co.* (6 Asp. Mar. Law Cas. 592; 63 L. T. Rep. 742; (1891) 1 Q. B. 35) and one of the most recent of which is *Alexander and Son v. Aktieselskabet Damps Hansa* (122 L. T. Rep 1; (1920) A. C. 88) to the effect that demurrage under a contract such as I am now considering runs continuously unless there are exceptions in the charter-party which excuse the charterer from the payment of demurrage for any period of time, or unless the shipowner has been

guilty of default preventing the charterer from loading the ship. The contention on the part of the shipowners with regard to that is that default means what it says, and must consist in some wrongful or unlawful act, having regard to the terms of the contract. It means wrongful act or breach of contract.

It was argued by Mr. Dickinson on behalf of the charterers, that default by the shipowner was satisfied if the responsibility for the interruption were traced to the shipowner; if it came about by reason of his acts. I am not going to decide that, because it is quite unnecessary for my decision, but had I to do so the inclination of my mind would be that the argument of Mr. McNair for the shipowners was correct. But it is unnecessary to decide that point, as will appear for reasons which I shall shortly give.

It is said, and said truly, on behalf of the shipowners, that here the bunkering did not come within any exception relating or applying to demurrage time. There was in the charter-party a provision with regard to running hours, that from them bunkering time, whatever that might mean, was to be excluded, but with regard to the demurrage time the charter-party is entirely silent. That contention for the shipowners was reinforced by the point that there was no breach of contract or wrongful act on their part in bunkering during demurrage time, in other words, that they were entitled to bunker and nevertheless to charge the time as demurrage time against the charterers. That is where, in my judgment, the argument for the shipowners breaks down. There is no express term in the charter-party allowing bunkering to be done in demurrage time. There is no allegation in the case, and no finding, and no finding of the tribunal that bunkering was necessary for the safety of the ship or for the prosecution of the loading. There is nothing whatever to show that the bunkering could not, so far as future voyages were concerned, have been done after the loading as well as before.

In that respect the case, in my judgment, differs entirely from the case of *Houlder v. Weir* (10 Asp. Mar. Law Cas. 81; 92 L. T. Rep. 861; (1905) 2 K. B. 267). There a sailing ship was being discharged and the discharge was interrupted to allow the sailing ship to take in ballast, and although some doubt has been expressed with regard to the correctness of the decision of Channell, J. in that case, in an important text-book (*Scrutton on Charter-parties*), yet I confess I do not share any doubt about the decision. It was found that the contemporaneous taking-in of ballast from time to time during the discharge was absolutely essential to the stability and safety of the sailing ship in question. Therefore, I regard the operation of ballasting the ship from time to time, not as an interruption of the discharge but as a means and method for its advancement and further prosecution. Had the facts been the same here with regard to the bunkering, my opinion

would have been the same as the opinion of Channell, J. in that case. But no such facts could be found with regard to a steamship.

In those circumstances, how does the matter stand? There has been for some time considerable discussion—an early instance of it appears in the case of *Wilson and Coventry v. Thoresen's Linie* (11 Asp. Mar. Law Cas. 491; 103 L. T. Rep. 112; (1910) 2 K. B. 405), and a quite recent instance of it appears in the case of *Aktieselskabet Reidar v. Arcos* (ante, p. 144; 136 L. T. Rep. 1; (1927) 1 K. B. 352), so, at any rate, for the period covered by those two cases there has been a discussion with regard to the right of charterers to have the ship available for loading during the period called demurrage time, after the time has expired within which the charterers undertook to load the ship. I do not know that the decisions are entirely harmonious with regard to the length of time during which the owner is bound to hold the ship available for the purposes of the charterer, or with regard to the reasons why he is bound to hold it available, but they all agree in this, that for a time exceeding the lay days the owner is bound to hold the ship available for the charterer, and the charterer is entitled to have the ship available for the purposes of his loading.

These rights seem to me to be correlative, and unless there is something either expressed in the contract between the parties or necessary to be implied from the contract, in my judgment the charterer is entitled to have the whole of the time of the ship—that is to say, the whole of the demurrage time—available for the purpose of loading, and there is no right to interrupt that time for the purpose of bunkering the ship. The same result would follow as to lay time. In my judgment it is only the words “excluding bunkering time” which allows and authorises the charterer to use lay time for bunkering on the terms that if he so uses it the time so used does not count in the lay time.

Mr. McNair argued that the words “excluding bunkering time” do not confer a right of bunkering during lay hours; they merely recognise the right and stipulate what is to be done with regard to the counting of time so used. That contention was, of course, obviously necessary, because there are no words present of a similar character with regard to demurrage time—necessary to support the contention that without express words there is a right to bunker during demurrage time. The same argument necessarily carries the logical continuation that where words stipulating what is to be done about time used in bunkering are absent, then the time used in bunkering counts against the ship.

That leads to the conclusion which I have already described as that adopted in argument by Mr. McNair. For the reasons I have given in my judgment the shipowner is not entitled under a contract in the terms of this contract to use the demurrage time for bunkering.

Consequently, he is guilty of a breach of contract. While he is so withdrawing the ship from the operation or from the possibility of loading he is not performing his contract, and the matter falls within the second head of the decisions laid down in *Budgett and Co. v. Binnington and Co.* (sup.), and loading is being prevented by the fault of the owner.

That is sufficient for the decision of this case. But I must notice two other contentions put forward on behalf of the owners. I will deal with them more briefly.

The next point taken is that there was, in the circumstances of this case, no prevention of loading, that the vessel was withdrawn from the actual place or position in which she was loading, but that had not she so withdrawn she would not have been loaded any sooner or any better. That contention would have been a formidable one had there been the facts necessary to support it. But it does not appear that the contention formed any part of the contentions of the shipowners before the umpire, nor is there any finding with regard to it. The only statement in the case on which the argument is founded is a statement that when the vessel was put on bunkers, no more cargo was then available for shipment, but there is no finding that cargo was not available, or would not have been available during the five or six days spent on bunkering after the vessel had been put on bunkers. Indeed, it rather appears that there was cargo available, at any rate at the end of the bunkering time, and that the loading of the cargo was resumed before the bunkers were all put on board because there were no more bunkers. Then the ship was again withdrawn from loading cargo to finish bunkering. To my mind there is absolutely no ground on which I ought to base a decision that the *prima facie* or natural result of what was done did not arise or happen in this case. The ordinary or natural result of taking the ship away to bunker is that she cannot load cargo, and I think the owners, in order to succeed, would have had to allege and prove that that result did not arise in this case. They have not done so and accordingly this ground fails.

The last point is this, and it is the point upon which the umpire has decided the case. It was argued that, at all events, only working time was excluded from the reckoning of the demurrage time, and that the umpire was right in deciding that the night hours fell into the category of demurrage hours. On inquiring why that result is to follow, Mr. McMair was compelled to argue, as I understood him, that two reasons applied; that bunkering time in the charter-party meant the actual time occupied as working hours in putting the bunkers on board, and that the construction recognised and adopted the view that the only time of interruption of loading was the actual time consumed in bunkering, and that by analogy or parity of reasoning, when you come to deal with demurrage time and find an interruption due to bunkering, that interruption due to bunkering only operated and delayed

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the ship and prevented the loading of cargo during the actual hours used for bunkering.

The answer to that contention is twofold. If I had to construe "excluding bunkering time" in the charter-party I should, without hesitation, construe it as the whole, whether it was day or night, when the vessel was occupied in and devoted to bunkering, whether the work was going on or not. In the second place, in my judgment, if the vessel is occupied during the whole time, that is to say, in this period of sixteen hours available for work for a purpose such as bunkering, which is opposed to and inconsistent with loading, then in my judgment and without hesitation, I should have found as a fact that she is detained during the idle time which necessarily follows upon the working time in question. So far as it is a matter of fact which is not for me, there is no finding so far as I can see of the umpire which on this matter can help the ship.

As a matter of law I hold that there is nothing to support the conclusion of the umpire that these hours were not included in the time to be taken out of the demurrage time.

Therefore, I answer the question put by the umpire by saying that in the opinion of the court the umpire was not right in holding that demurrage was accruing during the non-working hours of the period occupied in bunkering.

His Lordship accordingly gave judgment for the charterers.

The shipowners appealed.

Le Quesne, K.C. and *W. L. McNair* for the appellants.

Jowitt, K.C. and *J. Dickinson* for the respondents.

BANKES, L.J.—This is an appeal from a judgment of Roche, J., on a special case stated by an arbitrator. It raises what is undoubtedly in reference to this class of charter-party, an important question, and, to some extent, an interesting question. I wish, if I can, to make my judgment quite plain in reference to the facts upon which I consider I have to pass judgment, and to make it quite plain on the points which I do decide and the points which I do not decide or do not desire to decide. Now, the claim was for demurrage in respect of the detention of a vessel beyond her lay days. It was not in dispute that there was a breach on the part of the charterers of the obligation to load within the given lay days, and it is not in dispute that the vessel then came on demurrage under a charter which provided not for a fixed demurrage time but for a fixed payment in respect of the time upon which the vessel was on demurrage. The dispute arose in reference to the time which was occupied in bunkering the vessel during the period she was on demurrage, the shipowners claiming that they were entitled to payment at the demurrage rate for the whole of the period during which the vessel was being bunkered; that is to say, not only the working

hours during which the bunkering was proceeding, but the whole period covered by the time during which the vessel was being bunkered. The charterers, on the other hand, contended that the shipowners were not entitled to any demurrage in respect of that particular period of time.

The matter went to arbitration, and the arbitrator stated a special case. The arbitrator set out in his special case the contentions on the one side and the other. The contentions as made by the shipowners before the arbitrator are, in my opinion, confined to contentions of law, the contention being in substance that because the vessel had come on demurrage, the shipowners being occupied merely in bunkering, demurrage was as a matter of law necessarily payable during the whole of the bunkering period. The contention of the charterers, on the other hand, was that they ought not to pay demurrage at all in respect of any part of the time during which the vessel, in their own language, was used solely for bunkering. I do not think any question was raised before the arbitrator of this kind; it was not said on behalf of the shipowners, "the time occupied by bunkering was a time selected as a convenient time because there was no cargo available at the time for loading and we therefore occupied the time, which would otherwise have been wasted time, in bunkering; and that being so, it is not open to you, the charterers, to contend that you are relieved from your obligation to pay at the demurrage rate for the whole of that period." I do not understand that any such case was made before the arbitrator, and I do not think the arbitrator has dealt with the matter on that footing; he has dealt with it on the footing that the issue was, on the one side, that it was immaterial whether the cargo was available or not—as a matter of law the charterers were liable for demurrage; and on the other side it was, that it was not so because the vessel was used solely for bunkering. That was the case submitted to the court by the arbitrator. I think that was the case submitted to the arbitrator and that is the only case with which Roche, J. had, or we have, to deal with.

The charter-party was one which provided a fixed time for loading—150 running hours—and there was a provision that if bunkering took place during the running hours the bunkering time was not to count. There was no other provision at all with regard to bunkering. Therefore, the position was this: the shipowner might have selected part of the running time for bunkering; he might have decided that he would bunker during the running time, and, if he did, the exception clause would apply. He might have decided to wait to bunker until the cargo was completely loaded, in which case no question of the kind which we have to decide would have arisen; or he might have decided, as he did decide, to bunker after the running hours had expired but before the cargo was completely loaded. He therefore had the option of

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selecting one or more of those three periods. Of course, if he is right in his contention, the middle of the three periods is the most favourable for him because he would then be able to carry out the bunkering of the vessel, which in this case occupied a considerable time, and claim demurrage at the charter-party rate for the whole of that time. But, *prima facie*, that does not seem to be reasonable, although, of course, it may be the law.

Another thing one has to bear in mind in reference to the authorities which have been cited are the facts in those cases upon which the decisions were arrived at. Now three cases have been cited to us, two of them proceeding purely upon the same principle and the other proceeding on the same principle but on rather different facts. Both in the case of *Cantiere Navale Triestina v. Russian Soviet Naphtha Export Agency* (16 Asp. Mar Law Cas. 501; 133 L. T. Rep. 162; (1925) 2 K. B. 172), and in the case of *Budgett and Co. v. Binnington and Co. (sup.)*, the point was this, there being a contract time either for loading or unloading, the charterers were relieved from the obligation so undertaken by them simply because, for some cause or another, they were not able to occupy the whole of that time in either loading or unloading. It was said in those cases that in order to excuse themselves, the charterers must show that the particular facts on which they relied, as preventing the loading or unloading, were facts which came into existence because of some wrongful act on the part of the shipowners—it was not sufficient that the ship was not at their disposal, provided it was not at their disposal for some cause other than a wrongful act of the shipowners. The other case, the case of *Houlder v. Weir (sup.)*, was a decision of Channell, J., and proceeded on the same principle, but there the facts were facts which involved an act of the shipowners themselves—not an act such as a strike, as there was in the case of *Budgett and Co. v. Binnington and Co. (sup.)*, or an act of a superior force or Government, as in the *Cantiere Navale Triestina v. Russian Soviet Naphtha Export Agency* case (*sup.*). It was, in the case of *Houlder v. Weir (sup.)*, the act of the shipowners themselves, and there Channell, J., who decided the case, had regard to the special facts of that case, which were that the act of the shipowners, which prevented the charterers from fulfilling their part of the contract, was an act which was necessary to be done in order to secure safety of shipment cargo and to be done at that particular time.

I will not say what my decision would have been if the case had been presented to the arbitrator, "Oh, this bunkering, at the time it took place, was either done at that particular time in order to trim the vessel, or something of that kind, or done because at that time the shipowners had no cargo available." Nothing of that kind, in my opinion, arises here. We have to deal simply with the case that the shipowners selected this par-

ticular time in which to do the bunkering for no reason at all except that it was the most convenient time for them to do it. In those circumstances, what is the law? In my opinion the general rule laid down in Scrutton, L.J.'s book on Charter-parties which had been referred to, "When once a vessel is on demurrage no exception will operate to prevent demurrage continuing to be payable," has no application to this particular case, nor have the decisions which I have referred to in the case of *Cantiere Navale Triestina v. Russian Soviet Naphtha Export Agency (sup.)*, or in the case of *Budgett and Co. v. Binnington and Co.*, because what we have to deal with is a case where it is admitted by the charterers that they were in default.

The only question is whether under contract between the charterers and the shipowners, not contained in the charter-party, the charterers are under an obligation to pay on demurrage damages, if I may use that expression, in respect of the particular period selected by the shipowners to occupy the ship entirely for his own purposes—namely, bunkering. In my opinion, this being a claim for demurrage damages payable to the shipowners in respect of the detention of the vessel by the charterers, it does not lie in the mouth of the shipowners to say that the vessel was being detained in the way it was suggested during the time that they, for their own convenience, were bunkering the vessel—and that that decision covers the whole period, not merely the working hours during which the bunkering was actually taking place, but the whole period referred to in the arbitrator's award—namely, the period from the time the bunkering commenced until the time when the bunkering finished. I think that is, in substance, entirely in agreement with the view of Roche, J. on that point, and I think his judgment was entirely right.

A great point has been made by counsel for the appellants—the shipowners—as to the onus of proof. I do not think that that arises here, having regard to the case which was submitted by the arbitrator, and submitted by him because of the case which was fought before him. I treat this case as one in which we are asked to decide what the position in law is where the vessel has been used by the shipowners for their own purposes and for no special reason other than that it was convenient for them during the period when she was on demurrage, and that because she was being so used she was no longer available for the charterers to load. For those reasons I think the appeal fails and must be dismissed, with costs.

SARGANT, L.J.—I am of the same opinion. The short point, and the only point, which I think was decided by the arbitrator was this: demurrage having begun to run, and while the cargo had not been entirely loaded, the shipowners, for their own convenience, shifted the position of the vessel from a point where it was adapted to receive cargo, to a point where it was adapted only to receive bunker coal,

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and proceeded during a number of days to bunker the vessel, rendering it in fact impossible during that period for the charterers to continue the loading of the cargo. After that the shipowners are claiming that demurrage shall be paid by the charterers during the whole of the period during which the shipowners were using the vessel for their own purposes, and were rendering the vessel unavailable for the purposes of the charterers. To my mind that is an extremely bold claim, to say the least of it, and I do not think it is justified. It appears to me, in order that demurrage may be claimed by the shipowners, they must at least do nothing to prevent the vessel from being available and at the disposal of the charterers for the purpose of completing the loading of the cargo. That, to my mind, disposes of the case entirely.

We have had a very ingenious argument by counsel for the appellants on the question as to whether the charterers should not have shown, not only that the vessel was rendered unavailable for loading, but should also have shown that they had got cargo ready to load upon the vessel. On that point I agree with the view which has been expressed by Roche, J. It seems to me, when it is once shown that the vessel had been placed in a position, by the act of the shipowners, which rendered it unavailable for the charterers' purposes in loading cargo, that then it would have been for the shipowners claiming demurrage to show that the charterers had not in fact cargo available for loading, during the period while the shipowners were using the vessel for their own purposes, in bunkering, but that I do not think was really a point which was ever before the arbitrator or raised between the parties. I think the question that was raised and was decided was the simple question which I stated at the beginning of my judgment.

AVORY, L.J.—I agree, and have nothing to add.

Appeal dismissed.

Solicitors for the appellants, *Botterell and Roche*.

Solicitors for the respondents, *Kinch and Richardson*, agents for *Allen, Pratt and Goddard*, Cardiff.

June 29th and 30th, 1927.

(Before BANKES, ATKIN, and LAWRENCE, L.JJ.)

THE JUPITER (No. 3).

ON APPEAL FROM THE ADMIRALTY DIVISION.

Ship—Possession—Vessel formerly property of a Russian company carrying on business at Petrograd—Business carried on in France—Provisional administrator appointed by French courts in respect of property within jurisdiction—Vessel laid up in English port—Master custodian for French administrators—

Whether bailee—Union of Socialist Soviet Republics (U.S.S.R.)—Nationalisation—Russian Socialist Federative Soviet Republic (R.S.F.S.R.)—Ukrainian Socialist Soviet Republic—Vessel surrendered by master to representatives of U.S.S.R. in England—Sale by English company on behalf of U.S.S.R. to an Italian company—Indemnity—Claim to possession by French administrator—Action in rem—Affidavit by chargé d'affaires of U.S.S.R. in England alleging that vessel was property of U.S.S.R. not conclusive—Master—Possession—Whether a bailee.

There is no rule of law that the declaration of the representative of a foreign sovereign as to the ownership of property is conclusive in the courts of this country unless the foreign sovereign makes such declaration for the purpose of securing immunity from jurisdiction. Even if the question is as to the passing of property locally situated within the territory of the sovereign, and it is said that property has passed by an act of state, the act of state and its meaning and application must be proved by lawyers as a matter of fact: and the question whether the property or person alleged to be subject to the act of state was within the territory of the sovereign whose act of state is in question is equally a matter of fact to be proved by evidence.

The master of a vessel, under the conditions of modern commerce, has no possession of the ship as a bailee, but is merely a custodian for the owners. Moore v. Robinson (1831, 2 B. & A. 817) and Pitt v. Gaince (1700, 1 Salk. 10) dissented from.

The J., a vessel registered at Odessa, in the Ukraine, and formerly the property of a Russian company carrying on business with offices at Petrograd (the "Ropit") was handed over by her master to representatives in this country of the Union of Socialist Soviet Republics (U.S.S.R.) shortly after the recognition by this country of the U.S.S.R. The J. was at the time laid up at Dartmouth. Subsequently an English company, acting on behalf of the U.S.S.R., purported to sell the J. to the defendants, an Italian company. It appeared that the business of the Ropit had been transferred from Russia and was for some time carried on at Marseilles under a French translation of the Russian name of the Ropit. In 1920–21 the French courts appointed the plaintiff B. provisional administrator of the business and ships, including the J., which had formerly belonged to the Ropit. B., together with T. and M., who claimed to be carrying on with others the business of the Ropit at Marseilles under its French name, claimed possession of the J. in an action in rem.

It was contended by the defendants that the J. had been nationalised by decree of the U.S.S.R. in January 1918, and March 1919; that the J., having been at Odessa in April 1919, had been within the jurisdiction of the Russian Socialist Federative Soviet Republic (R.S.F.S.R.) or the Ukrainian Socialist Soviet Republic, of which the U.S.S.R. were the

successors. In support of this contention an affidavit by the chargé d'affaires of the U.S.S.R. in London in which the chargé d'affaires stated that the *J.* had been the property of the U.S.S.R. was put in evidence, and it was contended that this declaration by the representative of a sovereign was conclusive as to the ownership of the *J.* It was further contended that the master was in possession of the *J.* as a bailee, and had the right to possession of her.

Hill, J. held (i.) that the affidavit of the chargé d'affaires was not conclusive, the statement by the representative of the sovereign not being made with the object of securing the immunity of the sovereign from jurisdiction; (ii.) that the master of the *J.* had not possession but was merely a custodian for whoever might be entitled to possession; (iii.) that B., the provisional administrator of the business and vessels of the *Ropit* including the *J.*, appointed under the decrees of the French courts, was entitled to possession unless the defendants could establish a superior title derived by them from the U.S.S.R.; (iv.) that the defendants had failed to show that the *J.* had become the property of the U.S.S.R. under the decrees of nationalisation relied upon, or that the *J.* had ever been within the territory of the U.S.S.R. or its predecessors; (v.) and that the defendants having thus failed to establish a superior title, the plaintiff B. was therefore entitled to possession.

Held, on appeal, that the decision of Hill, J. (infra) was right.

ACTION IN REM.

The plaintiffs, the *Compagnie Russe de Navigation à Vapeur et de Commerce*, and *Claude Marie Auguste Adolphe Emile Bourgeois*, *Leonidas Tcheloff*, and *Gregoire Margoline*, on behalf of themselves and others trading as *Compagnie Russe de Navigation à Vapeur et de Commerce*, the owners of the steamship *Jupiter*, claimed to have possession of the steamship *Jupiter*. Appearance was entered to the writ by the *Cantiere Olivo Societa Anonima*, an Italian company.

The plaintiffs, the *Compagnie Russe de Navigation à Vapeur et de Commerce*, claimed by their statement of claim to be a Russian ship-owning company whose head office was originally at Petrograd, and all of whose assets were registered at Odessa (the *Ropit*). They further alleged that in or about the month of Nov. 1917 the head office was transferred to Odessa, and at the beginning of 1919 to Marseilles. The plaintiffs claimed that the plaintiff company was at all material times being administered under orders of the French courts: alternatively the plaintiffs, other than the plaintiff company, claimed to be the board of management of the plaintiff company appointed under such orders, and they claimed to be carrying on the business of the plaintiff company.

The plaintiff *Bourgeois* was in fact the official administrator appointed by the French courts.

In March 1924, whilst the *Jupiter* was laid up at Dartmouth, her master, Captain Lapine, without the authority of the plaintiffs, surrendered her to the representatives of the U.S.S.R. in this country. The plaintiffs thereupon commenced an action claiming possession of the *Jupiter*, but the writ was set aside upon the application of the U.S.S.R., who claimed that by virtue of a decree of the R.S.F.S.R., to whom the U.S.S.R. claimed to be successors, for the nationalisation of ships, they were entitled to possession of the *Jupiter* (*The Jupiter*, 16 Asp. Mar. Law Cas. 447; 132 L. T. Rep. 624; (1924) P. 236). Subsequently *Arcos Steamship Company Limited*, an English company, on behalf of the U.S.S.R. sold the *Jupiter*, free from all encumbrances and maritime liens to the present defendants, an Italian company. The plaintiffs thereupon issued the writ in the present action. A motion to set aside the writ upon the ground that the U.S.S.R. were impleaded thereby was dismissed by the President, whose decision was upheld on appeal: (*The Jupiter* (No. 2), 16 Asp. Mar. Law Cas. 491; 133 L. T. Rep. 85; (1925) P. 69.)

The defendants, amongst other defences, particulars of which fully appear from the judgment of *Hill, J.*, claimed that the *Jupiter* had become the property of the U.S.S.R. under a decree of the Council of People's Commissaries of the R.S.F.S.R., entitled "The Nationalisation of the Mercantile Marine," dated the 26th Jan. 1918, and a decree entitled "Liquidation of State Enterprises Liabilities," dated the 4th March 1919. They relied also upon an affidavit of *Christian Rakovsky*, in which *Rakovsky* stated that he was chargé de affaires in Great Britain for the U.S.S.R., and the representative of the Russian Socialist Soviet Republic and the Ukrainian Socialist Soviet Republic, members of the U.S.S.R., and that the *Jupiter* was at the time of the sale to the defendants in the possession of the U.S.S.R., and that the U.S.S.R. was the owner and entitled to the ownership of such vessel.

The facts, in so far as material, and the arguments of counsel, fully appear from the judgment of *Hill, J.*

Langton, K.C. and *Carpmael* for the plaintiffs.

Dunlop, K.C., *Dumas*, and *Harold Murphy* for the defendants.

The following authorities were referred to in the argument before *Hill, J.*, on the 21st, 22nd, 23rd, 27th, 28th, 29th, and 30th July, and the 25th and 26th Oct.

The Jupiter (No. 2), 16 Asp. Mar. Law Cas. 491; 133 L. T. Rep. 85; (1925) P. 69;

Aksionairnoye Obschestvo A.M. Luther v. James Sagor and Co., 125 L. T. Rep. 705; (1921) 3 K. B. 532;

Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse, 132 L. T. Rep. 99; (1925) A. C. 112;

Banque Internationale de Commerce de Petrograd v. Goukassow, 132 L. T. Rep. 116; (1925) A. C. 150;

Employers' Liability Assurance Corporation v. Sedgwick Collins and Co., 136 L. T. Rep. 72; (1927) A. C. 95;
Biddle v. Bond, 1865, 12 L. T. Rep. 178; 6 B. & S. 225;
Rogers v. Lambert, 64 L. T. Rep. 406; (1891) 1 Q. B. 318;
Moore v. Robinson, 1831, 2 B. & A. 817;
Pitts v. Gaince, 1700, 1 Salk. 10;
The Parlement Belge, 1888, 4 Asp. Mar. Law Cas. 234; 42 L. T. Rep. 273; 5 Prob. Div. 197;
Vavasour v. Krupp, 1878, 39 L. T. Rep. 437; 9 Ch. Div. 351;
Jeffries v. Great Western Railway Company, 1856, 5 E. & B. 802;
Eastern Construction Company v. National Trust Company and Schmidt, 110 L. T. Rep. 321; (1914) A. C. 197;
Farquharson Brothers and Co. v. King and Co., 86 L. T. Rep. 810; (1902) A. C. 325;
Hooper v. Gumm, 1867, 16 L. T. Rep. 107; L. Rep. 2 Ch. 282;
The Winkfield, 9 Asp. Mar. Law Cas. 259; 85 L. T. Rep. 668; (1902) P. 42;
Lecouturier v. Rey, 102 L. T. Rep. 293; (1910) A. C. 262;
Sea Insurance v. Russia Insurance Company of Petrograd, 1924, 20 Ll. L. L. Rep. 308;
The Lomonosoff, (1921) P. 97;
Richmond v. Branson and Son, 110 L. T. Rep. 763; (1914) 1 Ch. 968;
Russian Volunteer Fleet v. Crown, 1923, 15 Ll. L. L. Rep. 35;
Archangel Saw Mills v. Baring Brothers and Co., 1921, 37 Times L. Rep. 857;
Wilson v. Barner, 1833, 4 B. & A. 614;
Daimler Co. v. Continental Tyre and Rubber Company, 114 L. T. Rep. 1049; (1916) A. C. 307;
The Broadmayne, 13 Asp. Mar. Law Cas. 356; 114 L. T. Rep. 891; (1916) P. 64.

Jan. 14.—HILL, J. read the following judgment:—In this action the plaintiffs claim possession of the steamship *Jupiter*. The ship at the date of the writ and arrest was lying at Dartmouth. The writ was originally issued in the name of the Compagnie de Navigation à Vapeur et de Commerce, which was stated in the writ to be a corporate body according to the laws of France with their head office, 255, Rue St. Honoré, Paris. By subsequent amendments, three persons were added as plaintiffs, Mr. Bourgeois, Mr. Tcheloff, and Mr. Margoline, who were expressed to be suing on behalf of themselves and others trading as Compagnie Russe de Navigation à Vapeur et de Commerce. Appearance was entered by an Italian Company—Cantiere Olivo Societa Anonima. The defence has been conducted in the name of that company by representatives of the Union of Socialist Soviet Republics, commonly known and hereinafter referred to as the U.S.S.R. Three main questions have to be determined. First, whether the plaintiffs or any of them have given any authority to sue. Secondly, whether the plaintiffs or any of them had and have any such title to or interest in the ship as to give them the right to maintain an action of possession. The burden of those two issues is upon the plaintiffs. The burden of the third issue is upon the defendants.

It is this. Assuming that any of the plaintiffs would otherwise have had any such title or interest, whether its acquisition has not been prevented or its enjoyment destroyed by a change in the property in the ship by virtue of governmental acts of the U.S.S.R. or its predecessors in sovereignty, the Italian Company resting its right upon a transfer from the U.S.S.R. as owners and alleging that the *Jupiter* had become the property of the U.S.S.R. The first question was raised upon motion to set aside the writ and was referred by the Court of Appeal to this court. *The Jupiter* (No. 2) (16 Asp. Mar. Law Cas. 491; 133 L. T. Rep. 85; (1925) P. 69.) Now that the facts have been ascertained, it is clear that no retainer has been given by the first-named plaintiffs. There is no such corporate body according to the laws of France as the Compagnie Russe de Navigation à Vapeur et de Commerce. There is or was a corporate body of which the head office and seat of control were in Petrograd under a style of which the French title is a translation, known for short as "Ropit." It never established a branch in France; see French decree of the 23rd April 1925. It was in controversy whether it is an existing corporation. If it is non-existing, it cannot sue. If it is existing, it has given no authority to sue. The name of the Compagnie Russe de Navigation à Vapeur et de Commerce ought to be struck out of the writ as a separate plaintiff. A retainer by Messrs. Bourgeois, Tcheloff, and Margoline was not disputed. Affidavits were filed by each of them. This disposes of the question referred to the court by the Court of Appeal.

I now pass to the issues in the case, and first as to the right of the remaining plaintiffs to sue either on their own account or in a representative capacity. So far as is necessary for this part of the case, the facts are as follows:—In 1917 the *Jupiter* was one of a fleet of steamers owned by the Petrograd company—Ropit. The ships were registered at Odessa and the management of them was entrusted to a managing director stationed at Odessa. In Dec. 1917 the *Jupiter* was at Odessa, and was there also on the 26th Jan. 1918 and the 4th March 1919, and remained there till the 9th April 1919. I am not quite sure that she was not there throughout that period, but those are the specific dates mentioned in the evidence. I shall have later on to consider what was the political position of Odessa between Nov. 1917 and March 1918. But for the present purpose it is enough to say that there was no settled form of government there at that time. From March 1918 to Oct. or Nov. 1918 Odessa was in the occupation of the Austrians. From Oct. or Nov. 1918 to April 1919 Odessa was in the occupation of the French, together with Gen. Denikin. On the 9th April 1919 the *Jupiter* left Odessa; she went to Constanza and thence to the United Kingdom and thence to America. She was never again in a Russian port. Between the 28th Aug. 1920 and the 30th Sept. 1920 she was lying at Bordeaux. Except for this period

she does not appear to have been in any French port. From Bordeaux she made a voyage to America and thence to the United Kingdom. She arrived in the United Kingdom in Dec. 1920 and was then laid up in Plymouth until Sept. 1922, and at Dartmouth from Sept. 1922 until March 1924. On the 1st Feb. 1924 His Majesty's Government recognised the U.S.S.R. as the *de jure* rulers of those territories of the old Russian Empire which acknowledged their authority. On the 9th March 1924 Jacob Lapine, who had been master of the *Jupiter* since the 30th Aug. 1920, handed the ship's papers to representatives in England of the U.S.S.R. and the U.S.S.R. took actual possession of the ship. Then followed a writ *in rem* for possession, which was set aside on the ground that it impleaded the U.S.S.R. The proceedings on that writ are reported in 132 L. T. Rep. 624; 16 Asp. Mar. Law Cas. 447; (1924) P. 236. The *Jupiter* remained in the actual possession of the U.S.S.R., and in Sept. 1924 a contract of sale of the ship was entered into between the Arcos Steamship Company Limited and the Cantiere Olivo Societa Anonima. The Arcos Steamship Company Limited was acting on behalf of the U.S.S.R. By this contract the Arcos Company guaranteed the buyers against claims by third parties. Actual possession was transferred to the buyers. On the 8th Oct. 1924, while the *Jupiter* still lay at Dartmouth, a claim for the return of the ship was made by the plaintiffs on the Cantiere Olivo Societa Anonima and was refused. The writ in the present action was issued on the same day.

When the *Jupiter* left Odessa in April 1919 a number of other ships which formed part of the Ropit fleet left at the same time. A number of them proceeded to France. By the summer of 1920 some persons were carrying on business in France under the style of Ropit, or of its French equivalent—the Cie Russe de Navigation à Vapeur et de Commerce. They were managing from an office in Marseilles the Ropit ships which had left Odessa. I was given no precise information as to who these persons were. It would appear from the decrees of the French courts that they included some who were shareholders in the Petrograd company, and the names of a few such shareholders were given by M. Bourgeois in his evidence. It would also appear from the decrees that Admiral Kanine was taking an active part in the management. According to the evidence of Mr. Kriloff, Admiral Kanine had been a director of the Petrograd Company. Mr. Alexieff in his evidence spoke of the management of the ships being in Admiral Kanine under authority of Mr. Lefter, who had been managing director at Odessa of the Petrograd company and who at about this time appears to have been carrying on business in the name of Ropit at Sebastopol, then in occupation of General Wrangel. The French decree of the 3rd Dec. 1920 throws doubt upon the authority of Admiral Kanine as derived from Mr. Lefter. All I can say is that there were in France a number of persons

actually carrying on business under the name of the company and actually managing the ships. The managing office was at Marseilles. There was also an office at Paris, which I gather was the head office. These persons had no communication with Petrograd and did not act under any orders from anyone in Petrograd. Nor did they recognise the authority of the Soviet Republics.

Jacob Lapine was appointed master of the *Jupiter* on the 30th Aug. 1920. He had been in the service of Ropit for twenty-six years. He had left Odessa in another Ropit ship, the *Possaduiky*, and the French decree of the 8th June 1920 shows that he was still master of that ship as late as the 8th June 1920. It was not in so many words stated in evidence by whom he was appointed to the *Jupiter*. It is rather unfortunate that instead of the master being called before me on the trial of this case use was made of his affidavit and the cross-examination of him upon the original motion in the first application, a cross-examination which was not directed to many of the points which called for elucidation when it came to the final trial of the case, but I must make the best of the material I have got from him. He said that at Marseilles he was ordered to take over the command. Alexieff who was appointed chief engineer of the *Jupiter* in Sept. 1920 said that he himself was appointed by the Marseilles office of Ropit. Lapine said that he was paid by the Direction in Paris. A number of his receipts were put in, dating from May 1921 to March 1924. They relate to payments for wages, food allowances and other laying-up charges. They read: "Received from the Marseilles office of the Russian Steam Navigation and Trading Company." On the 13th May 1922 he signed an agreement adopting an agreement concluded in Marseilles on the 1st March 1922 and expressed to be "between the board of Ropit and the staff of the steamers." All I can definitely say is that Lapine was appointed master of the *Jupiter* by persons carrying on business in France under the style of Ropit or its French equivalent, and until March 1924 he was paid by and acted under the orders of those persons or of persons in France appointed under the French decrees to be presently mentioned. This at any rate is clear, that he was not appointed by the Petrograd office of Ropit or by anyone having the authority of the Petrograd company, if the Petrograd company still existed in 1920, nor was his appointment ever ratified and adopted by the Petrograd company. It is also clear that until the U.S.S.R. took possession in March 1924 Lapine was in no sense the servant of the U.S.S.R.; he was not appointed or paid or controlled by it.

It is in my opinion important to understand the position of Lapine. One point made for the defendants was that the person in possession of the *Jupiter* in March 1924 was Captain Lapine. This was put in different ways. One suggestion was that, having been appointed master by the Petrograd company and being

unable to communicate with his principals, he possessed as *negotiorum gestor* of the Petrograd company. This suggestion falls to the ground when it is found that he never was appointed to the *Jupiter* by the Petrograd company. Another suggestion was that at common law the master of a ship has possession of it, as a bailee. Mr. Dunlop cited *Moore v. Robinson* (1831, 2 B. & A., 817), which accepted and applied *Pitts v. Gaince* (1700, 1 Salk. 10). But at the present day it is, in my opinion, impossible to regard the master as the bailee of a ship. In former days when the master on a foreign voyage passed altogether beyond the control of the owners and perhaps sold the outward cargo and bought a homeward cargo on owners' account, it might be possible to regard him as bailee of ship and cargo. Similarly, in the seventeenth century the master seems to have been treated as the employer of the crew and responsible for the wages of the crew and responsible for their negligence: (see Marsden, 8th edit., p. 73, note D.). But to the conditions of modern commerce these considerations are quite inapplicable. The point is discussed by Pollock and Wright on Possession in the Common Law at pp. 60 and 138-9. After stating the rule that where an owner delivers a thing to a servant to be by him kept, used, carried or applied in the course of his employment as a servant . . . the master's possession continues, they add "it may be that it will sometimes as against strangers be treated as a possession in cases where the servant's charge is to be executed at a distance from the master and where the manner of the execution is necessarily left in a great degree to the discretion of the servant." In my judgment, Captain Lapine never was in possession of the *Jupiter*, nor had he at any time the right to possession. He was a custodian merely. The person for whom he was custodian was in actual possession. And the question is for whom was Captain Lapine custodian?

This brings me to the decrees of the French tribunals. It is by virtue of these decrees that Messrs. Bourgeois, Teheloff and Margoline contend that they had actual possession and the right to possession of the *Jupiter* in March 1924, when, as they say, their servant, the master, wrongfully allowed the representatives of the U.S.S.R. to take possession. Lapine, as I have said, became master of the *Jupiter* on the 30th Aug. 1920. Four days later, on the 3rd Sept. 1920, upon his application, the Commercial Tribunal of Marseilles appointed Maître Pelen "provisional administrator with power and mandate to watch over the interests of the Compagnie Russe de Navigation à Vapeur et de Commerce in the exploitation of the *Jupiter*." The *Jupiter* at the time was at Bordeaux and not at Marseilles. Some question was raised before me as to the jurisdiction of the Marseilles court, but upon the evidence I am satisfied that the decree of the Marseilles court would be recognised as binding in France. A similar order had been made on the 8th June 1920, with regard to six other Ropit ships,

including the *Possaduiky*, of which Lapine was then master, and it would appear from later decrees that similar orders were made with regard to other Ropit ships. There were a number of subsequent decrees, but the decree of the 3rd Sept. 1920 was the only one made while the *Jupiter* was in France. The effect of these later decrees may be summarised as follows. I think it will be well to go through them, though it may be that the rights of the plaintiffs, if any, depend upon the decree of the 3rd Sept. On the 3rd Oct. 1920 Admiral Schramshenko and others, including Admiral Kanine, claiming to act in the name and on behalf of the Compagnie Russe de Navigation à Vapeur et de Commerce, moved to set aside the decrees obtained by the masters of thirteen ships (of which the *Jupiter* was not named as one), but the court rejected the motion and confirmed Maître Pelen as provisional administrator, and directed that he should consult with Admiral Kanine, and, if necessary, form a shareholders' committee of inspection. On appeal, the Court of Appeal, on the 20th June 1921, confirmed this decree. On the 9th Aug. 1921, on the motion of John Cockerill Limited, as creditors of the Compagnie Russe de Navigation à Vapeur et de Commerce, the Commercial Tribunal of Marseilles extended the powers of Maître Pelen as administrator of the ships (including by name the *Jupiter*) and extended his administration to other property of the company outside Russian territory. This decree was expressed to be made "in order to provide for the payment of the creditors of the company and the protection of the interests both of the navigating staff and the shareholders." On the 12th Aug. 1921 the Commercial Tribunal of Marseilles, by decree, reciting *inter alia* that the tribunal had appointed Maître Pelen provisional administrator of the ships, appointed M. Jaujon co-administrator with Maître Pelen. In his application Maître Pelen had included the *Jupiter* in the list of ships of which he was provisional administrator. On the 23rd Sept. 1921 there came before the Commercial Tribunal at Marseilles a number of applications to vary the decrees of the 9th Aug. 1921, and the 12th Aug. 1921. These applications were on the part (1) of the captains interested; (2) of Admiral Kanine; (3) of the members of the committee of inspection, which it appears had been constituted on the 28th Jan. 1921. Maître Pelen, M. Jaujon, and John Cockerill Limited were also parties. The *Jupiter* is one of the ships enumerated in the judgment. A decree was made confirming Messrs. Pelen and Jaujon as "provisional administrators of the Ropit, but to discontinue their functions on the reconstruction of the said company," but directing them to form a board of directors to take the place of the committee of inspection; the board to be composed of the two provisional administrators, one member to be chosen by the captains of the ships, and two members to be chosen by shareholders. The board was given the widest powers, and especially those enumerated in the decree of the 9th Aug. 1921,

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and one of the provisional administrators was to be a party to all financial engagements and important transactions. Then follow a group of decrees of the 13th June 1922, the 3rd Jan. 1923, and the 25th Jan. 1923, the effect of which is that a M. Batellet was directed to be substituted for Messrs. Pelen and Jaujon as provisional administrator. From these decrees it appears that Mr. Tcheloff had been appointed by the captains as a member of the board of directors, and Messrs. Brodsky and Margoline had been appointed by the shareholders. The decree of the 25th Jan. 1923 conferred on M. Batellet all the powers conferred on Maître Pelen by the decree of the 9th Aug. 1921, and did away with the board of directors. From the recitals of the next decree it appears that in fact M. Batellet never acted, and that Messrs. Pelen and Jaujon continued to act as provisional administrators, and that Messrs. Tcheloff, Brodsky, and Margoline were anxious to continue as members of a board of directors. The decree is dated the 10th April 1923. It appoints M. Bourgeois provisional administrator in place of M. Batellet of the property situated outside Russian territory of Ropit, and declares that the board of directors, consisting of the provisional administrator and of the Russian members, appointed either by the shareholders or by the captains, shall have the fullest powers as regards the management of the affairs of the company, and in particular those referred to in the judgment of the 9th Aug. 1921, but the provisional administrator is to be a party to all financial engagements and important transactions. This is the last of the decrees before March 1924. It is, however, necessary to add that on the 23rd April 1925, the U.S.S.R. applied to the Commercial Tribunal at Marseilles to cancel the decree of the 10th April 1923, and allow the U.S.S.R. to retake possession of the vessels of Ropit. This was refused and the refusal confirmed by the Court of Appeal on the 23rd Dec. 1925. I mention this decree because the recital states that the provisional administration was for the purposes of attending to the interests of the shareholders of Ropit, the members of her crews, and to safeguard the interests of creditors until it is possible for the legal owners of the property of Ropit to re-enter into possession of their property. I should add that M. Bourgeois was still provisional administrator in March 1924, and so continues. Of the three elected directors, Mr. Brodsky is dead. But Mr. Tcheloff and Mr. Margoline were directors in March 1924; and so continue. M. Bourgeois gave evidence before me. He said that he administered the *Jupiter* as he did the other ships; he paid the wages, &c.; he rendered his accounts annually to the court. It appears from the decrees themselves that the provisional administrator was accountable to the court.

What is the effect of the decrees as to the possession of the *Jupiter*? On this point I had the benefit of the evidence of French advocates. M. Allemes, called by plaintiffs, had no doubt that a provisional administrator has legal

possession of property which he has to administer. He said that the decree of the 3rd Sept. 1920 gave the administrator legal possession of the *Jupiter*. He said that the later decrees had the same effect. But these were made at a time when the *Jupiter* was not in France. The decree of the 3rd Sept. 1920 was made while the *Jupiter* was in France. There may be difficulties in this court recognising a right to possession given by a French court to a ship which was neither French nor in French territory, and which never, after the right was conferred, came within French territory. But no such difficulty arises as to a decree made while the ship was in the jurisdiction of the court which made it. If M. Allemes' view of French law is right, the decree of the 3rd Sept. 1920 gave Maître Pelen the legal possession, the right to possession, of the *Jupiter*. M. Duhamel, called by the defendants, did not contradict this evidence of M. Allemes. He said that the decrees did not pass the property to the administrator. No one had suggested that they did. Indeed the decrees all proceed upon the assumption that the original company was still existing and the property in it, and they provide for administration until the legal owners re-enter into possession. Apart from the evidence of the French lawyers, I should be of opinion that the effect of the decree of the 3rd Sept. 1920 was to give the appointed administrator the right to possession of that which he was to administer, namely, the ship. I know not how else he was to administer it. I infer from the decrees that there was some controversy between the masters of the ships and the persons carrying on the business in France, and that the administrator was at first appointed to prevent those persons dealing with the ships as they chose. Afterwards the interest of creditors and shareholders was considered, and the conflicting claims of the masters and the shareholders were met by entitling each to appoint directors to assist the administrator. But throughout the administrator was maintained, under appointment by the court and answerable to it, and all attempts to get rid of a judicial administration of the ships were rejected by the court. I hold that the decree of the 3rd Sept. 1920 gave to Maître Pelen the right to possession of the *Jupiter*, and that this was a possession on his own account and not as agent for the Petrograd Company or anyone else. It was a possession under the court. The administrator was appointed by the court, could only be discharged by the court, rendered accounts to the court, and was answerable to the court for his administration. His possession was none the less his own possession because it was for the purpose of preserving the ship for the true owners. Maître Pelen continued to be sole administrator until the 12th Aug. 1921. From that date to the appointment of M. Bourgeois on the 10th April 1923, he and M. Jaujon were co-administrators. This covers the period of the *Jupiter's* voyage from Bordeaux to America and thence to the United Kingdom

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and her laying up at Plymouth and transfer to Dartmouth and part of the time she lay there. For the rest of the time at Dartmouth up to March 1924 M. Bourgeois was administrator. If I must give effect to the decree of the 3rd Sept. 1920, I think I must equally give effect to the later decrees so far as they merely substitute one person for another as administrator. It seems to me that the jurisdiction of the French court to make such substitutions does not depend on whether the *Jupiter* was or was not in France at the time they were made. If I am wrong in this, the difficulty would be removed by the addition of Maître Pelen as a plaintiff in the alternative. The legal position would in that case be this: right to possession in Maître Pelen under the decree of the 3rd Sept. 1920, and ship in custody of those who at his request were appointed to exercise his rights, for the substitution was made at the instance of M. Pelen. The point is therefore one of form and not of substance. The result is that I hold that M. Bourgeois was entitled to possession of the *Jupiter* in March 1924. If so, it is not of much importance whether the right to possession belonged to M. Bourgeois only or to M. Bourgeois jointly with Messrs. Tcheloff and Margoline. The evidence of the French lawyers was not, I think, directed to this point. On the whole I have come to the conclusion with some doubt that the right of possession was in M. Bourgeois only. It follows that the custody of Captain Lapine was for M. Bourgeois, as it had previously been for Maître Pelen. Captain Lapine was under the orders of and paid by the administrator for the time being and was custodian of the ship for him. He was the servant of the administrator. Whom else could he have sued for his wages, who else could have dismissed him? If he had incurred liabilities for necessities on account of the ship, who else but the administrator would have been liable *in personam*? If all this that I have just now said does not apply to the administrator alone, it applies to the administrator together with the other members of the board, namely, Tcheloff and Margoline. But, as I have said, I think it is the administrator alone. The practical effect is just the same whether the right be in M. Bourgeois alone, or in Bourgeois, Tcheloff and Margoline; it is a mere question of who recovers the judgment. It is quite enough for the plaintiffs if one recovers, or if all three, if they are entitled to recover.

The result of these considerations is that in March 1924, when Lapine allowed the U.S.S.R. to take possession of the ship, M. Bourgeois was in actual possession and had the right to possession. Lapine may have acted as a loyal subject of the U.S.S.R., but he betrayed his trust to his employers. *Primâ facie* the act of Lapine was wrongful. *Primâ facie* M. Bourgeois, who had possession in fact and law, was wrongfully deprived of possession in fact. *Primâ facie*, M. Bourgeois is entitled to recover possession. His right does not depend merely upon a right to sue given by the French decrees.

It depends upon possession and right to possession in England, and wrongful dispossession in England, and the ship is under the arrest of this court. Once this fact—possession and right to possession in this country—is grasped, a good deal of the argument as to the right to sue, based upon a consideration of the cases of *Russian Commercial and Industrial Bank v. Le Comptoir d'Escompte de Mulhouse* (132 L. T. Rep. 99; (1925) A. C. 112; *Banque International de Commerce de Petrograd v. Goukassow* (132 L. T. Rep. 116; (1925) A. C. 150); and *Employers' Liability Assurance Corporation v. Sedgwick Collins and Co.* (136 L. T. Rep. 72; (1927) A. C. 95) is not material. If M. Bourgeois had possession and the right to possession here, and was dispossessed here, there can be no question as to his right to sue here. Judgment must be pronounced in his favour, unless the Cantieri Olivo Societa Anonima can show that the U.S.S.R. who sold the ship to them, had a superior title. It is upon the title of the U.S.S.R. that the Cantieri defend. It is not said that the Petrograd company is still the owner of the *Jupiter*, or that it, as owner, has a superior title to the possessory title of M. Bourgeois, or that the condition of the French decrees, the re-entry of the Petrograd company into possession, has been fulfilled. The defendants' case is that before March 1924 the Petrograd company had ceased to exist, and that all its property, including the *Jupiter*, had passed to the U.S.S.R.

Before I deal with that part of the case, it will be well to dispose of the suggestion that, apart from a right by virtue of the French decrees, Messrs. Bourgeois, Tcheloff and Margoline are in some way entitled to sue in a representative capacity. I am unable to find any facts on which such a claim can be based. Before I can recognise such a claim, I must know whom they represent, and find that the persons they represent were entitled to possession of the *Jupiter*. But the evidence leaves me very much in the dark. I know that there were some shareholders of the Petrograd company in France, but have no satisfactory evidence who they were. And I have nothing upon which I can find that they had, or were entitled to, possession. Indeed, the main contention of the plaintiffs, possession by the administrator, is inconsistent with possession in other persons. The decrees themselves show that the possession by the administrator was adverse to a possession by the persons in France, whether shareholders or others, who before the appointment of an administrator, were managing the ships in France.

I now come to the question whether a title superior to that of the administrator has been established. The Cantieri Olivo Societa Anonima set up a superior title derived from the U.S.S.R. as owners. Strictly the transfer to the Cantieri was not proved—for the contract of sale contemplated a bill of sale, and the bill of sale was not produced. It was said that it was filed with the authorities in

Italy and could not be produced. But no certified copy was produced. The point, however, is not material. In any case the Cantiere Olivo have to establish the right of the U.S.S.R., and are entitled to rely on the right of the U.S.S.R., from whom they derive possession, and upon whose title and by whose authority they are defending: (see *Biddle v. Bond*, 1865, 12 L. T. Rep. 178; 6 B & S., 225; and *Rogers v. Lambert* (64 L. T. Rep. 406; (1891) 1 Q. B. 318). This consideration makes it unnecessary to examine matters to which much evidence was directed, namely, the form of the authority of the Arcos Company to sell, and the form of sale required by Russian law. What is pleaded is that, by virtue of a decree of the Soviet Government of the 26th Jan. 1918 the *Jupiter* became the property of the Soviet Government, and that by virtue of a decree of the 4th March 1919 the Petrograd company ceased to exist. Evidence was given on the one side and the other by a number of Russian gentlemen, some of them lawyers, upon matters of law and the constitutional history of Russia since 1917; there was also evidence as to what was done in the carrying out of the decrees. My difficulty, in dealing with this conflicting evidence upon matters which are in themselves obscure, is increased by the fact that these witnesses were not even agreed as to the correct translation of documents put in evidence.

But before I come to these witnesses, I have to consider a point made by Mr. Dunlop, which, if sound, concludes the matter, and relieves me from any further consideration of the evidence. It is therefore naturally a very tempting proposition. An affidavit by Mr. Christian Rakovsky, sworn on the 25th Nov. 1924, was put in. He stated that he was chargé d'affaires in Great Britain for the U.S.S.R., and that at the time of the sale to the defendants the U.S.S.R. was in possession of the *Jupiter* and was the owner, and entitled to the ownership of such vessel. Mr. Dunlop's contention is that that statement by the representative of the U.S.S.R. is conclusive as to the fact stated and must be accepted by this court. This contention was before the Court of Appeal on the hearing of the motion to set aside the writ in this action, and was referred to by Atkin, L.J. (16 Asp. Mar. Law Cas. 491, at p. 495; 133 L. T. Rep. 85, at p. 88; (1925) P. 69, at p. 78). What authority is there for the proposition that in the courts of this country the declaration of a foreign sovereign is conclusive evidence that personal property in this country was or is the property of the foreign sovereign? I believe that that proposition holds good only in the case where the jurisdiction of the court, or other jurisdiction of the Crown, is sought to be enforced against property, and in such cases is limited to the declaration that the property is the property of the foreign sovereign. It is involved in the principle that a foreign sovereign and his property are immune from the jurisdiction of the Crown, unless the foreign sovereign chooses

to submit to it. Professor Dicey, Conflict of Laws, 3rd edit. p. 217, after stating the rule as to the immunity of a foreign sovereign from the jurisdiction, says: "The immunity, moreover, applies to the property of the sovereign to the fullest extent, provided that the property is shown to belong to the sovereign." But where jurisdiction is invited over property in this country, as, for instance, by a writ *in rem*, the declaration of the foreign sovereign that the property is his must be accepted, for to investigate the truth of that declaration would be to determine the very question of jurisdiction which is in issue, and to exercise jurisdiction over the foreign sovereign, which the court cannot do against the will of such sovereign. I have always so understood and in many cases applied the judgment of Brett, L.J. in *The Parlement Belge* (1888, 4 Asp. Mar. Law Cas. 234; 42 L. T. Rep. 273; 5 Prob. Div. 197). But what authority is there for saying that where no question of immunity from jurisdiction is involved, the declaration of the foreign sovereign as to the ownership of property must be accepted? And on what principle can such a rule be based? Let me, first of all, consider it on principle. Suppose the foreign sovereign did not claim immunity and submitted to the jurisdiction, and the question before the court was whether the property was, or was not, in the foreign sovereign, must the declaration of the foreign sovereign be accepted as conclusive? If so, then the declaration of a foreign sovereign would have greater weight than a declaration made on behalf of the King. In a question between the Crown and a private person as to the property in chattels here, it surely would not be conclusive if a minister of state made oath that the property was in the Crown. *A fortiori* is the declaration of a sovereign to be accepted as conclusive when a question as to property is litigated between private persons, and the evidence produced by one of them is a declaration by a sovereign that the property had been in it? Moreover, if the declarations of a sovereign as to the ownership of property, not made for the purpose of securing immunity from jurisdiction, are to be conclusive, there is no reason why the same force should not be given to all other declarations. Why call foreign lawyers to prove the fact or the effect of foreign law, if a simple declaration by the representative of the foreign sovereign would be conclusive? What was the necessity of sect. 7 of the Evidence Act 1851, so far as foreign acts of state were concerned, if already such acts of state were conclusively provable by a declaration of the representative of the foreign sovereign? Even if the question in issue be the passing of property locally situate in a foreign country, is it clear that the declaration of the foreign sovereign is conclusive? Undoubtedly property passes according to the law of the place where it is situate. But if it is said to have passed by an act of state of the foreign sovereign, is not that a fact which must be proved in the

ordinary way by proof of the act of state, of its application to the property and of the local situation of the property? For instance, the property in a ship is said to have passed under a sale by a maritime court following a judgment *in rem*. Must not the judgment be proved? I cannot believe that a declaration by the representative of the sovereign of the court which condemned the ship must be accepted as conclusive proof. In every such case the question seems to me to be one of fact, to be determined by evidence. The act of state must be proved by lawyers, unless it can be proved as provided by the Evidence Act 1851. The meaning and the application of the act of state must also be proved by lawyers. The question whether the property or person alleged to be subject to the act of state was within the territory of the sovereign whose act of state is in question, is equally a matter of fact to be proved by evidence. And on all three points it seems to me that the evidence of the representative of the sovereign carries no more weight than that of any other competent witness.

Mr. Dunlop relied upon what was said by Scrutton, L.J., in *Aksionairnoye Obschestvo A.M. Luther v. James Sagor and Co.* (125 L. T. Rep. 705, at p. 715; (1921) 3 K. B. 532, at p. 555). The decision in *Sagor's* case is not in point, for the decree of the Russian Socialist Federative Soviet Republic was admitted and it was treated as having the effect of nationalising the goods in question, which at the time the decree was passed were admittedly within the territory of the R.S.F.S.R. The decision only applied the principle that the validity of the acts of an independent sovereign in relation to property and persons within its jurisdiction cannot be questioned in the courts of this country. Scrutton, L.J. points out that if the Russian Government had itself brought the goods into this country, and by its representative declared that they were the property of the Russian Government, the courts here could not investigate the truth of the allegation. This I understand to refer to a claim against the Russian Government. It is a statement of the rule that the Russian Government is immune from the jurisdiction of our courts. "It is impossible," he says, "to recognise a government, and yet claim to exercise jurisdiction over its person or property against its will." He says further, and it is on this that Mr. Dunlop relies: "If it (the court) could not question the title of the Government of Russia to goods brought by that Government to England, it cannot indirectly question it in the hands of a purchaser from that Government, by denying that the Government could confer any good title to the property. This immunity follows from recognition as a sovereign state." I am not sure that I follow the use of the word "immunity" in this connection. Immunity, as I understand it, means immunity from jurisdiction. But the words are spoken with reference to an admitted state of facts, namely, that the goods were in the territory

of the Russian Government, and while there became subject to an act of state of that Government, whereby they became the property of the Russian Government. In such a state of facts our courts could not deny that the Government could confer a good title to the property. It is governed by the general principle that "every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." In my opinion, nothing that was said in *Sagor's* case (*sup.*) establishes Mr. Dunlop's proposition. In *Vavasour v. Krupp* (1878, 39 L. T. Rep. 437; 9 Ch. 351) the court did consider an argument directed to show that the shells were not the property of the foreign sovereign, and pronounced it to be fallacious; though, as the proceedings were really directed against the shells, and the representative of the foreign sovereign declared them to be his property, it would look as if the case might be within the principle of *The Parlement Belge* (*sup.*) to which I have already referred. *Vavasour v. Krupp* (*sup.*) was decided the year before *The Parlement Belge*. I hold that Mr. Rakovsky's declaration is not conclusive.

I must consider the evidence to see whether the *Jupiter* became the property of the U.S.S.R. or of any one of the Republics which together form the Union. The two which are material are the Russian Socialist Federative Soviet Republic—the R.S.F.S.R.—and the Ukrainian Socialist Soviet Republic, which I will refer to as the Ukrainian S.S.R. If I understand the defendant's case, it is put thus: Firstly, that the decrees of the R.S.F.S.R., which were acts of state having legislative effect, made on the 26th Jan. 1918 and the 4th March 1919, dissolved the Petrograd company and transferred all its property, including the *Jupiter*, wherever that property was situated, to the R.S.F.S.R. Secondly, if the decrees did not in themselves dissolve the company and transfer the property, they provided for the liquidation of the company and the transfer of the property wherever situated, and that long before March 1924 the liquidation was completed and the transfer made.

These two contentions are independent of the question whether the *Jupiter* ever was within the territorial sovereignty of the R.S.F.S.R. They are based upon the fact that the head office of the company was in Petrograd, which undoubtedly was within the territorial sovereignty of the R.S.F.S.R.

Thirdly, they say as an alternative that in the end of 1917 and the beginning of 1918 political power in Odessa was in the hands of Soviets there, and that they, acting as members of or recognising the sovereignty of the R.S.F.S.R., seized the ships, and thereby made them the property of the R.S.F.S.R., or that their seizure, if made before the decree of the 26th Jan. 1918, was nevertheless a seizure for the R.S.F.S.R., and that the decrees

coupled with the seizure transferred the property to the R.S.F.S.R.

Fourthly, it is said as a further alternative, that the Soviets at Odessa seized the ships as an independent sovereign, and that the Ukrainian S.S.R., which subsequently came into existence and thenceforward exercised sovereignty in Odessa, is to be regarded as the successor of those who so exercised sovereignty in Odessa at the end of 1917 and the beginning of 1918.

These third and fourth contentions have regard to the fact that the *Jupiter* was at Odessa. In considering these, it is vital to remember that from March 1918 to the 9th April 1919, though the *Jupiter* was at Odessa, yet Odessa was not territorially within the sovereignty of either the R.S.F.S.R. or the Ukrainian S.S.R. (which indeed had not come into existence) or of any persons to whom they can be regarded as successors in title, nor within the sovereignty of any persons who were of Bolshevik principles, or minded to confiscate private property. Whoever the persons were who seized the ships before March 1918, they exercised no sort of political power in Odessa during the occupation of the Austrians and the French, except possibly for a few days in the autumn of 1918, between the Austrian and French occupations. And before the French left, the *Jupiter* had already left Odessa, and was never thereafter within the territory of either the R.S.F.S.R. or the Ukrainian S.S.R.

As to the first contention, it seems to me that the decrees as to shipping enterprises of the 26th Jan. 1918 and the 4th March 1919 go no further than the decrees as to banking and insurance enterprises, which were considered by the House of Lords in *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse* (sup.), as to banking, and *Employers' Liability Assurance Corporation v. Sedgwick Collins and Co.* (sup.), as to insurance. To adopt the words of the Lord Chancellor in the latter case, the decrees for nationalising shipping companies, which have been put in evidence, were, at least, not stronger than the decrees for nationalising the banking and insurance companies. If so they did not in themselves dissolve the Petrograd company, but merely at most provided for its liquidation. The question whether they nevertheless transferred at once the property of the company was the second question mentioned by the Lord Chancellor in the *Mulhouse* case: "Have they proved that the property in the bonds in dispute is no longer in the appellant company?" But the Lord Chancellor said it was unnecessary to consider the question, for counsel had deliberately refrained from arguing the question whether a Russian decree could confiscate foreign bonds which were in this country. Mr. Dunlop has not refrained from contending that the effect of the decrees was at once to transfer to the R.S.F.S.R. the property in the ships of the company wherever situate.

Two questions are here involved: First, whether they at once transferred the property; and, secondly, whether they transferred the property, though it was not locally situate within the territory of the R.S.F.S.R. As to the first, it seems to me that if the decrees only provided for the liquidation of the company, they equally only provided for the transfer of the property upon the completion or in the course of the liquidation. I express this view with some hesitation, because I observe that in *Employers' Liability Assurance Corporation v. Sedgwick Collins and Co.* (sup.) Lord Sumner treats the *Mulhouse* case (sup.) as deciding that the decrees as to banking companies "did not dissolve the companies themselves, but only stripped them of their assets and destroyed their goodwill by making banking a state monopoly."

If the view I have expressed is the true view of the decrees considered in themselves, I am quite unable to arrive at a contrary decision upon the most conflicting evidence called before me. It is for the defendants to satisfy me that the decrees were legislative acts, and that they had the effect alleged. They have wholly failed to do so.

As to the second question—that is the question whether the decrees transferred the property wherever situated—it was not suggested that ships were to be governed by any principles other than those applicable to other chattels. If the *Jupiter* was not within the territory of the R.S.F.S.R., I do not see how the mere passing of a decree could transfer the property. This seems to me to be recognised in all the cases: see, for instance, Atkin, L.J. in *Goukassow's* case (129 L. T. Rep., at p. 729; (1923) 2 K. B., at p. 693) and Sargant, L.J. in *Sedgwick Collins and Co.'s* case, in the Court of Appeal (133 L. T. Rep., at p. 871; (1926) 1 K. B., at p. 15), and the Lord Chancellor in the same case (136 L. T. Rep., at p. 74; (1927) A. C. 95, at p. 102). The Lord Chancellor treats it as obvious that the property and rights of the company in countries foreign to Russia are not effectively taken from it by the Russian legislation. I am strengthened in this opinion by the view taken by the R.S.F.S.R. itself, as set forth in two circulars. The first, No. 42, is dated the 12th April 1922, and was addressed by the People's Commissariat for Foreign Affairs to the Plenipotentiary Representatives of the R.S.F.S.R. abroad. It sets forth that "the regime of property rights established by decrees of the Russian Soviet Power regulates property relations on the territory of the R.S.F.S.R. only." And continues: "But relations in connection with property rights where the objects thereof are outside the territory of the R.S.F.S.R. and are not connected with such territory, cannot be discussed outside the boundaries of the R.S.F.S.R. in accordance with Russian laws, and are determined by local legislation without regard to the nationality of the subjects of such rights, even if such subjects were Russian citizens."

The second, No. 194, is a circular under date the 26th Sept. 1923. It is issued by the

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People's Commissariat of Justice to all district courts. It was issued after the union of the R.S.F.S.R. and the Ukrainian S.S.R. had been formed, but in terms applies only to citizens of the R.S.F.S.R. It states that "property rights of citizens of the R.S.F.S.R. which have to be enforced outside the boundaries of the U.S.S.R. are to be determined by the laws of the country where such rights are to be enforced." These circulars show that the R.S.F.S.R. recognise and enforce the general principle that the passing of chattels is governed by the law of the place where they are locally situate, and in particular they recognise that the nationalising decrees do not operate upon property outside the territory of the R.S.F.S.R.

It will be convenient to examine the question whether the *Jupiter* ever was within the territory of the R.S.F.S.R. when I consider Mr. Dunlop's third contention. But I may at once say that I find, for reasons to be stated presently, that it is not proved that the *Jupiter* ever was within the territory of the R.S.F.S.R.

As to the second contention, the view that the decrees could not transfer property which was not in the territory of the R.S.F.S.R. applies equally whether the liquidation was completed or not. Moreover, at the date of completion, if completion ever took place, the *Jupiter* certainly was not in territory of the R.S.F.S.R., even supposing that Odessa was in such territory, from Nov. 1917 to March 1918. The liquidation is said to have been completed in Dec. 1918, at a time when Odessa, where the *Jupiter* lay, was in the occupation of the French and General Denikin. If it was completed by Dec. 1918, I am puzzled by the defendants' insistence on the decree of the 4th March 1919. The defendants' evidence on this point is that of Mr. Kriloff and the file of the company at Petrograd, which he produced. These documents show clearly that up to November 1918 the liquidation of the company had not been completed, but Mr. Kriloff said that he was a member of the Board of Ropit from 1913, that after the decree of the 26th Jan. 1918 some of the former directors remained at Petrograd, and other directors were elected from the Petrograd staff of the company, and from the staff of the Petrograd agency of the company, that a commissary was appointed by the authorities—he did not know by whom—and that in Dec. 1918 they handed over all the books and documents to officials of the Supreme Council, and the board was dissolved. It is certain that up to this time the ships of the company other than those which were in Petrograd, or elsewhere in the north of Russia, had not been got into the possession of the R.S.F.S.R., and it, therefore, would look as if the chief part of the liquidation was still to be done. And I am not able to find affirmatively that the liquidation was completed before the *Jupiter* left Odessa in April 1919. I do not know that it would be against the interest of the plaintiffs if it were proved that the liquidation was completed in Dec. 1918. The *Jupiter* was at that

time not within the territory of the R.S.F.S.R., for reasons which I shall presently state, and the result of a completed liquidation might be that the Ropit ships at Odessa became *bona vacantia*, and the property of the first occupants, who were the persons who brought them to France. It is, however, the view of both Mr. Machover and Dr. Idelson that ships in the territory of the R.S.F.S.R. were nationalised before 1924. If so, the *Jupiter*, had it been within that territory, would have become the property of the R.S.F.S.R.

That brings me to Mr. Dunlop's third contention: Can Odessa be regarded as having at any material time been within the territorial sovereignty of the R.S.F.S.R.? In March 1924, and to-day, Odessa is within the territory not of the R.S.F.S.R., but of the Ukrainian S.S.R. It has been within the territory of the Ukrainian S.S.R. ever since that Republic came into existence as a sovereign State. Mr. Glouschenko said that since the Ukrainian S.S.R. was established it has always exercised jurisdiction over Odessa. Mr. Pouschkine said that a Soviet form of government was established in Odessa at the end of April 1919, after the French left, and that thenceforward Odessa was in control of the Ukrainian S.S.R. (except that General Denikin's troops occupied it from Aug. 1919 till Feb. 1920). On the 28th Dec. 1920 a formal agreement of alliance was entered into between the R.S.F.S.R. and the Ukrainian S.S.R., which recognised the independence and sovereignty of each contracting party. On the 30th Dec. 1922 these two Republics as sovereign States entered into a treaty with the White Russian S.S.R. and the Transcaucasian S.S.R., and on the 6th July 1923 the constitution of the four republics was agreed and the union—the U.S.S.R.—created. It thus appears that the sovereignty of the Ukrainian S.S.R. and that of the R.S.F.S.R. are quite distinct—though for certain purposes the two republics act together—and that from April 1919 the only sovereign of Odessa has been the Ukrainian S.S.R. During the French occupation and the Austrian occupation, whoever was the sovereign, it was not the Ukrainian S.S.R. (which had not come into existence), nor the R.S.F.S.R., nor any form of Soviet authority; during that period there cannot have been any persons exercising political authority to whom the Ukrainian S.S.R. must be treated as successors—still less any to whom the R.S.F.S.R. must be treated as successors.

What was the position between Nov. 1917 and the occupation by the Austrians in March 1918? Several witnesses have given an account of what happened. It is perhaps not surprising that they do not agree. The political position was very confused. In the first place, in Nov. 1917, a Ukrainian Socialist Republic—not a Soviet Republic—was proclaimed, and on the 11th Jan. 1918 its Government issued a manifesto declaring an independent sovereign State of the Ukrainian people. Mr. Machover said that it had its own army and financial

and judicial system. Its seat of government was Kief. Its representative body was the Rada. In Nov. 1917 the Council of People's Commissaries of the R.S.F.S.R. passed a decree which is in the nature of a remonstrance and almost an ultimatum to the Ukrainian Rada. The significance of this is that the document recognises the Ukrainian People's Republic, while complaining that the Rada does not recognise the authority of Soviets in the Ukraine. There is also the significant fact that the Ukrainian People's Republic was a party, as also was the R.S.F.S.R., to the Treaty of Brest-Litovsk concluded with the Central Powers in Feb. 1918. The witnesses on the one side and the other differ as to whether Odessa was within the Ukraine and whether the Rada exercised any authority there. The Rada claimed sovereignty over Odessa and the R.S.F.S.R. refused to admit the claim; there were discussions between the two Governments during 1918, which ended in neither giving way. So long as Odessa was in the occupation of the Austrians or French, these discussions related to the future and not the present. There is the evidence of Pouschkine and Shvetttau that during the Austrian and French occupations (March 1918 to April 1919) the Rada exercised some authority in Odessa. But I can find no evidence that it exercised any effective authority from Nov. 1917 to March 1918. Mr. Machover said that from Nov. 1917 to Nov. 1918 the Ukraine was in a state of civil war with a Soviet or Bolshevik party in most places. I think the proper inference from the evidence of Alexieff and others is that the Soviet or Bolshevik party in Odessa were masters of the town and port from Nov. 1917 till the arrival of the Austrians in 1918. It is, however, a long step from that fact to saying that that party was exercising the sovereignty of the R.S.F.S.R., whose seat of government was in Petrograd or Moscow. The evidence altogether fails to satisfy me that I ought to take that step.

The conclusion at which I am inclined to arrive is that the persons who seized the ships in Odessa were acting on their own account and independently of any sovereign or as exercising sovereignty on their own account, imitating, it may be, the proceedings of the revolutionary government in Petrograd, but not acting in obedience to it or as if they were members of the political society ultimately designated as the R.S.F.S.R. But, at best I am left in doubt. The defendants have failed to prove that which it was for them to prove. What is their evidence? Alexieff began by saying that in Dec. 1917 the sailors at Odessa nationalised all the vessels. He then said that this was done by the Council of Nine. He said that a Soviet form of government was already formed in Odessa by Oct. 1917, and that a Council of Nine was appointed by the supreme organisation, the executive of the Soviets in Odessa, that the Council of Nine called upon the Union of Sailors to appoint an economic commission, and that this commission took an

inventory of the ships and handed over all the documents to the Council of Nine, and the Council of Nine then worked the ships and paid the wages of the crews. He says that the nationalisation was completed in Feb. All that Alexieff says about Petrograd is that the Soviets in Odessa were in touch with Petrograd and sent delegates to a Congress of Soviets at Petrograd in 1917—he thinks after the second conference in Oct. 1917. He made no reference to the decree of the 26th Jan. 1918.

Mr. Glouschenko says there was a Soviet in Odessa after Oct. 1917, chosen by the various Unions of Workmen and Soldiers, and that it sent delegates to two congresses of Soviets in Petrograd. He says that the decree of the 26th Jan. 1918 was published in Odessa on the following day and was put in force in Odessa by the Council of Nine, which was appointed by the Soviets in Odessa. He also says that at the end of Nov. 1917 he and three others were sent by the office of the Ropit, whose managing director was still in Odessa, to get money from the Council of People's Commissaries at Petrograd, and that he got it and brought it back to Odessa; and that there were continuous communications between Odessa and Petrograd. He said also that the military force in Odessa was provided by the Soviets in Odessa. I find it very difficult to reconcile this evidence with much of Alexieff's. If the nationalisation was begun in Dec. 1917, how was it done under the decree of the 26th Jan. 1918? If Odessa sent to Petrograd and obtained money for the working of the ships, it is remarkable that Mr. Kriloff, who continued to act at the head office in Petrograd, knows nothing about it. He said: "I do not remember if we asked for money for Odessa or got any." Further, contradicting Glouschenko, he says that in the early part of 1918 there was no post or telegraph or railway communication between Odessa and Petrograd. The file of the Ropit Company supports this. It shows how little Petrograd knew of what was taking place at Odessa. On the 16th Feb. 1918 there is a minute of a decision "to get into contact with the south"; and on the 30th March 1918 there is a report of all the information received from Odessa, which was meagre, but, so far as it went, agrees rather with Alexieff's account than with Glouschenko's account. It reads as follows: that "on the 6th Jan. the Odessa Section of the Sailors' Union proclaimed the entire fleet of the Russian company the property of the union. Later on the democratic organisations and the professional unions of Odessa acknowledged that the Sailors' Union is to be regarded as a transitory measure to the nationalisation of the fleet of the Black Sea and the Sea of Azov. To safeguard the same as a national property, on the 12th Jan. a Council of Nine was formed for the general management of the affairs of all waterways and transport in the region indicated above. This Council of Nine was composed of representatives of the following democratic organisations" (naming them.) "The said Council of Nine proposed to Ropit that they should continue their service

under the Council's control and guidance, which the Odessa administration consented to do. The Board has no further information about the affair." I am not quite clear whether the dates are old or new style; but at any rate they are all dates before the 26th Jan. 1918.

Mr. Shvettan said that in the autumn of 1917 the Government of Odessa changed to a Government of Soviets, and that in the beginning of 1918 the Soviet Government was in actual control of Odessa, and that it appointed a Commissar to the University. All this comes to is that there was a Soviet form of government at Odessa at that time.

Mr. Pouschkin was not at Odessa. He said that in 1918 the position at Odessa was very peculiar and that the R.S.F.S.R. was very anxious to retain power over the Black Sea ports. His evidence does not help me on the point now under consideration.

Mr. Krougliakoff was of opinion that from Nov. 1917 to March 1918 the Soviets at Odessa exercised power, acknowledging the sovereign authority of the supreme Soviet power in Petrograd. But he gave no facts to support his view. His opinion was based on the assumption that the Petrograd Government succeeded to the sovereignty over all the territories which had been territories of Imperial Russia. There is nothing to justify this assumption. As a lawyer's view it is opposed to the lawyer's view of Mr. Idelson that the R.S.F.S.R. never was sovereign of any territory except Northern Russia.

In the course of the evidence there was put in a decree dated the 1st Dec. 1917 which is described as a "Decree of the Second All-Russian Congress of Soviets of Workers, Soldiers, and Peasants' Deputies respecting the establishment of the Council of People's Commissaries." This is one of the Congresses of Soviets held in Petrograd. It is difficult to regard these Congresses as having sovereign power. They are rather in the nature of meetings of delegates of party organisations. The Congress is styled an All-Russian Congress of Soviets. But on the 1st Dec. 1917, for reasons I have already stated, no Soviet organisation had sovereignty in the territory of the Ukrainian Socialist Republic. If the Soviets in the Ukraine sent deputies to the Congress of the 1st Dec. 1917 they were not there as members of a sovereign body. Similarly, if the Soviets in Odessa sent delegates to the Congress, it does not follow that they attended as members of a sovereign body. The decree contemplates the convening of a Constituent Assembly. The evidence was that such an Assembly was convened in Petrograd in January and came to no decision and was no more heard of. There is no evidence that the Soviets in Odessa sent delegates to this Assembly. The decree says that the management of separate branches of State life is given to committees, and that the governing power belongs to the Collegium of Chairman of these committees—that is, the Council of People's

Commissaries, subject to the All-Russian Congress of Councils of Workers, Peasants and Soldiers' Deputies and its Central Executive Committee. There is no evidence that the Soviets of Odessa ever sent a chairman of their committee to Petrograd as a member of this Collegium.

The decree of the 26th Jan. 1918, on which the defendants rely, is expressed to be a decree of the Council of People's Commissaries. It provides for the appointment of commissaries to take charge of the shipping companies' offices. There is no evidence that that was done by the Soviets at Odessa. Those Soviets had in fact begun to seize the ships on their own account long before the decree of the 26th Jan. 1918, and after the decree of the 26th Jan. 1918 they continued to do it in their own way, without regard to the decree of the 26th Jan. 1918, until in March 1918 their activities were put an end to by the arrival of the Austrians.

I was also referred to a copy of a paper, *The Voice of Revolution*, of the 9th March 1918. Its office was in Odessa. Mr. Glouschenko said it was the official paper of the Soviets. It styles itself *Organ of the Executive Committee of Soviets of Workers, Soldiers, and Peasants' Deputies of the Rumanian Front and Region*. It reports some decrees or orders made in Petrograd and speaks of the Russian Republic. This is a small bit of evidence to support the view that the Soviets of Odessa recognised the sovereignty of the persons in power at Petrograd. But it carries me a very little way.

Taking the evidence as a whole, and I think I have set out the whole of the evidence, I am quite unable to find that Odessa was at any time within the territory of the R.S.F.S.R. or of the revolutionary government of Northern Russia which afterwards took definite form as the R.S.F.S.R.

As to Mr. Dunlop's fourth contention, the persons who seized the ships—whether the Sailors' Union or some association of Soviets in Odessa—either seized them as robbers or seized them as an independent sovereign and made them the property of that sovereign. But their sovereignty, if sovereignty it was, came to an end in March 1918 and was never revived. And how can I regard the Ukrainian S.S.R. as their successors? There was a complete break. No doubt, if a Government originates in revolution and is then established as a Government, and is then recognised by this country, the recognition is retroactive and recognises the acts of the Government from its beginning (see *Sagor's case, sup.*). But that supposes a continuity in the governmental activities of the persons so recognised. What was the beginning of the governmental activities of the Ukrainian S.S.R.? Certainly there were none in Odessa until after the *Jupiter* had left Odessa. I can see less reason for saying that a seizure by the Soviets in Odessa resulted in the property in the ships being in the Ukrainian S.S.R. than for saying that the

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retaking of the ships by the persons who controlled them during the occupation of the Austrians and the French and ultimately removed them to France, vested the property in those persons.

In my judgment the defendants have not shown that the property in the *Jupiter* ever was in the U.S.S.R. or any of the republics forming the U.S.S.R. In my view, therefore, each of these contentions fails, and the defendants have not discharged the burden which rested upon them on this part of the case.

The result is that, in my judgment, M. Bourgeois in March 1924 was wrongfully deprived of possession, and that no one has established any title superior to that of M. Bourgeois. In arriving at this conclusion I have not considered it necessary to consider how far the Ukrainian S.S.R. adopted, or by what means the Ukrainian S.S.R. adopted, the legislation of the R.S.F.S.R. There may be some other matters that were discussed before me which I have not considered, but if I have not considered them it is because in my view the conclusions at which I have arrived make it unnecessary for me to consider them. I find that M. Bourgeois has made out a *prima facie* right, and is entitled to judgment unless a superior right is made out. No superior right has been made out, and therefore M. Bourgeois must have judgment for possession. Bail has been given in the sum of 7800*l.*, and there will be judgment against the defendants and their bail for that amount with costs.

The defendants appealed.

Dunlop, K.C., Dumas, and Harold Murphy for the appellants.

Langton, K.C. and Carpmael for the respondents were not called upon to argue.

BANKES, L.J.—This is an appeal from a judgment of Hill, J., in an action of which the subject matter of the dispute between the parties was a vessel named the *Jupiter*. The question in the action was, which of the two claimants before the court, an administrator appointed by the French court on the one hand and an Italian company on the other, was the person entitled to the vessel in the month of March 1924.

Now the case was fought most elaborately before the learned judge in the court below, and in a very careful and detailed judgment the learned judge deals exhaustively with the many points that were raised before him. It is not necessary, in my opinion, to refer to a number of those points. The two main questions that emerge, indeed I think the only two questions which emerge, in this appeal, are: (1) whether the Italian Company have a title which is superior to any title which the French administrator can make a claim to; and (2) whether in the events which happened, the French administrator has established that he has a sufficient possessory title to maintain the

action. Those are the two questions and, of course, the more important one is the second one, because if the second one is established, then it becomes unnecessary to consider the first.

The second question, in my opinion, depends entirely upon questions of fact, because it depends partly on questions of Russian law, which in this court and in the court below must be treated as questions of fact, and also upon what I may call pure questions of fact. The learned judge has come to a clear conclusion on all those points, and for reasons which I will give in a moment, I see no ground whatever for differing from his conclusions.

On the second point the case for the Italian Government was this. It was said, "True it is that the vessel originally belonged to a Russian company whose headquarters were at Petrograd, a Russian company therefore subject to and governed by Russian law. It was said that by the decree of the Soviet Republic of the 26th Jan. 1918 the whole of the property of this Russian company was nationalised, and that as the result of the decree and the effect of the decree, the property of the company, including this vessel, the *Jupiter*, passed to the Soviet Republic provided possibly that they were in a position to take possession and did take possession of the property, including the *Jupiter*. It was admitted that a considerable time elapsed between the date of the decree and the nationalisation of the property of the company and the taking of possession of the vessel, the reason being that the vessel from some time before the decree had ceased to trade in what may be called Russian water at all, and had been occupied in trading between this country and America. For some years before March 1924 it had been laid up, partly at Plymouth and partly at Dartmouth, when, owing to the action of her captain, the Soviet Republic were enabled to take possession of her. It was said that the effect of the decree coupled with that taking of possession, created a complete transfer of the property in the *Jupiter* to the Soviet Republic, and they in turn have sold the vessel to the Italian Government, who under those circumstances established a title which must be superior to the title of the French administrator. Now that was the way in which the claim was put forward on behalf of the defendants against whom the action was brought.

The answer to that, as found by Hill, J., was this. He said: "Assuming that the decree has the effect contended for, and assuming that the circumstances which occurred in March 1924, amounted to a taking possession of the vessel, yet for two reasons which I give, I do not think that the Italian company make out their case." The first reason is that on his view of the evidence as to Russian law he comes to the conclusion—and I see no reason whatever for differing from him—that the decree has no operation to transfer any property except property which was in the jurisdiction of the Soviet Republic. He deals with

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that in his judgment. First of all, he expresses an opinion about the decree, which I do not think it is necessary to deal with, but I will just read it. He says: "If the view I have expressed is the true view of the decrees considered in themselves, I am quite unable to arrive at a contrary decision upon the most conflicting evidence called before me. It is for the defendants to satisfy me that the decrees were legislative acts, and that they had the effect alleged. They have wholly failed to do so." I do not wish to express any opinion upon that. It is not necessary to go into a number of matters which I do not really think it is necessary to deal with. The learned judge then comes to the second question: "As to the second question"—that is the question whether the decrees transferred the property wherever situated—"it was not suggested that ships were to be governed by any principles other than those applicable to other chattels." He then refers to some dicta and some cases, which he thinks are in support of his view, and he then proceeds to deal with the evidence, and comes to the conclusion upon the evidence of Russian law that the decrees have no application to property not situate within the jurisdiction of the Soviet Republic. As I say, I see no reason to differ from that conclusion.

The learned judge then proceeds to consider the next material question, that is whether this vessel, the *Jupiter*, was at any material time within the territory of the Soviet Republic. Again, that is a pure question of fact. He goes into the whole dealings, and he comes to the conclusion as expressed by him, that it was not proved that the *Jupiter* ever was within the territory of the Soviet Republic.

If that view of the law and the facts is correct—and as I have said, I see no reason to differ from it—it follows that the Italian company have failed to establish this superior title which they were setting up as against the claim of the plaintiff, that he by virtue of the French decree had such a possessory right in this vessel as to entitle him to maintain the action.

The only other question is whether the learned judge was right in coming to the conclusion that of these several plaintiffs, the one plaintiff who had been appointed by the French court as administrator of the property of a number of persons who had sought to transfer the business of the Russian company to Paris, and who were, amongst other things, directing the managing of some of the vessels which had belonged to this Russian company, including the *Jupiter*, had a sufficient possessory title under the decree entitling him to maintain the action. I do not think Mr. Dunlop seriously contended that he had not; but whether that contention was made or was not made, in my opinion, it could not succeed, because I think it plain on the terms of the order of the French Court, that this gentleman, Mr. Bourgeois, certainly had a sufficient title to maintain this action as against anyone except someone who could

establish that he had a superior title to that to which he laid claim.

I think, under those circumstances, it is unnecessary to go into the many matters which were so fully and exhaustively dealt with by the learned judge. I do not wish to disagree with any of his conclusions, but I satisfy myself by saying that on these three particular, and as it seems to me, vital matters, I agree with him. The result is that the appeal fails and must be dismissed.

ATKIN, L.J.—In my judgment the appellants here have not displaced any of the conclusions of fact arrived at by the learned judge below, or any of his conclusions of law based upon the conclusions of fact. The judgment of the learned judge appears to me to be an admirable one, and I content myself with saying that I agree with it, and that it is unnecessary to add anything to what we have said on the matter. For these reasons I agree that the appeal should be dismissed.

LAWRENCE, L.J.—I agree, and have, too, very little to add to the very careful and exhaustive judgment delivered by Hill, J., which I think was perfectly right, and which seems to me to cover all the points raised before us.

In my opinion, the determining factors in this case are (1) That the nationalising decrees of the Union of Socialist Soviet Republics do not operate on property outside the territory of that republic, whether such property belonged to a Russian citizen or not. (2) That the *Jupiter* was not at the date when those decrees were promulgated, and has not since been within the territory of that republic. (3) That at the time when the *Jupiter* was handed over by the master to the Union of Socialist Soviet Republics it was in the lawful possession of the French Provisional Administrator. The learned judge has treated these three matters, and rightly I think, as pure questions of fact to be decided upon the evidence which was deduced before him at the trial. There was ample evidence to support those findings of fact, and I see no reason for disturbing them. In those circumstances it follows that the plaintiffs have established their case, and that the appeal fails, and must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Wynne-Baxter and Keeble*.

Solicitors for the respondents, *William A. Crump and Son*.

House of Lords.

Feb. 21, 22, 24, 25, 28, and April 4, 1927.

(Before Lords SUMNER, ATKINSON, WRENBURY, CARSON, and BLANESBURGH.)

F. O. BRADLEY AND SONS LIMITED v. FEDERAL STEAM NAVIGATION COMPANY LIMITED. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Bill of lading—Cargo of apples—Damage to cargo—Cause of damage—"Inherent defect, quality, or vice of the goods"—Onus of proof—Statutes of Australia—Sea-Carriage of Goods Act 1904 (No. 14 of 1904).

Apples were shipped from Hobart (Tasmania) to the United Kingdom on board the defendants' steamship N. under bills of lading, each of which contained the following overriding provision: "This bill of lading is to be read and construed as if every clause therein contained which is rendered illegal or null and void by the Sea-Carriage of Goods Act 1904 had never been inserted therein or had been cancelled and eliminated therefrom prior to the execution thereof and is issued subject to all the terms and provisions of and to all the exceptions from liability contained in such Act." And by the Sea-Carriage of Goods Act 1904 it was provided by sect. 8, sub-sect. (2): "In every bill of lading . . . unless the contrary intention appears, a clause shall be implied whereby, if the ship is at the beginning of the voyage seaworthy in all respects and properly manned, equipped and supplied, neither the ship nor her owner . . . shall be responsible for damage to . . . the goods resulting from . . .

(d) the inherent defect, quality, or vice of the goods." When the apples, after their arrival in the United Kingdom, were distributed to the trade, extensive damage was found by reason of the fact that a large proportion of the apples were proved to be affected with a species of internal browning. An action was accordingly brought by the endorsees of the bills of lading against the shipowners claiming damages for breach of contract: for negligence and unseaworthiness; and the plaintiffs alleged that although the apples were good shipping apples, suitable for the voyage in kind, in ripeness and in packing, they were damaged on account of the faulty ventilation of the ship. The defendants' case was that the N. was a seaworthy ship and they relied on sect. 8, sub-sect. 2 (d), of the Act as exonerating them.

Held, that the damage was caused to the apples not because of the ship or of the sea, or of the route, but because they were apples which were not fit to make the voyage in an ordinary way. This was not the kind of risk which the Act called on the shipowners to bear and it was well within the words "resulting from . . . inherent quality or vice."

Decision of the Court of Appeal affirmed.

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

APPEAL by the plaintiffs from a judgment of the Court of Appeal (Bankes and Scrutton, L.JJ.; Atkin, L.J. dissenting) dated the 26th March 1926.

The plaintiffs in the action, who were fruit merchants carrying on business in London, sought to recover from the defendants in respect of damage caused to a large consignment of Tasmanian apples shipped on board the defendants' steamship *Northumberland*, in the month of April 1921, for carriage from Hobart (Tasmania) to London and Liverpool. The plaintiffs claimed as owners of the consignment, namely, 15,272 cases of apples, and as holders for value and (or) endorsees of six bills of lading in respect thereof. No question arose as to the plaintiffs' title to the goods. The main question in issue at the trial was whether the damage occurred during transit, and if so, whether the defendants were liable.

In the year 1921 when the voyage in question took place the *Northumberland* was under requisition to His Majesty's Government at fixed Blue Book rates, and in accordance with directions given the *Northumberland* had been directed to proceed to Hobart and other ports and there load, *inter alia*, a cargo of apples. In pursuance of such direction she arrived at Hobart on the 18th April 1921, where she loaded a cargo consisting of 144,610 cases of apples (including the plaintiffs' consignment) and 8822 trays of pears. She arrived at Tilbury on the 15th June, where she discharged her London cargo and then proceeded to Liverpool. When the London consignment of apples came into the hands of sub-purchasers it was found that a proportion of the apples were affected with a species of internal browning, and the Liverpool consignment was found to be similarly affected.

The plaintiffs' claim was based on breach of the contract to deliver safely evidenced by the bills of lading, and upon negligence and unseaworthiness in connection with the ventilation of the holds and the withdrawing of gases from the same.

The defendants' case was that the *Northumberland* was a seaworthy ship; that there had been no negligence in or about the carriage; and that the damage was due to the inherent quality of the apples shipped and (or) to decay, and they relied on sect. 8, sub-sect. 2 (d), of the Australian Sea-Carriage of Goods Act 1904.

The facts and relevant terms of the bills of lading and of the sections of the Act are set out in Lord Sumner's opinion.

Branson, J. held that there must have been constitutional trouble with the apples, and that the vessel was not unseaworthy. He therefore directed judgment to be entered for the defendants. His decision was affirmed by the Court of Appeal (Bankes and Scrutton, L.JJ., Atkin, L.J. dissenting).

The plaintiffs appealed.

Stuart Bevan, K.C., S. L. Porter, K.C., and W. L. McNair for the appellants.

H.L.] F. O. BRADLEY AND SONS LIM. v. FEDERAL STEAM NAVIGATION CO. LIM.

[H.L.]

W. A. Jowitt, K.C. and G. St. C. Pilcher for the respondents.

The House took time for consideration.

LORD SUMNER.—In 1921 the respondents' steamship *Northumberland* discharged from her refrigerated compartments a large quantity of Tasmanian apples at Tilbury. No casualty and no exceptional weather had befallen the ship. The apples appeared to be and on the surface were in excellent condition, but, soon after they had been distributed to the trade, extensive damage was found. It was of a kind quite new to shippers and shipowners generally. In 1922 the *Northumberland* again shipped a large quantity of apples and similar damage again occurred. In neither year was this kind of damage confined either to this ship or to ships fitted with the same grid-refrigerating system. A scientific investigation of apples and their diseases, with special reference to storage and transport by sea, was at that time in progress at Cambridge. Attention was directed to these mishaps in 1922, and in 1923 trained observers from Cambridge visited Australia to examine and report on local and transport conditions. This action was brought by endorsees of the bills of lading of part of the cargo of 1921.

The documents were in a form, which contained a full collection of the protective exceptions and clauses in which modern bills of lading abound, but, as the voyage was one to which the legislation of the Commonwealth of Australia applied, there was included the following overriding provision:—

CLAUSE PARAMOUNT.—This bill of lading is to be read and construed as if every clause therein contained, which is rendered illegal or null and void by the Sea-Carriage of Goods Act 1904, had never been inserted therein or had been cancelled and eliminated therefrom prior to the execution thereof, and is issued subject to all the terms and provisions of and to all the exemptions from liability contained in such Act.

A question was raised below, but not before your Lordships, as to the extent to which certain protective words in the bill of lading form survived elimination by the paramount clause, and particularly as to an exception of "decay," a limitation upon the amount of the ship's liability for damage, and a requirement of specially early notice of claim. I need say nothing on these points and will deal with the case, in the manner most favourable to the appellants: viz., as though the above Act exclusively governed the conditions of exemption from liability for damage brought to light during and at the end of the voyage. Your Lordships were not informed of anything in the law of the Commonwealth, except the above Act, that would affect the matter, and the bill of lading itself provides that "all questions arising under this bill of lading shall be settled according to the principles of English law."

The bill of lading described the goods as "shipped in apparent good order and con-

dition" and proceeded "and to be delivered at the ship's anchorage from her deck (where the ship's responsibility shall cease) at the Port of London." Though the usual words "in the like good order and condition" do not appear after the word "delivered," it was common ground that the ship had to deliver what she received, as she had received it, unless relieved by excepted perils. Accordingly, in strict law, on proof being given of the actual good condition of the apples on shipment and of their damaged condition on arrival, the burden of proof passed from the consignees to the shipowners to prove some excepted peril which relieved them from liability, and further, as a condition of being allowed the benefit of that exception, to prove seaworthiness at Hobart, the port of shipment, and to negative negligence or misconduct of the master, officers and crew with regard to the apples during the voyage and the discharge in this country.

Greatly to the advantage of a speedy and satisfactory trial, the statement of claim pleaded the plaintiffs' whole case, whether the burden of proof was strictly on them in the first instance or only passed to them in rebuttal, and the evidence was called in the same way. No real difficulty arises, now that all the evidence is out, in adjusting the obligation of proof in accordance with the strict rights of the parties.

The substance of the appellants' case was shortly as follows: The apples were good shipping apples, suitable for the voyage in kind, in ripeness, and in packing. They were damaged because they were kept during this long voyage in unventilated compartments. This was the active and exciting cause of the damage, but it was assisted by the fine weather met with on the voyage. This case was rested principally on the scientific investigation before mentioned, coupled with evidence taken at Hobart of the condition of the apples, when maturing in the orchards and when gathered, send down to Hobart and shipped.

The reply was this. The ship was in every way unexceptionable. Her refrigeration was effected by brine pipes, arranged within the refrigerated compartments themselves and not screened off from the adjacent cargo, though not in contact with it. When the compartments were loaded, pains were deliberately taken to close all apertures. Not only was no ventilation provided for the apples but the intention was to prevent it, except in so far as some interchange between the atmosphere in the refrigerated chambers and that outside them is inevitable. This, which the consignees said was the guilty cause of the damage, was in the eyes of the shipowners and their technical advisers the most beneficial mode of treatment and quite innocuous to any ordinary apples fit to be taken to sea at all.

The explanation of this apparent paradox is simple. In 1921 there were two systems in vogue for the carriage of fruit in refrigerated chambers, one that adopted in the *Northumberland* and many other ships, the other a

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system in which the refrigeration was effected by cooling air mechanically in a separate chamber and then forcing it by fans into the refrigerated chambers and out again. Both were pretty equally in use. Both types of ship had carried and delivered cargoes quite satisfactorily. With the exception of one little-known case in 1911, as to which but scanty evidence was forthcoming, no damage, such as occurred on this voyage, had ever been known before in the Tasmanian trade among practical men. According to the experience of the day the *Northumberland* was equipped and her refrigerating system was managed during the voyage in a perfectly proper manner. As for those on board, they could have admitted ventilation to the hold by removing hatches and otherwise but, in the then state of knowledge, they did not suppose and were not instructed that it would be right to do so. On this evidence Branson, J. found the ship to have been seaworthy at the commencement of the voyage and held that there had been no want of care in the course of it. In the Court of Appeal, Bankes and Scrutton, L.JJ. expressly agreed with him, while Atkin, L.J., who delivered a dissentient judgment, expressed no opinion on this point. Your Lordships, with very full assistance from counsel, have examined the evidence in detail and I think are unanimously of the same opinion as the majority in the Court of Appeal.

In the law of carriage by sea neither seaworthiness nor due diligence is absolute. Both are relative, among other things, to the state of knowledge and the standards prevailing at the material time. The words "properly equipped" in the Commonwealth Act also, in my opinion, import no absolute propriety, whatever that may be, but must be read as being relative only. For seaworthiness, the material time is the date of sailing; for due care, the period of the voyage. There was, to say the least of it, no real reason at the time to condemn or to decry the unscreened grid arrangement adopted on the *Northumberland*, or the exclusion of ventilation, and it is only against these that any attack is made. They were in general and successful use. The other arrangements and systems were not markedly superior, if at all, and the damage now in question was virtually unknown under both. Nor could the ship be said to have been sent to sea in an unseaworthy condition, on the ground that the stoppage of ventilation could not be undone in case of need—if, for example, damage was found to be extending in the cargo—for, if ventilation was required, the ship had very ready means of admitting air when necessary, by opening hatches and so forth, and, to the extent to which, according to the knowledge of the time, this might be requisite, the officers were free and able to do so. They were not sent to sea fettered by inviolable orders never to alter the ventilation system at all, but they were instructed in what was believed to be the better system and in general they kept the holds sealed. Accordingly they

could not be negligent in acting, like their masters, according to one of the accepted views of the time. In fact, during the voyage they were unaware that any damage was in progress.

On these findings the shipowners contend that they are excused by the exception in the Act of "inherent quality." These words, and not the other contiguous words, seem to me to be those most suitable for consideration, though, no doubt, the others form a material context. The whole clause in the Act runs as follows:

8 (2).—In every bill of lading with respect to goods, unless the contrary intention appears, a clause shall be implied whereby, if the ship is at the beginning of the voyage seaworthy in all respects and properly manned, equipped and supplied, neither the ship, nor her owner, master, agent or charterer, shall be responsible for damage to or loss of the goods resulting from . . . (d) the inherent defect, quality or vice of the goods.

Accordingly the following questions have to be asked: What was the actual damage and in what did it consist? What caused it? Did the cause arise on shipboard or during the voyage? If not, is there anything proved as to the fruit before shipment that shows the cause of the damage? If nothing is proved, is it admissible to infer, from the negation of all other causes, some unspecified idiosyncrasy, propensity or quality, inherent in the fruit, and if so, does such an inference establish "inherent quality or vice"?

The actual damage to the apples was entirely internal. The skin was intact and showed no sign of the state of things within. The core was unaffected, but the intermediate substance was brown, generally in patches but sometimes altogether so, and in this condition turned later on to decay and finally to dust.

About twenty per cent. of the entire cargo of apples is thought to have been damaged, but owing to the late date at which the mischief was discovered, the exact figure is not known. This percentage was distributed, not merely throughout the whole of the apple cargo or even throughout the whole of a single compartment, but throughout separate cases. Of two apples side by side, one might be damaged and the other sound, yet both might appear to be in perfect condition. This diversity is of great importance, but what determined it is not known.

The evidence of the scientific experts as the result of their observations was quite positive and unchallenged. The cause of this damage was exposure to an excessive concentration of carbon dioxide combined with an insufficient proportion of oxygen in the atmosphere, in which the apples were stored. They relied partly on laboratory experiments and partly on their observations on shipboard. Their explanation was this. An apple, as part of its vital process, exhales carbon dioxide as the result of its consumption of oxygen from the atmosphere. There is an internal atmosphere also in the microscopical ducts and canals within the apple, in which an excess of carbon

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dioxide and a deficiency of oxygen may occur. When the external atmosphere to which the apple is exposed contains a concentration of carbon dioxide in excess of 13.6 per cent. danger begins, and, unless the atmosphere is corrected by ventilation, damage shortly follows. The apple suffocates and dies. Carbon dioxide, however, at a lower concentration has a beneficial effect. Up to ten per cent. it retards the process of ripening, and, at the normal storage temperature of 35 deg. Fahr., prolongs the apple's life. The experts said, with confidence, that the mischief was done in the *Northumberland's* holds. They had been intentionally sealed up so as to avoid ventilation as far as possible. In such conditions she stifled her cargo of living apples, and the name of the disease, of which they died, was "Brown Heart."

According to the scientific witnesses and their printed report, "Brown Heart" is not a matter of infection or due to any parasitic organism. It is a pathological condition; a functional disorder. There is, however, another cause of damage in apples, which is called "Internal Breakdown." The visible symptoms of "Internal Breakdown" are the same as those of "Brown Heart." There is the same fair outside and the same decay within; the same brown spots or patches in the same intermediate portions of the apple. What causes "Breakdown" is not determined, but it is the *differentia* of "Brown Heart" that it is caused by ill-ventilated holds, and that of "Internal Breakdown" that it is not, for it arises somehow or other on shore.

In these circumstances the defendants called the *Northumberland's* captain and chief engineer and one of her refrigerating engineers, and their evidence has all along been recognised to be of crucial importance. They said that in the course of their duties they entered the different refrigerated compartments in rotation, and thus paid several visits to each during the voyage. They were chiefly concerned to examine the brine pipes, but they also took some notice of the apples. The scientific witnesses candidly stated that on the one hand convection currents would distribute any carbon dioxide uniformly throughout the compartment. "Carbon dioxide mixes uniformly with the enclosed atmosphere and practically as quickly as it is formed": (Food Investigation Report, No. 12, p. 2). It would not fall to the bottom of the hold or hang about in patches or pockets. On the other hand, at a concentration of the order of seven per cent. of carbon dioxide, human beings die. Now these officers, one and all, were none the worse for it. They said they never noticed the presence of carbon dioxide, though they were quite alive to the risk that it might be there in quantities dangerous to themselves. Their credit as honest witnesses has not been impugned. Their routine of duty was probable in itself, was unlikely to have been neglected and was a matter about which mistake was hardly possible. Branson, J. accepted their evidence in its entirety, and if the case is left

there, the apples were no more suffocated in the holds than were the officers. It is true that a similar routine was observed in 1922, when, according to the scientific witnesses, "Brown Heart" was indubitably the cause of the damage found on discharge, but it was the 1921 voyage and not that of 1922 that was tried, and I think we know too little of the later voyage to be guided by their conclusions about it.

The appellants met this difficulty at your Lordships' Bar by two explanations, neither, I think much developed at the trial. The excessive concentration of carbon dioxide, they said, would be dissipated from time to time by unintentional ventilation. The officers' visits always happened to occur when the carbon dioxide was at or below 7 per cent. In the much longer intervals when they were absent, it accumulated to more than 13.6 per cent., and so remained for periods sufficient to cause the damage. No doubt, if it is assumed that the apples were suffocated as described, and if the evidence of the officers is nevertheless accepted, these singular phenomena must have occurred, since no others would be consistent with the premises. This may be logical, but I think it asks too much of coincidence. After all, the question is how the apples came to be damaged, now the theory of "Brown Heart" damage can successfully be vindicated. As for unintentional ventilation, no doubt there was some, but as express precautions had been deliberately taken to make it as little as possible it seems only fair to expect some precise determinations of the extent to which the atmosphere of one compartment could interchange with an adjacent atmosphere in a given time, and also of the extent to which that interchange would carry off the carbon dioxide and substitute normal air, and these were not forthcoming. Mere estimates took their place. All these compartments were below the shelter deck. The largest of them were lower holds and well below the water line. Interchange between 'tween decks and lower holds would not greatly change matters, and access to the outer air must chiefly have taken place, when the caps were periodically taken off the thermometer tubes in order to read the instruments.

It is plain that some method of accounting for the disappearance of a tell-tale quantity of carbon dioxide before the officers' visits came round, when it might have been remarked, was vital to the appellants' case. They suggested, disregarding the positive evidence of the engineers to the contrary, that, between the loading of the apples at Hobart and the clearing of the *Northumberland* for sea at Adelaide, no visits were paid to these holds, and that the combination of fairly high temperatures with fair weather at sea and still water in port would cause a great and rapid exhalation of carbon dioxide. Before the engineers began their inspection of the chambers on finally proceeding to sea, the damage was done, though the fact was unsuspected. Hence the argumentative importance of unintentional ventilation.

Nothing else could clear away this excessive accumulation after it had done its work and before the engineers entered the holds ; nothing else could account for the fact that, although the uninjured apples must have been producing their accustomed quantity of carbon dioxide during the rest of the voyage, either there never was any excess over 6 or 7 per cent. or, if there was, it somehow made its exit regularly and before it could be observed. The suggested means by which the fatal quantity was so regularly reduced to one that was too small to be noticed was very largely the panting of the ship herself. No ship, it was said, can be built absolutely rigid, which is true, and a regular deformation of the sides or decks of a compartment, as the ship worked in a sea way, might alternately expel and inject air under pressure, through such crevices and apertures as might exist. There could have been no apertures, except such as were known and kept as far as possible tightly closed, because nothing went wrong either with the insulation or the hull, and no damage to the ship is suggested. Even if this effect was large it would fail to support the theory, if the foul air forced out was promptly drawn in again. I heard no reasonable explanation of the way in which a reciprocating bellows action, going on at the hatches, now out and now in, could regularly expel a foul atmosphere and as regularly draw in only a pure one. The 'tween deck hatches did not open direct into the outer air. Further, I find it impossible to believe that such a panting effect would be anything but minute, in the absence of evidence from practical marine architects and surveyors to corroborate the scientific, and, I take leave to add, the theoretic evidence of Dr. Kidd's assistants. With regard to the practical tests made in 1923 by isolating a few cases of apples in a box, kept among other apples in a hold fitted with grid refrigeration and not intentionally ventilated, I think that, although the results are striking, the scale of the experiments was too small and the conditions were too little detailed in the evidence, to make them outweigh the great body of proof, which acquitted the absence of intended ventilation on this voyage of having caused the "Brown Heart" damage.

If, then, the mode of carriage did not damage the apples, their disease was not proved to be "Brown Heart," and if, on the other hand, it was not specifically proved to be "Break-down" or any other known complaint of apples, must one not infer that the cause was after all some unidentified defect or some propensity in the particular apples, which suffered damage, when most of the apples escaped ?

It was on this point that Atkin, L.J. based his dissentient judgment. He preferred the evidence of the scientific witnesses to the arguments against it based on the officers' visits to the holds and on practical experience. He expressed the opinion that under the Act the shipowners remained liable for damage

occurring while the apples were on board, unless they could excuse themselves under some definite exception, and he concluded that, if the exception relied on was damage resulting from inherent quality or vice, they had failed to prove their defence. With the utmost respect for the learned Lord Justice's opinion, I am unable to agree with it. The evidence called by the respective parties was very different in kind. On the ætiology of this particular disease no doubt the scientific witnesses alone were of authority, but the question, whether on this particular voyage the apples were exposed to fatal doses of carbon dioxide, depended quite as much on the construction and management of the ship as on any matter of science, and Dr. Kidd himself, in an admission which was properly relied on by Branson, J., recognised that there might be room for some other cause than that to which he traced the damage. Again, accepting the Lord Justice's theoretic construction of the bill lading, it does not appear to me that on the present facts there is room for something unknown between insufficient ventilation and inherent quality or vice, nor can I agree, if the cause of the damage was inherent quality or vice, that the shipowners would fail merely because they could not put a name to the vice or specify some particular inherent quality and distinguish it from all others. Both terms are quite general. When the common law makes the ship bear the risks of the voyage and of all that may happen to the cargo in the course of it, but excepts the act of God, the King's enemies and inherent vice, the scheme is evident. The act of God and the King's enemies neither party can wholly guard against, so the loss lies where it falls. For the rest, the carrier answers for his ship and men, the cargo-owner for his cargo. The carrier has at least some means of controlling his crew and has full opportunity of making his ship seaworthy, but of the cargo he knows little or nothing and, as the skipper has the advantage over him in this respect, he must bear the risks belonging to the cargo. Such being the scheme, to which the Commonwealth Act gives expression, can it be said either that the shipowners must fail, if they cannot specify what the particular quality or vice inherent in the cargo may have been, or if, having means of saving the cargo from the consequences of its own qualities or vices during the voyage, they have failed quite innocently to use them ? In the first case, the cargo-owner is to say : "You may have cleared your ship and men, but even so, till you find out the actual and specific cause of the decay of my apples, you do not shift the risk to the cargo on to me." In the second he says : "If my cargo was stifling in your hold, as other living things would, because you did not give it air, you cannot escape liability for the resulting damage by saying that it is my fault for having apples that cannot stand being suffocated at sea."

The appellants, however, contended that their proof of the sound condition of the apples,

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when shipped, did something more than shift the burden of proof. To the admission in the bill of lading of the appearance of good condition, they had added a considerable body of evidence taken at Hobart early in the case, which showed that the whole crop in the 1921 season, both early kinds and late, was exceptionally good, was favoured by weather and free from pests, and was harvested in a satisfactory manner. Many of the apples shipped and more particularly of those shipped by the appellants' sellers themselves came from the later ripening districts and were therefore less matured and better fitted to meet the trials of the voyage. These witnesses were not cross-examined to suggestions of any latent weakness or any seeds of disease then existing in the apples. Hence, it was said, inherent vice in general has been negated in advance, and only specific proof on grounds not cross-examined to will even relieve the shipowner for the time being from the burden of clearing himself. When in addition to this, proof is given of a mode of carriage well known and in general use, which would have prevented the inherent quality of the apples in the widest sense of the term from resulting in damage at all, that damage cannot be shown to have resulted without liability to the ship even though seaworthiness and care be proved. It was further suggested that inherent vice is a term indicative of some abnormal defect or disease, and that the normal fact that apples are but mortal is not sufficient to satisfy this or the other expression used, viz., "inherent quality."

I am not able to assent to this contention. It appears to raise the old controversies about *causa causans* and *causa sine qua non* and to force into undue prominence the words "resulting from." I think it may be answered in either of two ways. Branson, J. argued thus. The evidence has eliminated the operation of an excessive concentration of carbon dioxide, to which the disease of "Brown Heart" was ascribed. If the apples did not die a natural death, some other failing must have caused it, and as they are not said to have been otherwise ill-treated on board ship, that failing must have been at least latent before shipment. The negation of the one establishes the other. It appears to me that this was a legitimate train of reasoning and your Lordships are not called upon to dissent from it: (*Kendall v. The London and South-Western Railway Company*, 26 L. T. Rep. 735; L. Rep. 7 C. P. 373). The similarity of the appearances in the case of "Brown Heart" and of "Breakdown," and the common knowledge of mankind, that apples are but perishable things, afford material for saying that the damage was caused ashore and might well have arisen there without its having been possible to prove when it arose or where or how?

The other way is to say that the "inherent quality" referred to is not said to be an inherent bad quality and that the words are "resulting from" not "solely resulting from." The nature of the apples, which were damaged—whether they were simply weaker than their neighbours

or had some idiosyncrasy—was such, that they could not stand the voyage. They decayed, not because of the ship or of the sea, or of the route, but because they were apples which were not fit to make the voyage in an ordinary way. This is the kind of risk which the Act does not call on the shipowner to bear, for he has had nothing really to do with it and it is, in my opinion, well within the words "resulting from . . . inherent . . . quality or vice."

I think that the appeal should be dismissed with costs and I move your Lordships accordingly.

I desire to add that my noble and learned friend, Lord Carson, concurs in this opinion and motion.

Lord ATKINSON.—I concur.

Lord WRENBURY.—I concur.

Lord BLANESBURGH.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellants, *Parker, Garrett, and Co.*

Solicitors for the respondents, *William A. Crump and Son.*

Jan. 31, Feb. 1, and April 4, 1927.

(Before Lords HALDANE, SUMNER, ATKINSON, WRENBURY, and BLANESBURGH.)

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ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Ship—Limitation of liability—Dock owner—Ship repairer also owner of dry dock—Damage caused to vessel whilst undergoing repair in dry dock by negligence in conduct of repairs—Right of repairer dock owner to limit liability—Merchant Shipping (Liability of Shipowners and others) Act 1900 (63 & 64 Vict. c. 32), s. 2.

The plaintiffs claimed to limit their liability under sect. 2 of the Merchant Shipping (Liability of Shipowners and others) Act 1900, in respect of damage sustained by the defendants' steamship R. whilst undergoing repairs in the plaintiffs' dry dock at Blackwall in May 1923. The damage was caused by fire due to the negligence of the plaintiffs' servants whilst performing the repairs. The plaintiffs carried on business as ship repairers, and were also the owners of dry docks used in conjunction with their repairing business. By sect. 2 of the Act of 1900 it was provided that "the owners of any dock shall not, where without their actual fault and privity any loss or damage is caused to any vessel or vessels, be liable to damages beyond an aggregate amount not exceeding £l. for each ton of the tonnage of the largest

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

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registered British ship which, at the time of such loss or damage occurring is, or within the period of five years previous thereto has been, within the area over which such dock owner performs any duty or exercises any power." The plaintiffs claimed to limit their liability in respect of the damage sustained by the defendants' steamship to the sum of 69,067*l.* being 8*l.* per ton of the tonnage of the largest vessel which had been within the previous five years in their dry dock.

Held, per Lords Haldane, Sumner, and Atkinson (Lords Wrenbury and Blanesburgh dissenting), that the words of sect. 2 were too plain to admit of any other restraint being put on their operation than that of geographical area. The plaintiffs were therefore entitled to limit their liability.

Decision of the Court of Appeal (ante, p. 138; 136 L. T. Rep. 146; (1927) P. 47) affirmed.

APPEAL from the decision of the Court of Appeal (Bankes, Atkin, and Sargant, L.JJ.) (reported ante, p. 138; 136 L. T. Rep. 146; (1927) P. 47) in an action for limitation of liability.

The plaintiffs, Messrs. R. and H. Green and Silley Weir Limited, claimed under sect. 2 of the Merchant Shipping (Liability of Shipowners and others) Act 1900 to limit their liability in respect of damage caused to the defendants' steamship *Ruapehu* by fire whilst the plaintiffs were carrying out repairs to the *Ruapehu* in their dry dock at Blackwall in May 1923. The plaintiffs had been held liable for the damage sustained by the *Ruapehu*, but it was conceded that the damage was done without the actual fault or privity of the plaintiffs. The plaintiffs claimed to limit their liability to the sum of 69,067*l.* being 8*l.* per ton of the tonnage of the largest vessel using their dry dock in the preceding five years.

Sect. 2 of the Merchant Shipping (Liability of Shipowners and others) Act 1900 provides as follows:—

(1) The owners of any dock or canal, or a harbour authority or a conservancy authority, as defined by the Merchant Shipping Act 1894, shall not, where without their actual fault or privity any loss or damage is caused to any vessel or vessels . . . be liable to damages beyond an aggregate amount not exceeding eight pounds for each ton of the tonnage of the largest registered British ship which, at the time of such loss or damage occurring, is, or within the period of five years previous thereto has been, within the area over which such dock owner . . . performs any duty or exercises any power. . . . (4) For the purpose of this section the term "dock" shall include wet docks and basins, tidal docks and basins, locks, cuts, entrances drydocks, graving docks . . .

The Court of Appeal held, reversing the decision of Hill, J., that the above section should not be read subject to a limitation in respect of the nature of the act done. The proper limitation was in respect of the area in which the act was done. Thus, notwithstanding that the negligent act of the plaintiffs had been done in their capacity as ship

repairers, they were entitled to limit their liability, since the act was done within the area of their dock. The defendants appealed.

Jowitt, K.C. and G. St. C. Pilcher for the appellants.

Macmillan, K.C., Langton, K.C., and Carpmael for the respondents.

The House took time for consideration.

LORD HALDANE.—This is an appeal from a judgment of the Court of Appeal which reversed a judgment of Hill, J. in an action brought by the respondents as plaintiffs in which they sought to limit their liability for damage and loss arising out of a fire to 69,067*l.* 7*s.* 2*d.* with interest. This limitation was claimed under sect. 2 of the Merchant Shipping (Liability of Shipowners and others) Act 1900, which enacts that (*inter alios*) the owner of docks of various kinds, which include dry docks, is not to be liable for loss or damage to any vessel, where the loss or damage is caused without his actual fault or privity, beyond a statutory limit. It is conceded that there was neither actual fault nor privity in this case. The respondents are the owners of a dry dock at Blackwall, and they carry on there the business of ship repairers.

In May 1923 the steamship *Ruapehu* was lying in the respondent's dry dock at Blackwall undergoing repairs which they were carrying out. A fire took place in her hold and the vessel was seriously damaged. The owners commenced an action for such damage before Hill, J. He gave judgment for the owners against the present respondents. The Court of Appeal affirmed his decision. The respondents then commenced the present action for a declaration, under the Merchant Shipping (Liability of Shipowners and others) Act of 1900, of limitation of liability. The question was raised whether the respondents were dock owners within the meaning of sect. 2 of that Act, a preliminary point which was disposed of adversely to the respondents by Hill, J., as trial judge, but in their favour by the Court of Appeal. The only question now before the House on this appeal is whether the decision of the Court of Appeal in the respondents' favour on this point was right.

Sect. 2 of the Merchant Shipping (Liability of Shipowners and others) Act 1900 enacts by sub-sect. 1 [His Lordship read the sub-section]. Sub-sect. 3 enacts that sect. 504 of the Merchant Shipping Act 1894 shall apply to this section as if the words "owner of a British or foreign ship" included a harbour authority and a conservancy authority and the owner of a canal or of a dock. Sub-sect. 4 declares that for the purpose of this section the term "dock" shall include wet docks and basins, tidal docks and basins, locks, cuts, entrances, dry docks, graving docks, gridirons, ships, quays, wharves, piers, stages, landing places, and jetties. It is clear that the respondents' dry dock at Blackwall was, at the material period, within the section.

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The real question which we have to determine is whether the Act means that the respondents, who were repairers as well as dock owners when doing the work which resulted in damage, are entitled to invoke the language used, or whether the limitation of liability is confined to acts done or omitted to be done by those whose function is that of dock owners only, and not, as in this particular case, of repairers also who are carrying out the repairs.

Hill, J., the trial judge, thought that the negligence for which the present respondents had been held liable, had nothing to do with docking, or the arrangements of shorers or blocks, or the pumping out or letting in of water, or other matters necessary to the proper management of a dry dock or of a ship in relation to a dry dock. The work of the respondents was done, he thought, in the capacity of ship repairers, and not in that of dry-dock owners. If shipowners were to hire space in a dry dock belonging to a public authority, and to employ ship repairers to do repairs to a ship while she lay there, and the repairers incurred liability by negligence, it would be clear that the liability as repairers did not amount to liability as dock owners. When liability is incurred by exactly the same kind of negligence, he was of opinion that the fact that the ship was in a dry dock did not turn the work into work done in the capacity of dock owners, for the mere circumstance that the ship was in the repairer's dry dock could not have that effect. Suppose that the negligence gave rise to a fire in the sheds belonging to the yard of those claiming limitation of liability, and that the fire spread to the ship, no one could say that this was negligence of the claimants in the capacity of dry dock owners, or that the liability was incurred in that capacity. This illustration, and other analogous illustrations which the learned judge gave, seemed to him to show that the liability in the present case did not arise from negligence from work done in the capacity of dock owners.

The first observation which occurs on this reasoning is that the question of what liability arises must be determined by the words used in the section, and not from what might reasonably be expected in the actual circumstances of a case such as this. The Legislature has, on grounds which may seem good or seem bad, employed certain language. With the special grounds which influenced it we have nothing to do. The only question is whether the words are clear. Now, turning to these, I cannot find any ambiguity in the language. It declares that the owner of a dry dock is not to be liable in excess of the statutory limit, and the conditions defining the limit are to be sought for within the area over which the dock owner performs any duty or exercises any power. There is not a word about the capacity in which the dock owner has acted. It may well be that Parliament desired to encourage the construction of docks even by professional repairers. The expressions used

in the statute are indistinguishable from those used in the Merchant Shipping Act of 1894 and in earlier Acts of which that statute took the place. The dock owner is put in the same position as was a shipowner. Now, if we turn to the case of a shipowner, a question analogous to that which arises in this case was settled as long ago as 1872, not, it is true, by this House, but by the full Court of Appeal in Chancery, constituted of Lord Selborne, James, L.J., and Mellish, L.J., in *The London and South-Western Railway Company v. James* (1 Asp. Mar. Law Cas. 526; 28 L. T. Rep. 48; L. Rep. 8 Ch. App. 241). The railway company, who were also shipowners, contracted to carry passengers and goods through from London to Guernsey. The passengers and goods were taken under the through contract by railway from London to Southampton, and were there put on board a ship which belonged to the railway company. The particular ship, on her way to Guernsey, came into collision with another ship and sank, with several of the passengers and all the goods. On claims for damages in respect of loss of goods and of life, it was held that the railway company was entitled to the limitation on liability imposed by the then Merchant Shipping Act of 1862, s. 54, the terms of which were for present purposes completely similar to those as regards ships of the Act of 1894. It was argued that the limitation had no application to the case of persons and goods carried by the shipowner when he was not merely shipowner but also carrier. But Lord Selborne and the Lords Justices held that every case where the owner would be liable, whether he was carrier or not, was intended to be within the relief given by the statute.

The case I have cited presents only an analogy, but I think that the analogy is a very close one, especially for the reasons given in some detail, not only by Lord Selborne, but by Mellish, L.J. The court refused to entertain a distinction founded on the capacities in which the railway company contracted. It was held that the words of the enactment were so free from ambiguity as not to admit of any such distinction being drawn. Liability for what happened by the loss of the ship was specifically limited. I cannot find that this decision was noticed in the courts below or in the arguments here, but I think that the principle adopted in it comes very close to that of the present case.

In the Court of Appeal, where the judgment of Hill, J. was reversed, Bankes, L.J. held that some restriction must be put on the generality of the words in the section enacting the limitation. He thought that this was the result of the decision in the case of *The City of Edinburgh* (15 Asp. Mar. Law Cas. 234; 125 L. T. Rep. 375; (1921) P. 274). That was a case in which by the negligence of the servants of a firm of ship repairers a vessel and its cargo were damaged by fire. The repairs were being done in a dock belonging to the Mersey Docks and Harbour Board. The ship repairers

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sought to limit their liability on the ground that they were owners of a dry dock at Garston, some distance away. It was held by Hill, J. who also tried that case, that they were not entitled to a limitation of their liability under the section we have to construe. For the section, in restricting the liability of the dock owner, had, in his view, regard to the area over which he "performs any duty or exercises any power." The liability was one incurred by the ship repairers as such at a distance, and not as dock owners or at or near their dock. The Court of Appeal—Lord Sterndale, M.R., Scrutton, L.J., and Younger, L.J.—affirmed this judgment, but expressions were used by the two former which point to a somewhat different reason from that of Hill, J. having been in their minds. Lord Sterndale thought that the words must refer to a limitation of liability of the dock owner as such, that is, "in respect of something in some way connected with his dock." Scrutton, L.J., considered that the very wide words, if interpreted in their widest sense, would lead to absurdity, and it was an absurdity to limit the liability of a person who owned a dock for anything he chose to do in another capacity. Thus, while Hill, J. made area or geographical restriction the basis of his judgment, the Court of Appeal, or at any rate the majority there, determined the case rather on the principle of distinguishing the capacity in which the repairer acted. I am not sure that Hill, J., in his judgment in the present case, was not influenced contrary to his own opinion towards the view of capacity rather than geographical area, which appears to have been adopted by the Court of Appeal, which differed from his opinion on the point in the case of *The City of Edinburgh* (sup.). Anyhow, in reversing his judgment in the case now before us, the Court of Appeal, differently constituted, reverted to the principle that the basis of the limitation was area and not capacity. Bankes, L.J. expressly says so. He doubted whether *The City of Edinburgh* (sup.) decision was really based on any different principle, although he admits the ambiguity of some of the expressions used in giving it. He held that to introduce a limitation which depends on the nature of the act done was to create unnecessary confusion. It was simpler to read the limitation as confined to area. Atkin, L.J. agreed. He considered that to read the words of the section literally and to apply them to the circumstances of the present case, gave rise to no such absurdity as was contended for in *The City of Edinburgh* (sup.). Moreover it would often be impossible to determine whether particular work was done by a person as repairer or as dock owner. Sargant, L.J. agreed. He held that there was no such absurdity in the repairers' contention as would justify a departure from the grammatical and ordinary interpretation of the words used in the statute.

I, also, think that the words of the statute are too plain to admit of any other restraint being put on their operation than that of

geographical area. I think that this is the result of the interpretation placed on the statute in 1872 in *The London and South-Western Railway Company v. James*. (sup.). That interpretation appears to me to be the true one, and I am of opinion that this appeal should fail.

LORD SUMNER.—The respondents, the plaintiffs in the limitation action, carry on business as ship repairers at Blackwall, where they own a dry dock. While they were repairing the appellants' steamship *Ruapehu* in their dry dock, fire broke out, without their actual fault or privity, and great damage was done to ship and cargo, for which at common law they were responsible. The evidence in the damage action was to the effect that the same negligence would have caused the same fire if the repairing work in question had gone on while the ship was afloat. No further evidence now material was given in the limitation action, but it was common ground that the respondents' business is to repair ships, and that at the time in question they were using their dry dock for the *Ruapehu* in the ordinary course of business. I think we must take this state of facts as the basis of this appeal. True we do not know whether the respondents have a wet dock or any other submerged ground than such as may be necessary for docking and undocking ships in connection with the dry dock; we do not know whether they also do repairs to ships afloat within their premises or to ships elsewhere whether afloat or not; we do not know whether they have any other business than that of ship repairers, but it seems to me that, if any of these questions could have affected the solution of the problem which arises on the *prima facie* case for limitation of liability, the appellants should have provided the materials for such answers as might have served to modify or to negative that right. For present purposes the respondents are dry-dock owners; the damage was done in their dry dock and by their servants in the course of their employment; and we know of no business carried on by the respondents except that of ship repairers who use their dry dock for that purpose.

The language of the Merchant Shipping (Liability of Shipowners and others) Act 1900 is clear enough. "Dock owners," which includes dry-dock owners, without any specification of the use to which they put their docks, are expressly empowered, when liable for damage to ship and cargo occurring without their actual default or privity, to limit their liability as the respondents claim to do. The appellants' argument really is that the respondents are nevertheless not within the Act, because they are dry repairing dock owners, and themselves use their dry dock for one of the main purposes for which dry docks exist, namely, ship repairing. To adopt this argument is practically to strike dry docks out of sub-sect. 4. The short answer is that the Act says nothing of the kind. The respondents fail

within the description of those persons on whom the right of limitation is conferred. What is there in the words to restrict this description, so as to exclude them?

The City of Edinburgh (sup.) does not, in my opinion, touch this case. What had to be decided and what was decided there was this—How far, if at all, was the right to limitation available, where the ownership of the dock and the use of that dock had no connection whatever with the damage or with the injured ship or cargo? The answer was, Not at all. A contrary conclusion would have made the Act confer a personal immunity, at the expense of owners of ships and cargoes whom they had wronged, upon persons who happened to own a dock somewhere else. The policy of the Act, beyond an intention to protect dock owners from being crushed by liabilities for accidents, which they cannot always avoid, is not declared on its face and would only be a subject of speculation now, but it certainly was safe to say, as Lord Sterndale said, that the section refers to a limitation of liability of the dock owner in respect of something in some way connected with his dock. This is the true ground of this decision, which, as a decision, cannot be questioned. I do not think it is either accurate or helpful to argue that this is a “docks clause” not a “repairers’ clause,” or that the action, which leads to the liability, must have been action by a dock owner “as such”—except in the sense of the above words—or must have consisted in “dock-owning activities.” If a dry-dock owner or a graving-dock owner is within the section, or whether or not—so far as the words go—he repairs ships in his dock or only hires it to others, I cannot see why he is not acting as a dry-dock owner “as such” when he repairs a ship in his own dock in the ordinary course of business. The appellants’ argument really begs the question and further introduces criteria for distinguishing one case of damages from another almost infinitely complex, almost impossible to apply, and most arbitrary in their operation. The Act says nothing about them. They would not have been even plausible but for the notion that there is something in this kind of limitation, which public policy requires us to restrict, but this, as it seems to me, is purely a matter for the Legislature. True, there is the rule that those who claim exemption from a common-law liability must bring themselves within it, but this depends on the language of the Act. Here the right to the limitation is clear, provided the respondents are dock owners, as they are.

The question is asked, *à propos* of Lord Sterndale’s canon in *The City of Edinburgh* (sup.), “what connection is there in this case between the dry dock and the fire in the ship’s hold?” The answer is “The ship was in the respondents’ dry dock and it was because she was in that dry dock that their careless workman was employed upon her at that time.” True, he might equally have been employed on the *Ruapehu* if she had been lying afloat at buoys in the Thames and might have been

equally careless there, but these were not the facts. It is true also that, if independent repairers had been at work on the *Ruapehu* in the respondents’ dock and had been liable for the fire, they would have been liable in full, but that is because they would not be dock owners in any way connected with the damage. Just as we cannot, as a matter of construction, extend the section to them when they are not dock owners, so we cannot exclude the respondents from it when they are. The proposition is not “necessarily connected” or “inevitably connected” with the dock, but actually connected with it in some way. On the appellants’ argument, in half the cases of fire on board ship, the shipowner would lose the benefit of the statutory limitation, because, as fire will break out equally on shipboard as on shore, if you upset lighted lamps or fling lighted matches among inflammable merchandise, there would be none but a casual connection between the burning of the cargo and the ownership of the vessel. This would revolutionise what is well settled under the Act of 1894 and many earlier Acts. I see no reason for treating the amending Act of 1900 in any different way. It may be that the section fastens on ownership because the ground of limitation may be supposed to be the great inroad upon the property owned by the judgment debtor, if he were cast in damages without statutory limit, though this would have been an argument for deciding *The City of Edinburgh* (sup.) the other way; but it throws no light on the question before us or, if it does, the light favours the respondents, for the judgment debtors are equally liable for their servants’ wrong-doing to the full extent of their property, whether the servants were heating rivets or fixing shores.

I think further that nothing can be founded upon the specification of the parties, who are to enjoy the benefit of limitation of liability, or on the reference to the “area,” over which they “perform any duty or exercise any power.” These expressions form part of the context, but they neither add to nor take anything from the main operative words. The parties are four, dock owners—with a statement of what the word “dock” includes; canal owners, with no such statement; harbour authorities; and conservancy authorities, both of these last as defined in the Merchant Shipping Act 1894, s. 742, and not *prima facie* as owners of docks in any sense of the word. I find nothing here that excludes the respondents from being “dock owners” or that restricts the kind of operation in the course of which the liability that is to be limited is to arise. The reference to an “area” is inserted primarily in order to show where the appropriate measure of the amount of the limited liability is to be found, but in any case the *Ruapehu* was within the respondents’ “area” when she was burnt. The words “performs any duty or exercises any power” are, it is true, odd words to apply to a private company using its own business premises and are suggestive of public authorities and undertakers; but, unless they have the

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effect of excluding private owners from the category of dock owners, which they clearly have not, they carry the present issue no further. As for the observation that the section, by including wharves and jetties in docks, may raise some difficult questions, when we come to consider whether in such cases the damage is "connected with" the dock, I agree that they may, and will consider them when they do, but I need say no more about them now.

The only sound way of construing such a section is to follow its exact words and give effect to them, unless some plain necessity can be found for implying some limitation. There is no absurdity, no repugnance, no inconsistency produced by reading the words in their plain grammatical sense, and, so read, the conclusion must be that at which the Court of Appeal arrived. With that I agree. I think the judgment of the Court of Appeal should be affirmed and that this appeal should be dismissed.

LORD ATKINSON.—The facts have already been fully stated and it is unnecessary to repeat them. The parties are practically agreed as to the question which arises for decision in this Appeal.

The appellants in the seventh paragraph of their case state it as follows: "7. It was agreed, as appears from the correspondence passing between the parties previous to the trial of the action before Hill, J., that the question raised by par. 3 of the amended defence as to whether the respondents were dock owners within the meaning of sect. 2 of the Merchant Shipping Act 1900, and as to whether they were entitled to limit their liability as such in the special circumstances of the present case, should be tried as a preliminary point and this is the only question for decision upon the present appeal."

The third paragraph of the amended defence runs as follows: "The defendants deny that the plaintiffs are dock owners within the meaning of 63 & 64 Vict. c. 32 and further say that the said liability of the plaintiffs was incurred by them as ship repairers and not as dock owners." And the respondents in the second paragraph of their case state it as follows: "The sole question which arises on this appeal is a preliminary point of law, namely, whether the respondents (plaintiffs in the action), who are owners of a dry dock at Blackwall, are entitled by virtue of sect. 2 of the Merchant Shipping (Liabilities of Shipowners and others) Act 1900 to limit their liability in respect of a fire caused by the negligence of their servants on board the steamship *Ruapehu* at a time when the said steamship was lying within the respondents' said dry dock."

A reference to a most helpful authority, not cited in argument, but appealing to one's common sense, at least in my view, shows that the contention of the parties is based upon a false principle. That authority is the case of *The London and South-Western Railway Company v. James (sup.)*. I shall refer to the case

in detail presently, but I think I may at once say that it appears to me to determine that the right of the owners of a ship which has been lost or has met with an accident depends not so much on what was the nature of the thing which met with the accident causing damage as upon what that particular thing was engaged in doing at the time the accident happened. The particular thing in that case was a ship, and the work she was engaged in doing was carrying passengers and goods from Southampton to Guernsey. Repairs, even substantial repairs, may be executed on a ship while she is in a wet dock belonging to certain owners, such as putting new boilers or engines into her while she is afloat, just as they may be possibly in a graving dock belonging to the same owners. In both cases she is in the hands of repairers, the only difference being that she rests upon and is upborne by the water in the one case, and rests upon mechanical supports in the other, but the owners of the docks, the harbour authority, or conservancy authority, exercise control over the graving dock as they do and claim to do over the floating dock. I think it is a mistake to suppose that in the case of the graving dock this authority of the owners, the harbour authority or the conservancy authority, is entirely superseded by that of the repairers, who happen to be executing repairs upon the ship, which they would not be if the repairs were effected in a floating dock. In the case of *The London and South-Western Railway Company v. James (sup.)*, through tickets were purchased by these passengers from the company in London covering the whole journey by sea and land from London to Guernsey. No other kind of tickets were issued to them in London, and no tickets of any kind were issued to them in Southampton. When they arrived there they straightway embarked on a steamship bound for Jersey, in this case named the *Normandy*. Goods were loaded on this vessel to be carried to the same destination. In the course of the voyage the steamship *Normandy* collided with another steamship named the *Mary*, and sank. Many of the *Normandy's* passengers and their luggage and effects were lost and all her cargo was lost. In cross suits between the owners of the two vessels the *Normandy* was held alone to blame. Several actions were brought against the company, some by passengers for loss of luggage, injury, and delay; some, under Lord Campbell's Act, by the administrators of the passengers who were lost. A case for limitation of liability was instituted in the Court of Admiralty, and an order was made by that court restraining all these actions on payment by the company into court of the sum of 6376*l.*, being 15*l.* per ton on the gross tonnage of the *Normandy* plus interest. On the 27th Jan. 1872, the Court of Exchequer, in an action instituted by one John James, one of the *Normandy's* passengers, decided that a writ of prohibition should issue to prohibit the judge of the Court of Admiralty from enforcing the injunction issued by him. This judgment

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was affirmed by the Court of Exchequer Chamber. This decision left the persons who had brought actions, or intended to bring actions against the company in respect of the collision, free to proceed with them. The company thereupon filed a bill against the owners of the steamship *Mary*, and against the several persons who had actually instituted or threatened to institute actions against the company, stating the above facts, and also stating that the collision had occurred without the actual fault or privity of the company, and claiming that the company and the owners of the *Normandy* were entitled to such limitation of their liability as was in that behalf provided by the Merchant Shipping Act of 1854, and the Amendment Act of 1862, and alleging that the company for the purposes of the suit admitted their liability to the extent and to the amount mentioned in these Acts, and were willing to pay 15*l.* per ton on the gross tonnage of the *Normandy* and interest thereon. The bill prayed for a declaration that the company were, as owners of the *Normandy*, entitled to the benefit of the limitation of liability under the Merchant Shipping Acts, and that the losses and damages in respect of which they were answerable might be determined as the court should direct, and that the defendants might be restrained from proceeding further in this suit or actions against the company. John James, one of the passengers, denied that he had any notice of a by-law or any notice of the vessel by which he was to travel. The company allowed judgment to go by default in each of the actions which had been brought against them, but the damages had not been assessed. The Master of the Rolls granted an injunction against all the litigants except James. The other litigants were to be at liberty to have their damages assessed but not to levy them. The company appealed. The appeal was heard by a full court. The principal point made upon the appeal was that the company were in this case acting as carriers of persons and goods, and that the Merchant Shipping Acts had no application to such cases.

Lord Selborne, in giving judgment, said (1 Asp. Mar. Law Cas., at p. 527; 28 L. T. Rep., at p. 49; L. Rep. 8 Ch., at p. 349) that "the ordinary case was not excluded, and that every case where the owner would be liable whether he was a carrier or not was intended to be within the relief intended to be given to the owner, nor was that inference rebutted by the repeal of this section (*i.e.*, sect. 50 of the Act of 1854)." Mellish, L.J. delivered a most helpful judgment. He said (1 Asp. Mar. Law Cas., at p. 528; 28 L. T. Rep., at p. 50; L. Rep. 8 Ch., at p. 252): "I think that the case clearly comes within the words of the Act. The London and South-Western Railway Company were the owners of the ship *Normandy*. They are sued by Mr. James for damages on account of the loss of goods which were being carried on board that ship. The case being directly

within the words, it ought to be held within the Act unless it is clearly not within what was the scope and intention of the Legislature in passing the Act. But what was the scope and intention of the Legislature in passing the Act? Ever since the reign of George II. there has been a limitation on the liability of the owners of ships. It has been thought a matter of public policy to encourage persons to embark their capital in ships by limiting their liability to be incurred by the loss of goods, and this, previous to Lord Campbell's Act, was the principal liability. It was thought expedient to limit the liability because a ship might carry gold or goods of great value and then, from some trifling act of neglect on the part of the master or on the part of the man steering the vessel, the shipowner might be made subject to enormous liability. On that account the Legislature thought it was for the public advantage that there should be this limit on the liability of the owner. Why should that not apply to the case before us? The London and South-Western Railway Company are encouraged by that limitation to embark as shipowners in the trade of carrying passengers and goods between Southampton and Jersey, and I do not understand what the grounds are upon which it is said they are not to avail themselves of this limitation. The ground put by the Master of the Rolls is simply that the passengers took a through ticket from London to Jersey. It was admitted that if the passenger had taken a ticket from London to Southampton instead of from London to Jersey, and when he got to Southampton had walked on board the ship and gone as a passenger to Jersey, then he would be subject to the limitation. But what possible object can there be in holding that in order that the company may avail themselves of the limitation, it shall be necessary to deprive all the passengers of the convenience of paying for their tickets at one time instead of paying on two different occasions. Such a decision would not deprive the company of the benefit of the Act and would only put the passengers to inconvenience. In my opinion the case comes both within the words of the Act and within what I think was the spirit of the Act."

The words of this judgment apply as appropriately to the owner of a dock as they do to the owner of a ship. Are not the owners of docks encouraged by the right of limitation of liability to embark as dock owners in the trade of affording facilities to ships to load and unload, and be repaired in their dry dock? It is admitted that the words of the second section of the Merchant Shipping Act of 1900 must be construed, if they are to be at all reasonably construed, so as to put some limit on its general language. This must, I think, be so, because the liability which is to be limited is the liability which would fall upon the dock owners if sued at common law for injury done to a ship in their dock by reason of the negligence of their servant. If the dock

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owners had docks at Leith and also docks at Southampton, and a ship was injured in the docks at Leith by reason of the negligence of the owner's servant, then if the dock owner was sued at common law in respect of the injury done at Leith, everything connected with the dock at Southampton would *prima facie* be held to be irrelevant and could not be gone into. Yet, as I understand it, it is contended that when the question is what liability is to be imposed, the condition, value or management of Southampton Docks, though at common law irrelevant, becomes relevant for the purpose of fixing liability. This inquiry as to the limitation of liability must, in my view, be confined to the condition of things, and the occurrences in the docks in which the accident took place. Bankes, L.J. said that the second section of the Act of 1900 should be construed as if the words "whilst being at or upon the dock or canal" were, as I understand, inserted after the words "vessel" and before the words "be liable to damages beyond an aggregate amount not exceeding —." These words will effect the just and desired object of confining the liability which is to be limited to damages inflicted in the docks or canal mentioned earlier in the section.

On that construction, which, in my view, is necessarily the right one, the appeal fails and should be dismissed with costs.

LORD WRENBURY.—The question to be decided is as to the nature of the acts in respect of which a dock owner is, by virtue of sect. 2 of the Merchant Shipping Act 1900, entitled to limit his liability. If he carries on the business, not of a dock owner only, but of a ship repairer also, is he entitled to limit his liability in respect of acts done by him as a ship repairer?

I have to assume that such events have happened as that the dock owner has come under a common law liability in damages for some act done by his servants without his actual fault or privity. The section is one by virtue of which he is not to be liable in full for the damages which he is at law liable to pay. He is to be liable, so to speak, for less than he owes. It would be a material assistance if some principle could be suggested for this remission of liability, but it would seem to be the fact—and I accept it as being the fact—that the only ground for it is that a ship is a chattel of so great a value, that full liability would be so heavy that the construction and ownership of docks would be discouraged unless limitation of liability were sanctioned. This, however, does not give much assistance towards determining what the extent of the concession is to be in order to achieve the object in view. But it does give some assistance towards saying that it is to the dock owner *qua* dock owner that the privilege is given. The question is entirely one of the true meaning of sect. 2 of the Act, and I prefer, in the first instance, to endeavour to ascertain that meaning for myself by a careful perusal

of the section without reference, for the moment, to any authority; applying the usual principle of scrutinising the language used, regarding in every case the context, bearing in mind the object indicated by the words, and thus settling the true meaning of the section in the particular circumstances of this case.

A dock owner, let us say, who is also a ship repairer, does acts in reference to a ship in the dock which he owns, but they are acts which are referable not to his character of dock owner but to his character of ship repairer. Is he entitled to limit his liability? That is the question. Purposely I assume that acts as dock owner and acts as ship repairer are capable of being discriminated. If they are not, and all the acts may be taken as being done as dock owner, the question under debate does not arise.

The first guidance I obtain in reading the section is, that the dock owner is one of a group of four persons or bodies who are grouped together and form the common nominative to the verb which follows. They are: (1) the owners of any dock; (2) the owners of any canal; (3) harbour authorities; and (4) conservancy authorities. The latter three of these four are not bodies likely to be contemplated as carrying on the business of ship repairers. I am entitled, I think, to say that the Legislature when it mentions the dock owner is thinking of a dock owner comparable with the other three bodies, and not of a dock owner who may be carrying on other business in connection with ships, for example, ship repairers or persons who supply ships' tackle.

Further, I find that by virtue of the definition in sect. 2, sub-sect. 5, the owner of a wharf or pier or jetty is, for the purposes of the Act, a dock owner. Many repairs may be done without going into dry dock. Suppose a ship repairer who undertakes the repair of a ship afloat, builds or buys for the purposes of his business a pier or jetty and moors the ship there while he is executing the repairs, is he a dock owner entitled to limit his liability in respect of acts done as a ship repairer? It is truly said, I think, that it would be a cheap mode of insurance for such a ship repairer to become a dock owner by building or buying a pier.

The Court of Appeal measured the dock owner's right to limit his liability in respect of acts done as a ship repairer by geographical considerations, impressed, seemingly, by the fact that the section attributes importance to the area of the dock in that in measuring the limit of liability, the ship whose tonnage is to determine the limit is to be the largest which, within a certain time, has been within the area. But there is nothing in the section to convey that the right to limit liability, as distinguished from the measure of the liability, is to be governed by the relative positions of the ship and of a dock which the ship repairer happens to own. If *The City of Edinburgh* (*sup.*) was rightly decided—and I think it was—in my judgment it governs this case—not, of course, that it binds this House, but that in material

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facts it is not distinguishable. A decision is indistinguishable when not the facts but the material facts are the same. *The City of Edinburgh (sup.)* differs from this case only in the one fact that the dock owner who was repairing the ship was repairing it in a dock which was not his own. The dock he owned was some miles away. In the present case the dock owner was "at home"; he was repairing the ship in a dock which he owned. I fail to see any ground upon which he should be entitled to limit his liability in the one case and not in the other. As a dock owner he either is or is not entitled to limit his liability in respect of acts which he does in a business other than that of dock owner. He must succeed in claiming limited liability, if at all, by reason of the fact that he is a dock owner, not by reason of the fact that he is a dock owner "at home." I agree with Lord Sterndale that the liability in respect of which he claims limited responsibility must be a liability of the dock owner as such, that is, in respect of something in some way "connected with his dock," and with Scrutton, L.J., that his limited liability as a dock owner does not extend to "anything which he chooses to do in any other capacity."

In *The London and South-Western Railway Company v. James (sup.)* a similar question arose upon the Act but the facts were inverted. The railway company were, as shipowners, entitled by virtue of the statute to limit their liability. The question was whether they had forfeited that right because they were also a railway company and contracted with the passenger to carry him on a journey which, commencing with a journey by rail, included a passage by sea. It was held that they had not. Here the question is whether the ship repairer has acquired a right to limit his liability by reason of the fact that he is a dock owner and is repairing a ship in his own dock. *The London and South-Western Railway Company v. James (sup.)* would have been in point if the accident had happened on the railway and the company had contended that their immunity as shipowners extended to the railway journey. That, of course, was not the case. I fail to see that that decision has any bearing upon the present case.

Everyone is agreed that some limitation must be placed upon the very general words of the section because there would otherwise be included cases in which the application of this section would lead to an absurdity. The proper limitation is, I think, to read the section as if it contained the words "as such" so that the dock owner as such will enjoy the benefit in respect of acts done by him as dock owner.

In my opinion the appeal should be allowed.

LORD BLANESBURGH.—That the actual decision of the Court of Appeal in the case of *The City of Edinburgh (sup.)* was not not only right but inevitable, no one at your Lordships' Bar has been bold enough to suggest. Any

other result on the facts of that case would have been absurd. Nevertheless, the dock owners there, on the grammatical and ordinary construction of the words of sect. 2, sub-sect. 1, of the Merchant Shipping (Liability of Shipowners and others) Act 1900, seemed entitled to claim a decision in their favour. The words of the section so construed appeared to cover their case exactly. Yet they failed, and, as is now agreed on all hands, they rightly failed. And for one of two reasons, either of which was, in that case, adequate. They failed, either because it was, as is suggested, the opinion of the Court of Appeal that the section is only operative to limit the liability—say of the owner of a dock—in respect of a claim within the section which is made against him in that character; or they failed, as is suggested by the respondents, because the damage there sued for was sustained by the *City of Edinburgh* when she was outside the area of the repairers' dock, and the Court of Appeal was of opinion that the section is, on construction when a dock is in question, confined to cases where the vessel is actually within the dock at the critical moment.

I was myself a party—albeit a silent party—to that decision of the Court of Appeal. I have my own views of what the court intended to decide. A statement of them might not have been irrelevant when this case was in the Court of Appeal. It would be of no moment now. The whole question is at large in this House, and it being conceded that the section, if absurd results are not in many cases to ensue, must be held to be limited either in the one way or in the other, the duty is now cast upon this House to choose between these two alternatives. The choice is vital. In the present case everything turns upon it. If the appellants' limitation be accepted—I may compendiously describe it as a "limitation by function"—their appeal will, I think, succeed. If the respondents' be adopted—their limitation may be termed a "limitation by area"—then even more inevitably the appeal must fail.

Some of the considerations to which your Lordships will have regard in making your choice between these two alternatives are not, I should suppose, open to controversy. The House would hesitate to accept a form of limitation calculated to lead to absurdities only less numerous and serious than those from which the unqualified section has thereby been rescued. A limitation again would be at once suspect if, as its result, it excluded from the benefit of the section cases for which, having regard to its whole frame and tenor, it must be presumed the Legislature intended to provide. Still another consideration occurs to me as apposite. The benefit of the section is extended to four classes of beneficiary compendiously described as, the owner of a canal; the owner of a dock; a harbour authority; a conservancy authority. To each of these classes, various as they are in responsibility and status, the section extends a privilege in terms identical. It would seem to follow

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that any proper modification introduced into it must also with equal appropriateness apply to every case, and as the selection made will, when promulgated, apply to each member of every class benefited, it should owe nothing to the accidental circumstances of the case in which it was called for. In other words, while your Lordships, in making your final choice, will not forget the position of the owner of a dry dock, who repairs vessels within it, neither will you fail to have regard to the position under the section of the other beneficiaries, for example, that of a harbour authority, to which I will allude later.

Real assistance in this most important inquiry is, I think, supplied by an examination of the terms in which the classes to be benefited are by the section defined. The aspect in which each of them is being regarded by the Legislature is on such examination brought into full relief. A significance concealed by the commendous words of description employed in sub-sect. 1 itself is thereby revealed.

The only one of these descriptive terms which is not subsequently expanded is the term "canal." Every other is the subject of a definition. I begin with the word "owner." The "owners of a dock or canal" are defined to include "any person or authority having the control and management of any dock or canal as the case may be": sub-sect. 5. An owner of a dock, that is to say, to be within the protection of this section, need not be in any sense a proprietor nor need he have any proprietary interest in the dock. He is entitled to the benefit of the section if he can say of himself that he controls and manages it. A "dock" again, as has already been stated, includes many things besides dry docks. For facility of reference I again transcribe the miscellaneous list. The term includes "wet docks and basins, tidal docks and basins, locks, cuts, entrances, dry docks, graving docks, gridirons, slips, quays, wharves, piers, stages, landing places, and jetties": sub-sect. 3. This definition is I think, significant in at least three relevant directions. When taken in connection with the definition of owner it shows how small is the place—even in the category of "owners of docks"—which is held by those of the respondents' sub-class. Again, while it is a catalogue of places with reference to each of which the owners in their "control and management" will frequently be responsible for damage to ships, very few of them are places in which even the possibility of their owners conducting upon them any separate business is other than remote, or is indeed existent at all. More particularly still the definition in its remarkable comprehensiveness seems to dispose once and for all of the suggestion—never a very hardy one—that the extension of the benefit of the section to the respondents as repairers of ships under the name of the owners of a dry dock may well be justified by the view that the Legislature had an intention to encourage such repairers to construct their own dry docks whereon ship repairs could be carried out. The

principle of *noscitur a sociis* is fatal to such a suggestion.

The definitions of a harbour authority and a conservancy authority are also specially suggestive in the present connection. Harbour authority includes "all persons or bodies of persons corporate or unincorporate, being proprietors of or entrusted with the duty or invested with the power of constructing, improving, managing, regulating, maintaining or lighting a harbour": Merchant Shipping Act 1894, s. 742. "Conservancy authority" includes "all persons or bodies of persons, corporate or incorporate, entrusted with the duty or invested with the power of conserving, maintaining or improving the navigation of a tidal water": *ibid.*

This being a section by which an identical benefit is, in identical terms, conferred upon these various classes of persons or bodies, it is manifestly important to discover, if one can, whether there is now disclosed any characteristic position or responsibility common to them all and of a nature not inappropriate to instruct the benefit which by the section is indifferently extended to each.

And first, it cannot be suggested that all the individuals or bodies concerned are looked upon as the potential owners of separate businesses from any of the responsibilities of which they should have their liability limited. This is not so of any one of them, even in their subdivisions; it is almost unthinkable in relation to a conservancy. Ownership or the possession of a proprietary interest again is not the essential thing. Even in the case of a canal or dock, it is not, as has been seen, essential to protection; in the case of a conservancy authority, the possibility of ownership is not so much as mentioned in the definition, and in the case of such an authority such possibility *ex necessitate rei* is indeed remote. But the examination discloses that there is attached to every one of the four a responsibility which, while in no way inconsistent with ownership, is capable of a separate existence. That responsibility is in relation to canals and docks described as the power of "control and management"; it is in relation to harbour authorities and conservancy authorities, the discharge of the duties and powers with which they are respectively entrusted and invested. And there being nothing in the section necessarily leading to any other conclusion, I should myself have thought, on a consideration of these things alone, that the liability and the only liability which under it a defendant is in any circumstances entitled to limit is a liability which, in the case of "the owner of a canal or dock" arose from his responsibility for the control and management of the canal or dock, and in the case of a harbour authority or conservancy authority arose from its discharge or failure to discharge some duty or power with which the authority in question was entrusted or invested.

But the correctness of this view by no means depends on that consideration alone. Later, in describing the area with reference to which

the limit of liability is to be ascertained, the section refers to it as the area "over which such dock or canal owner, harbour authority or conservancy authority performs any duty or exercises any power"—the same terms being employed, it will be noticed, both with reference to the "owners" and the "authorities"; and the terms chosen being taken from the definitions of the harbour and conservancy authorities as applicable to all to which reference has been made. That comprehensive reference, couched in terms so significant when they are traced to their origin, supplies to my mind the strongest confirmation of the view that the liability with which the section is dealing is a liability arising as above stated and none other.

But the argument does not even stop there. Sub-sect. 6 of this sect. 2 has not yet been alluded to. To my mind it clinches the whole matter. The sub-section is as follows: "Nothing in this section shall impose any liability in respect of any such loss or damage on any such owners or authority in any case where no such liability would have existed if this Act had not passed." The necessity, or, at the least, the propriety of such a reservation is apparent if the liability referred to is intended to be confined to a liability arising from the performance of a duty or the exercise of a power in relation to a canal, dock, harbour, or conservancy area. But how entirely otiose and unnecessary it becomes if the liability to be limited is one that may arise on the part of the "owner" or "authority" on any account whatever.

Accordingly, by reference to the terms of the section, unaltered and unexpanded, but, be it noted, to all its terms, I reach the conclusion that the liability of the respondents to the appellants, already established in this House, is entirely outside its protection. That liability was in no way referable to the duties or powers of the respondents as owners of their dock. The negligence which led to the fire on the steamship *Ruapehu* in the dry dock of the respondents was negligence of their servants in the course of their duties as ship repairers—it was negligence which would have caused the fire wherever the vessel had been, whether in the dock of the respondents or of another; whether in a dock at all or afloat.

I would further observe that the relevance to the present discussion of sub-sect. 6 of this sect. 2 is very pointedly illustrated by the case of *London and South-Western Railway v. James*, to which reference has been made by three of your Lordships. I think myself that the distinction between that case and the present has been clearly shown by my noble and learned friend, Lord Wrenbury. I refer to it again only because the whole basis of Lord Selborne's judgment is confirmatory of that view of this present section which I have ventured to present to your Lordships. The gist of Lord Selborne's judgment is to be found in the following words (28 L. T. Rep., at p. 49; L. Rep. 8 Ch. App., at p. 249); "We think it manifest that the ordinary case, or

at least one of the most ordinary cases, in all contracts of affreightment is that of the ship-owner carrying on his own ship. The corresponding term 'carriage' occurring in the 505th section of the Act of 1854, with what is there said about freight, appears to me to show that the ordinary case was not excluded and that every case where the owner would be liable, whether he was carrier or not, was intended to be within the relief intended to be given to the owner, nor is this reference rebutted by the subsequent repeal of this section." I claim support from these words: "Whether the owner was carrier or not." Lord Selborne there recognises a separation of function exactly comparable to the separation of function in the case of the owner of a dry dock who also repairs vessels within his dock. But more apposite still, these words foreshadow the principle which in terms is to be found embodied in sub-sect. 6 of this section. The liability of the respondents as ship repairers will be limited by the section only to the extent to which, as owners of a dock, they are under the same liability. But they must, as dock owners, be under some liability if there is to be any limitation at all. When the dock owner is also ship repairer, he will be entitled under the section to limit the amount of such damage as would, in a question between the ship and the dock owner, have been recoverable against the latter had he been someone other than the ship repairer. And to a limitation of that damage he will be entitled, whether or not in respect of it he was also liable as ship repairer or in any other character. But liability as dock owner for that damage there must be.

The strength of the appellants' case is not, however, dependent only on the cogency of the considerations by which it can be affirmatively supported. It gains almost as much from the destructive criticism to which the respondents' alternative limitation is exposed. It is, I think, true of that limitation to say, first of all, that it is purely arbitrary. It will enable those in the position of the respondents to limit their liability where its origin was, in connection with their dock, as remote or accidental as was the liability in the case of *The City of Edinburgh* (*sup.*). I agree with Lord Wrenbury, in thinking that there is, in principle, no distinction between the facts of that case and the present. But, secondly, I think this limitation is calculated to create absurdities hardly less serious than those which it would remove. Under it the liability for any damage done by the respondents, even as ship repairers, would be limited if the vessel in question were within the dock of the respondents; their liability for damage done by them without their actual fault or privity, even as dockowners, would be unlimited if the vessel were in another dock or even just outside their own. The limitation, too, would produce the striking result shown by one of the illustrations of Hill, J. He supposes the case of a railway company owning a pier—which is a "dock" within the meaning of the section—and also

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steamships. The railway company for reward permits another ship to be at the pier. One of the railway company's steamships, by the negligence of the master or crew, collides with and sinks that ship. The negligence arises and the liability is incurred in the capacity not of pier-owner but of steamship owner. Yet the respondents' proposed limitation would presumably entitle the railway company, if it suited them, to limit their liability by the standard provided by the Act of 1900, and not by that provided by the Merchant Shipping Act 1894. More serious still, the limitation proposed by the respondents would exclude from benefit cases—it may be many cases—which I suggest are clearly within the benefit of the section. Take, by way of example, one case of a harbour authority. Amongst the defined duties of such an authority as has been seen, is that of lighting its harbour. Suppose that without the actual fault or privity of the authority the entrance to its harbour is on some stormy night left unlighted, and in consequence a vessel making for that entrance loses her bearings and is wrecked on rocks outside the harbour. That would, I suppose, be the case of cases clearly within the protection of the section so far as a harbour authority is concerned. Yet, if your Lordships are induced to sanction, as the proper and necessary limitation, this limitation by area, the authority would, in such a case, be left liable without limit of amount for the total loss of that ship.

The only purpose of introducing the limitation by area in preference to a limitation by function, is to include within the section liabilities incurred on what I may call general account. I have given my reasons for the view that such liabilities are quite outside the scope of the enactment. It is, however, permissible to suggest in the present connection that a court of construction should hesitate before, by actually reading words into the section which are not there, it is led at such a price as that just indicated to produce a result at once so dubious and so equivocal. Limitation by area can, admittedly, only be made effective by reading words into the section. Unlike, as I think, limitation by function, it cannot be extracted from the section as it stands.

I find myself in this case and for these reasons in agreement with Lord Wrenbury. In my judgment it would be proper for your Lordships to discharge the order appealed from and restore that of Hill, J.

Appeal dismissed.

Solicitors for the appellants, *William A. Crump and Son.*

Solicitors for the respondents, *Pritchard and Sons.*

May 12, 13, 16, and 31, 1927.

(Before Lords CAVE, L.C., DUNEDIN, ATKINSON, PHILLIMORE, and CARSON).

BOARD OF TRADE v. CAYZER, IRVINE, AND CO. LIMITED. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Arbitration — Charter-party — Crown — Vessel chartered by Government—Loss by war risk—Claim by owners—Plea of Statute of Limitations—Action not maintainable until award made in arbitration—Right of Crown to plead statute—Statute of Limitations 1623 (21 Jac. 1, c. 16).

A charter-party under which a steamship was chartered in May 1917 by the Crown through the Director of Transports, during the War, contained a clause providing that all war risks should be undertaken by the charterers, and an arbitration clause, referring all disputes to arbitration and providing that the making of an award should be a condition precedent to any action thereon. The steamship was sunk in July 1917 by a collision. The owners claimed damages for their loss from the Crown in Nov. 1923 and an arbitration was held. The arbitrator found that the vessel was lost as a consequence of warlike operations and awarded damages against the Crown. The owners brought an action on the award and the Crown pleaded that the claim was barred by over six years' lapse of time under the Statute of Limitations (21 Jac. 1, c. 16).

Held, that inasmuch as it was provided by the arbitration clause in the charter-party that an arbitration should be a condition precedent to the commencement of any action at law, the effect of that condition, as interpreted in *Scott v. Avery* (5 H. L. Cas. 811) was that until an award was made the claimants had no complete cause of action. It followed that under the statute of James time ran, not from the date of the loss of the steamship, but only from the making of the award.

Decision of the Court of Appeal (ante, p. 150; 136 L. T. Rep. 7; (1927) 1 K. B. 269) affirmed.

APPEAL from a decision of the Court of Appeal (Lord Hanworth, M.R., Scrutton, L.J., and Romer, J.) (reported ante, p. 150; 136 L. T. Rep. 7; (1927) 1 K. B. 269) on a special case stated by Mr. Cloughton Scott, K.C., as arbitrator, under the Arbitration Act for the opinion of the court.

The claimants were the owners of a ship which was requisitioned by the Director of Transports in May 1917 under the terms of a charter-party known as T.99, which provided that all war risks should be undertaken by the charterers, and contained an arbitration clause, referring all disputes to arbitration and providing that the making of an award should be a condition precedent to any action thereon.

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

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On the 19th July 1917 she was steaming, by direction of the Admiralty, without lights when she came into collision with an Italian steamer, and was totally lost. The claimants commenced proceedings in the Admiralty Court against the owners of the Italian ship, who eventually compromised the matter by a payment to the claimants in settlement of the marine risk. In Nov. 1923 the claimants commenced arbitration proceedings against the Crown in respect of the war risk under the charter-party. The Crown objected to the validity of the arbitration proceedings, but it was agreed that without prejudice to the Crown's objection the award should be stated in the form of a special case for the opinion of the court. The Crown contended that as the ship was lost more than six years before the commencement of the arbitration proceedings, the claim was barred by the Statute of Limitations (21 Jac. 1, c. 16).

The arbitrator made an award in favour of the claimants.

It was contended on behalf of the Crown that although the Crown was not bound by any Act of Parliament yet it was open to it to take any advantage of any Act if it thought fit; and that although the Statute of Limitations did not avail the Crown in answer to a petition of right which was not a "proceeding" it was a defence open to the Crown in arbitration proceedings.

The claimants contended that the Crown was not protected by the Statute of Limitations, and that the statute did not in any case apply to arbitration proceedings, but only to proceedings in the courts.

The Court of Appeal held (reversing the decision of Rowlatt, J.) that as the charter-party provided that no right of action should arise until the making of an award in an arbitration, time did not begin to run until after 1923 and the action was therefore not statute barred.

The Crown appealed.

Sir Thomas Inskip, K.C. (S.-G.) and Russell Davies (Sir Douglas Hogg, K.C. (A.-G.) with them) for the Crown.

Sir John Simon, K.C., A. T. James, and James MacMillan for the respondents.

The House took time for consideration.

Lord CAVE, L.C.—In the month of May 1917 the Admiralty requisitioned the respondents' steamship *Clan MacLachlan* upon the terms of the well-known form of charter-party T.99. Under the terms of that document the Admiralty took the risk of loss by warlike operations; and the charter-party contained the following arbitration clause:—

Clause 31: Any dispute arising under this charter shall be referred, under the provisions of the Arbitration Act 1889, or any amendment thereof, to the arbitration of two persons, one to be nominated by the owners and the other by the Admiralty, and should such arbitrators be unable to agree, the decision of an umpire whom they must elect shall be final and binding upon both

parties hereto, and it is further mutually agreed that such arbitration shall be a condition precedent to the commencement of any action at law.

On the 19th July 1917 the *Clan MacLachlan*, while on a voyage from Cardiff to Malta with a cargo which included coal for His Majesty's ships and dockyards and other naval stores, came into collision with an Italian steamship off the Straits of Gibraltar, and became a total loss. The respondents forthwith gave notice to the Ministry of Shipping that the loss might fall to be dealt with as a war risk; but they did not at once take steps to enforce their claim, as certain cases raising questions as to the meaning of the expression "warlike operations" were then before the courts. Those cases were finally decided in this House in or before Nov. 1923; and, on the 29th Nov. 1923, the respondents appointed Mr. Cloughton Scott their arbitrator under clause 31 of the charter-party, to determine the question of the liability of the Crown, and gave notice to the Board of Trade (which had taken the place of the Ministry of Shipping) of that appointment. The Board of Trade made no appointment, and accordingly Mr. Cloughton Scott was appointed sole arbitrator.

The arbitrator made his award in the form of a special case raising a number of questions; but the only question which survives for your Lordships' determination to-day is whether the arbitrator should have found that the claim of the respondents was barred by the Statute of Limitation (21 Jac. 1, c. 16) by reason of the fact that the first step in the arbitration, namely, the appointment of the arbitrator, was not taken within six years after the date of the loss of the steamship. That question has been answered by the Court of Appeal in the negative, and the Board of Trade now appeals to this House.

I am far from wishing to throw doubt upon the view which has been commonly held, and which was affirmed by the decision of a Divisional Court in the case of *Re an Arbitration between the Astley and Tyldesley Coal Company and the Tyldesley Coal Company* (80 L. T. Rep. 116), that an arbitrator acting under an ordinary submission to arbitration is bound to give effect to all legal defences, including a defence under any statute of limitation. A decision against that view might seriously prejudice the practice of referring disputes to arbitration; and, while I am unwilling to pronounce a final opinion upon a question which does not really arise in this case, I certainly say nothing which is adverse to the view to which I have referred. But this is not the case of an ordinary submission to arbitration, nor is it the case of a dispute arising under the common clause in a contract providing for the submission to arbitration of all disputes arising under the contract. The arbitration clause contained in the charter-party known as T.99 is in a special form, and provides that an arbitration under the clause shall be a condition precedent to the commencement of any action at law. The effect

of that condition, as interpreted in *Scott v. Avery* (5 H. L. Cas. 811) and other cases, is that, until the arbitrator has performed his duty and has found whether any and what liability exists, or on the making of his award will exist, the claimant cannot even commence to enforce his claim at law—or (in other words) that until an award is made he has no complete cause of action. Crowder, J., in advising the House in the case of *Scott v. Avery* (sup.), said that it appeared to him that under the contract in that case, which contained a similar provision, “no cause of action could arise before the sum to be paid was ascertained and settled by the arbitrator.” Lord Cranworth, in accepting that view, said that “the right of action would be, not for what a jury would say was the amount of the loss, but for what the persons designated in that particular form of agreement should so say”; and Lord Campbell was of opinion that, on a just construction of the instrument, “until those questions had been determined by the arbitrators no right of action could have accrued to the insured.”

It appears to me that the decision given in *Scott v. Avery* (sup.) disposes of the present appeal. Under the statute of James, which applies to this case, time runs from the cause of action; and it seems to me to follow beyond question that under the clause which we are considering, and having regard to the case cited, time runs not from the date of the loss of the steamship, but only from the making of the award. If this be so, then the arbitrator, however willing he may have been to give effect to all legal defences, could not properly have found that time had run against the claimants.

It is argued that on this view of the law claimants under a document containing an arbitration clause in the *Scott v. Avery* (sup.) form might delay their proceedings indefinitely, and a claim might be made ten or twenty years after the damage had arisen. This may be so, but if so it is a feature which results from the form of contract which the parties have chosen to adopt; and it may be noted that it is at any time open to either party to expedite a decision of the matter by himself instituting proceedings for arbitration.

I should add, in order to prevent misapprehension, that the question as to the right of the Crown to take advantage of the Statute of Limitation, which was referred to in the Court of Appeal, has not been argued in this House and, on the view which I have taken of the matter, does not arise.

For these reasons I am of opinion that this appeal fails, and I move your Lordships that it be dismissed with costs.

LORD DUNEDIN.—The Lord Chancellor has narrated the facts and has quoted the clause on which the question turns. I need not, therefore, either recapitulate or requote.

It has, I think, to be kept steadily in view that the liability which is here in question is not

a liability in respect of tort. If a ship were sunk by a collision occasioned by the fault of another ship there is an immediate liability which springs into existence when the collision occurs. But here there was not any liability arising from the collision as against the Government, except the liability that sprang from contract. One goes, therefore, to the contract, and then one finds that there is not undertaken by the Government any liability unless there has been found to be such a liability by the award of an arbitrator. It cannot be more forcibly put than it was by Lord Cranworth, L.C., in *Scott v. Avery* (sup.): “If I covenant with A. B. that if I do or omit to do a certain act, then I will pay to him such a sum as J. S. shall award as the amount of damage sustained by him, then, until J. S. has made his award, and I have omitted to pay the sum awarded, my covenant has not been broken, and no right of action has arisen”; or again by Lord Herschell in *Caledonian Insurance Company v. Gilmour* (1893) A. C., at p. 90: “Under the policy, the only contract on the part of the appellants to make any payment at all is a contract to pay the sum ascertained in a particular manner, viz., by the arbitration provided for by the thirteenth condition of the policy.”

The Solicitor-General made a strenuous effort to distinguish the clause in *Scott v. Avery* (sup.) from the present clause. In that I think he was quite unsuccessful. The two clauses are practically the same. The arbitrator in each is to be the judge, both of the existence of the liability and of the sum to be paid if he finds liability established; and it is that sum and that sum alone that the Government has contracted to pay.

The question here raised is what is the application to these facts of the expression “cause of action” in the statute of James? Now Lord Campbell, in *Scott v. Avery* (sup.), said—and it is the sentence of his judgment which Lord Watson quotes in *Caledonian Insurance Company v. Gilmour* (sup.) stating that it is the main reason of judgment—“Now, in this contract it is stipulated in the most express terms, that until the arbitrators have determined, no action shall lie in any court whatsoever. That is not ousting the courts of their jurisdiction, because they have no jurisdiction whatsoever, and no cause of action accrues until the arbitrators have determined.”

The Solicitor-General contended that “cause of action” in this sentence was not the same thing as cause of action in the statute of James, but really only meant right of action which he would differentiate from cause of action. Here, again, I think his contention fails. The expression is, I think, deliberately chosen, and it may not be out of place to remark that the same expression is used by two of the consulted judges whose opinion was upheld, viz., Crowder, J. and Coleridge, J., *Scott v. Avery* (sup.). Cause of action in the statute of James means that which makes action possible; and in the

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present case that is the award of the arbitrator, for until it is in being no action is possible.

It was urged that the claimant might indefinitely postpone moving in the arbitration. This is not likely in fact, for people do not generally indefinitely stand out of money which they conceive is due to them. But, besides that, there were certainly means available to the defendant to get the arbitration started if the plaintiff unduly delayed.

I am therefore of opinion that the judgment of the Court of Appeal was right.

Lord ATKINSON.—This is an appeal by the Board of Trade acting in the capacity of Shipping Controller by virtue of the statute 11 Geo. 5, c. 8, s. 1, and under an Order in Council of the 24th March 1921, No. 447, made thereunder, from an Order of the Court of Appeal dated the 19th July 1926, which reversed an order of Rowlatt, J., dated the 8th Dec. 1925, upon an award dated the 9th Feb. 1925, stated in the form of a special case by H. Claughton Scott, Esq., one of His Majesty's Counsel.

The question for decision in the appeal is whether, in the circumstances appearing, Messrs. Cayzer, Irvine, and Co. Limited, the respondents, at all material dates the owners of a steamship named the *Clan MacLachlan*, and the claimants in the above-mentioned arbitration are entitled to recover from the appellants a sum of money to be ascertained as compensation for the loss of the above-mentioned ship.

The facts of the case have already been fully stated. It is unnecessary to restate them beyond what is required to make my judgment intelligible.

It is not disputed that on the 14th May 1917 this vessel was requisitioned for the use of the Government on the terms of a *pro forma* charter-party marked T.99. No formal charter-party was ever signed, but it is not disputed that the vessel entered the Government service on the terms of this *pro forma* charter-party, and continued to be employed in that service up to the date of her loss. It was provided by this charter-party by clause 18 that the marine risk to which this vessel might, in the Government's service, be exposed, should be for the account of the owners, and that risk of war as therein defined or described should be taken by the Admiralty on the ascertained value of the steamer, if she should be totally lost, at the time of such loss, and that should any dispute as to the value of the steamer arise the same should be settled as laid down in clause 31 of the charter.

Clause 31 runs as follows [His Lordship read the clause and continued:]

On the 19th July 1917 the steamship *Clan MacLachlan* came into collision with the Italian steamer *Europa* off the Straits of Gibraltar, and was sunk, becoming a total loss. The dividing lines between war risks and marine risks were about this period not accurately defined or described. It was only after several

cases decided in the House of Lords from 1920 onwards that those dividing lines and these respective risks were with some accuracy defined. At the time of the loss the *Clan MacLachlan* was insured against marine risks with various underwriters.

The Indemnity Act of 1920 (10 & 11 Geo. 5, c. 48) became law on the 16th Aug. 1920, but it did not apply to this case because of the provision that notice of the claim for compensation for loss should, under sect. 2, sub-sect. 1 (ii.), be given within one year from the termination of the war, or the date when the transaction giving rise to the claim took place—whichever might be the later. In the present case the latter date was the date of the collision, and no notice of claim under this statute was ever made by the owners of this ship to the Ministry of Shipping or other Government department until the 14th Aug. 1923, when the solicitors for the respondent company wrote to the solicitor to the Board of Trade a letter dated the 14th Aug. 1923. Even if that letter can be taken as a notice, it is undoubtedly late. This letter, after referring to the litigation in the House of Lords in *The Petersham* and other cases of that kind, winds up with this following paragraph: "The result of the decisions is that marine underwriters are entitled to say that this risk falls on the Government as bearing the war risks under T.99 charter. We shall be much obliged if you will kindly look into the matter accordingly and let us know that liability is admitted. Failing an admission of liability, our clients will, of course, proceed with arbitration under the terms of the charter."

The Admiralty did not appoint any arbitrator under the appropriate clause in the Arbitration Act of 1889, and consequently, on the 10th Dec. 1923, Mr. Claughton Scott was, under the provisions of the sixth section of the above-mentioned Act, empowered to act as sole arbitrator. The proceedings before him included the liability of the Admiralty to the claim made against them, as well as the *quantum* of the amount of the claim. The arbitrator, at the request of both parties, consented to make his award in the form of a special case for the opinion of the court on questions of law, and on the 9th Feb. 1925 he made and published his award in the form of a special case. It contained the following recitals amongst others:

And whereas the said vessel whilst on such requisitioned service was lost in collision in the month of July 1917 And whereas the claimants allege and the respondents deny that the said vessel was lost by risks of war which were taken by the Admiralty under the terms of the said *pro forma* charter-party And whereas the said *pro forma* charter-party T.99 provides that any dispute under the charter shall be referred under the provisions of the Arbitration Act 1889 to the arbitration of two persons, one to be nominated by the owners and the other by the Admiralty And whereas certain disputes and differences have in consequence arisen between the claimants and the respondents as in the following case are more particularly mentioned and described And whereas the claimants allege and the respondents deny that

the said arbitration clause in the said *pro forma* charter-party amounts to a valid submission of the said disputes and differences to arbitration in accordance with the provisions of the said clause.

The following are in it stated to have been the contentions put forward before the arbitrator by the Board of Trade :

19. It was contended before me on behalf of the respondents—

(a) That there was no submission to arbitration within the meaning of the Arbitration Act 1889, inasmuch as (according to the respondents' contention) there was no written agreement to submit present or future differences to arbitration.

(b) That assuming that there was a valid submission to arbitration, any right which the claimants might have had to proceed by way of arbitration was taken away by the provisions of the Indemnity Act 1920 (10 & 11 Geo. 5, c. 48).

(c) That proceedings in the arbitration were not taken within six years after the date of the loss of the said steamship, and that by reason thereof the claimants' claim was barred by the Statute of Limitations (21 Jac. 1, c. 16).

(d) That at the time of her loss the *Clan MacLachlan* was not engaged upon any warlike operation.

(e) That both vessels were to blame for the said collision, and that in consequence thereof it could not be held that the said collision was a consequence of warlike operations within clause 19 of the said *pro forma* charter-party.

(f) That the payments made by the marine underwriters and the conduct of the said underwriters and the claimants with regard to the said proceedings against the owners of the steamship *Eurapa* constituted a good defence to the claimants' claim upon the facts found by me in clauses 1 to 17 hereof inclusive.

And the following are the arbitrator's actual findings :—

In so far as it is a question of fact, I find, and in so far as it is a question of law and subject to the opinion of the court, I hold and declare :

(19) (a) That there was a valid submission to arbitration within the meaning of the Arbitration Act 1889; and that I had jurisdiction in the matters referred to me.

(b) That the claimants' right to proceed by way of arbitration under the said submission has not been taken away by the provisions of the Indemnity Act 1920.

(c) That the claimants' claim was not barred by the Statute of Limitations (21 Jac. 1, c. 16) by reason of the fact that these proceedings were not taken within six years after the date of the loss of the said steamship.

(d) That at the time of the said loss Malta was a war base and the *Clan MacLachlan* was engaged in a warlike operation within the meaning of clause 19 of the said *pro forma* charter-party, namely, in carrying war stores to a war base.

(e) That the said collision was a consequence of warlike operations within the meaning of the said clause 19.

(f) That neither the payments made by the marine underwriters nor the conduct of the said underwriters or of the claimants with regard to the proceedings against the owners of the steamship *Eurapa* and the settlement thereof constitute any defence to the claimants' claim.

(g) That the claimants are entitled to an award in their favour in these proceedings against the respondents under clause 19 of the said *pro forma* charter-party.

The question for the opinion of the court is whether in respect of the contentions mentioned in par. 19 hereof I have come to a right determination in point of law.

If the court should be of opinion that I have come to a right determination in point of law in respect of each of the said contentions, then my award shall stand and I direct that the respondents shall pay to the claimants the costs of this my award and their costs of the reference to be taxed if not agreed.

If the court should be of opinion that I have come to a wrong determination in point of law as to the validity of the submission or as to my jurisdiction, then I award that the respondents are under no liability in these proceedings and I direct that the claimants shall pay to the respondents the costs of this my award and their costs of the reference to be taxed if not agreed.

The important question at once arises what would be the effect of this art. 31 on any action at law which might be brought by the owner of the *Clan MacLachlan*, based on the *pro forma* charter T.99, to recover damages from the Board of Admiralty or its successors, in this matter the Board of Trade, for the loss of their ship. In my view, if the case of *Scott v. Avery* (*sup.*) was rightly decided—as it has been many times held to have been, and that by the most distinguished judges—such an action would not be maintainable until the condition precedent, *i.e.*, the holding of the arbitration, had been performed, if even then. It is necessary, however, to examine closely the language used by the noble Lords in the House of Lords who delivered judgment in that case, in order to appreciate the meaning and reach of the words they used.

The headnote states with sufficient fullness and accuracy what were the points raised and the decision upon them. The action was brought upon a policy of insurance to recover damage for the loss of a ship. One of the conditions of the policy was that the sum to be paid to any insurer for the loss should in the first instance be ascertained by the committee, but if any difference should arise between the insurer and the committee relative to the settling of any loss, or to a claim for average or any other matter relating to the insurance, the difference was to be referred to arbitration in the way pointed out in the condition. Then comes the vital provision, namely, “no insurer who refuses to accept the amount settled by the committee shall be entitled to maintain any action at law or suit in equity on his policy” until the matter has been decided by the arbitrators, and “then only for such sum as the arbitrators shall award,” and the obtaining of the decision of the arbitrators was declared to be a condition precedent to the maintaining of any action. It was held that these conditions were lawful, and that even should the difference relate to other matters than those of mere amount, no action was maintainable till the award was made.

From the fifth and sixth pleas filed by the defendants it is obvious that the matter to be referred to arbitration was not merely the *quantum* of the damages.

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Lord Cranworth, L.C., in giving judgment, said: "It appears to me perfectly clear, that the language used indicates this to have been their intention, that, supposing there was a difference between the person who had suffered loss or damage and the committee as to what amount he should recover, that was to be ascertained in a particular mode, and that until that mode had been adopted, and the amount ascertained according to that mode, no right of action should exist. In other words, that the right of action should be, not for what a jury should say was the amount of the loss, but for what the persons designated in that particular form of agreement should so say. . . . It appears to me perfectly clear, that until the award was made, no right of action accrued."

Lord Campbell said: "In the first place, I think that the contract between the shipowner and the underwriters in this case is as clear as the English language could make it, that no action should be brought against the insurers until the arbitrators had disposed of any dispute that might arise between them. It is declared to be a condition precedent to the bringing of any action. There is no doubt that such was the intention of the parties; and, upon a deliberate view of the policy, I am of opinion that it embraced not only the assessment of damage, the contemplation of *quantum*, but also any dispute that might arise between the underwriters and the insured respecting the liability of the insurers, as well as the amount to be paid. If there had been any question about want of seaworthiness or deviation or breach of blockade, I am clearly of opinion that upon a just construction of this instrument, until those questions had been determined by the arbitrators, no right of action could have accrued to the insured. That being the intention of the parties, about which I believe there is no dispute, is the contract illegal? There is an express undertaking that no action shall be brought until the arbitrators have decided, and there is abundant consideration for that in the mutual contract into which the parties have entered; therefore, unless there is some illegality in the contract, the courts are bound to give it effect. There is no statute against such a contract, then on what ground is it to be declared illegal?"

He then ridicules the notion that it is void as against public policy, and, after referring to *Thompson v. Charnock* (8 T. R. 139), he says: "There is no case that goes the length of saying, that where the contract is as it is here, that no right of action shall accrue until there has been an arbitration; then an action may be brought, although there has been no arbitration. Now, in this contract of insurance it is stipulated, in the most express terms, that until the arbitrators have determined, no action shall lie in any court whatsoever. That is not ousting the courts of their jurisdiction, because they have no jurisdiction whatsoever, and no cause of action accrues until the arbitrators have determined. There-

fore, without overturning the case of *Thompson v. Charnock* and the other cases to the same effect, your Lordships may hold that, in this case, where it is expressly, directly, and unequivocally agreed upon between the parties that there shall be no right of action whatever till the arbitrators have decided, it is a bar to the action that there has been no arbitration."

This judgment of Lord Campbell has been many times approved of. In *Caledonian Insurance Company v. Gilmour* (*sup.*) the action out of which the appeal in that case arose, was brought by Gilmour, the respondent, against the appellant company to recover on a policy against loss by fire a sum of 1700*l.*, or the amount he might prove to be payable to him by the company as insurers. The policy had a condition endorsed upon it in these words:—"Where the company does not claim to avoid its liability under the policy, on the ground of fraud or non-fulfilment of any of the conditions hereinbefore set forth, but a difference at any time arises between the company and the insured, or any claimant under this policy, as to the amount payable in respect of any alleged loss or damage by fire, every such difference, when, and as the same arises, shall be referred to the arbitration of one person to be chosen by both parties, or of two independent persons who should choose an umpire. And it is hereby expressly declared to be a condition of the making of this policy, and part of the contract between the company and the insured, that where the company does not claim to avoid its liability under the policy on the ground of fraud or non-fulfilment, as aforesaid, the party insured, or claimant, shall not be entitled to commence or maintain any action at law or suit in equity on this policy till the amount due to the insured shall have been awarded as hereinbefore provided, and then only for the sum so awarded, and the obtaining of such award shall be a condition precedent to the commencement of any action or suit upon the policy." A point was made by the insured, that as the arbitrators were not named in the clauses referred to arbitration, it was void. This point was held to be irrelevant to the suit. It was held by the House that the condition as to ascertaining the amount of the damage by arbitration was incorporated into, and formed an integral part of, the contract of indemnity, and was a condition precedent to the bringing of an action upon the policy, and secondly that the contract, being one upon which no cause of action accrued until the amount of damage had been determined by arbitration, was excepted from the rules of Scottish law that a reference to arbitrators not named could not be enforced.

The case of *Scott v. Avery* (*sup.*) was followed. Lord Herschell, in delivering judgment, said: "I may add that the reasoning of the noble and learned Lords who took part in the decision of *Scott v. Avery* (*sup.*) appears to me completely applicable to the present case. Its cogency is not affected by any of the distinctions which then existed between the law

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of England and that of Scotland in relation to arbitration clauses."

Lord Watson, in delivering his judgment, referred at length (p. 96) to *Scott v. Avery* (sup.). He pointed out that it was held by the House, affirming the judgment of the Exchequer Chamber, that until an award was made no action was maintainable, and quoted, apparently with approval, the passage from Lord Campbell's judgment at pp. 851 and 854 of the report which I have already quoted.

In the cases *Trainor v. Phoenix Fire Assurance Company* (65 L. T. Rep. 825) and *Scott v. Mercantile Accident and Guarantee Insurance Company Limited* (66 L. T. Rep. 811), the decision in *Scott v. Avery* (sup.) was followed and approved of. In *Spurrier and another v. La Cloche* (1902) A. C. 446 the respondent sued the appellant as agent in Jersey of the Sun Fire Office to recover a sum of 1000*l.* insured by a fire policy dated the 4th Jan. 1897, effected by the respondent on his collection of foreign stamps. The appellants pleaded that the policy was made subject to a condition—No. 12—whereby it was expressly agreed and declared to be a condition precedent to the liability of the company that the claimant should have no right of action against it except for the amount of the claim, if admitted, or the amount of any award of the arbitrator or arbitrators or umpire, and that the respondents had appointed one arbitrator and the company another—that the arbitrators had not agreed upon an umpire, and that the conditions had not been fulfilled, and they prayed that the action might be dismissed. The respondent pleaded that this condition was contrary to the law of Jersey, and of no force or effect. The committee of the Privy Council which heard the case was composed of Lords Macnaghten, Davey, Robertson, and Lindley, and Sir Ford North. Lord Lindley delivered the judgment of the Board. At p. 450 of the report he said: "It follows from these observations that no action could be sustained in Jersey any more than in this country, for any money payable under the policy unless and until the amount so payable had been settled by arbitration pursuant to the 12th condition: (see *Scott v. Avery* (sup.) and *Caledonian Insurance Company v. Gilmour* (sup.)). The contract is one on which no cause of action could accrue until the amount to be paid had been determined by arbitration, and by arbitration as provided by the contract. Mr. Deans contended that the arbitration clause was invalid by the law of Jersey, because not only the amount payable but also the liability to pay was to be decided by arbitration; and that this was an illegal attempt to oust the jurisdiction of the court, and went further than *Scott v. Avery* (sup.). But if a contract is so framed as to give no cause of action unless a certain condition is performed, no question arises as to ousting the jurisdiction of any court. It was by not observing the difference between no cause of action and a defence which assumes a cause of action, but is based on the incom-

petence of a particular court to enforce it, that the Court of Exchequer went wrong in *Scott v. Avery* (sup.). The oversight was pointed out and corrected in the Exchequer Chamber, and again in the House of Lords."

I think clause 31 of T.99 brings this case within the authority of *Scott v. Avery* (sup.) and the cases which followed it. I think the condition in its last three lines is as effectual for that purpose as are the more lengthy provisions upon the subject to be found in these authorities. Moreover, I am unable to see how a provision to the effect that an arbitration shall be a condition precedent to the commencement of any action does not as effectually secure that no action at law can be brought on the matters referred until this arbitration has been held as any of the lengthy conditions found in the authorities I have cited.

With regard to the Statute of Limitations (21 Jac. 1, c. 16), it has no application, I think to actions or suits which, by the contracts of the parties to them, are placed in such a position that they cannot be commenced, begun or enforced. The whole purpose of this Limitation Act as to persons who have good cause of action which they could, if so disposed, enforce, is to deprive them of the power of enforcing them after they have lain by for the number of years respectively and omitted to enforce them. They are thus deprived of the remedy which they have omitted to use. I think it is obvious that the Act cannot apply to a cause of action which the person entitled to it cannot, because of his own contract, enforce against anyone.

I think the appeal fails, and should be dismissed with costs.

LORD PHILLIMORE.—When an action in progress is referred to arbitrators for disposal, and no special directions are given limiting or conditioning the functions of the arbitrators, as, for instance, directing them, as I have known it happen, to take account of moral or social considerations, the arbitrators must decide the case as a judge would, or as an official referee would, and give effect to all legal defences such as the Statute of Limitations. But when there is no action in progress, and the parties agree to refer their disputes to arbitration, it will depend upon the terms of the agreement to refer, or the submission to arbitration, whichever phrase you use, whether the arbitrators are in deciding to give effect to this class of legal defence or not.

It may be as the judges thought, in the case of *Re an arbitration between the Astley and Tyldeley Coal Company and the Tyldeley Coal Company* (sup.), that in the absence of special direction it is to be inferred that the parties intended the arbitrators to do precisely what a judge would.

It is not necessary, in my view, to decide whether this is so, but for the purpose of the present case I can assume it. I can assume it, because the clause in this charter-party which provides for the submission of disputes arising

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[ADM.]

under it is not, in my judgment, such a submission to arbitration.

I cannot better express my view than by adopting the language of Cresswell, J. when advising this House in *Scott v. Avery* (*sup.*) and calling this reference one which makes the arbitration "ancillary to an action or suit."

The arbitration is not to take the place of an action at law, but is a necessary step towards an action at law.

It is true that an award in such an arbitration may decide all questions in dispute concerning the rights of the parties, so that nothing be left, but an action to enforce it, to which action there can be no defence, or that without action an order of the court may be obtained for enforcing the award.

But it is also true that the award of the arbitrators may not completely determine the rights, let alone the remedies, of the parties.

Your Lordships are dealing with a common form of charter-party in use by the Admiralty. It may happen not unfrequently that some clause may be varied by the parties by express agreement, and it may well be that the dispute will take this form. First of all, was the shipowner bound to do so-and-so without extra remuneration under the terms of the charter-party; and secondly, if he was so bound, was there a subsequent agreement of some particular date which released him from his obligation or varied it?

Questions of release or set-off would be outside the jurisdiction of the arbitrators. I doubt whether any adjudication on figures other than such as would be derived from pure calculation, would be within the province of the arbitrators.

For the purposes of this case, I should introduce another consideration. The authority of the arbitrators extends to deciding upon questions of right and not upon questions of remedy. If there is any question of the latter class, it is to be raised and decided in the subsequent and consequential action at law.

So far as this matter came under consideration in the great case of *Scott v. Avery* (*sup.*), the language of the learned and noble Lords who decided that case is to this effect.

The Lord Chancellor speaks "of no right of action accruing," until after the award. Lord Campbell says "no cause of action accrues until the arbitrators have determined."

The same point is very clearly expounded in *Caledonian Insurance Company v. Gilmour* (*sup.*) (see especially per Lord Field at p. 102).

But if this be so there is no action or suit to which the Statute of Limitations can apply until the arbitrator has found in favour of the claimant.

These are sufficient grounds for holding that the appeal by the Board of Trade fails, but the matter may—as it was put in the course of the argument—be put in another way equally fatal to the appeal.

Assuming that the arbitrator is to consider remedy as well as right and to give effect to legal defences, and that he does, as indeed

the arbitrator did in this case, take into account the Statute of Limitations, he would ask himself did a cause of action accrue to the claimants more than six years ago? and he would have to answer in the language of *Scott v. Avery*, "no." A claim which might have ripened into a cause of action did accrue; but it cannot ripen till after his decision.

One word more. It is said that this construction of the clause in the charter-party would enable a shipowner to bring, after many years' delay, the stalest of claims. To this there are other answers, but one is sufficient. It would be easy to amend the form of charter-party and introduce a clause such as one finds in a number of similar commercial instruments, making it incumbent upon a claimant to make his claim in writing within some brief defined period after the occurrence of the event which gives rise to the claim.

I agree that this appeal should be dismissed.

LORD CARSON.—I agree. I am unable to add anything to what has already been said by the noble Lord on the Woolsack.

Appeal dismissed.

Solicitors for the appellants, *Solicitor to Board of Trade.*

Solicitors for the respondents, *Ince, Coll, Ince, and Roscoe.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Wednesday, March 30, 1927.

(Before BATESON, J. and Elder Brethren).

THE MACROOM. (a)

Collision—Practice—Vessel at anchor—Preliminary Act, par. vii.—Order XIX., r. 28.

In a collision action, where one vessel was at anchor, par vii. of the Preliminary Act of the owners of such vessel, which requires a statement of the course and speed of the vessel when the other was first seen, should, in addition to stating that the vessel was at anchor, state her heading. It is not a sufficient or satisfactory answer merely to state that the vessel was "at anchor."

COLLISION ACTION.

The plaintiffs, owners of the steamship *Marwood*, claimed damages in respect of a collision with the defendants' steamship,

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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THE BACKWORTH.

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Macroon, which took place on the 24th Aug. 1926, in Long Reach, River Thames.

In accordance with Order XIX., r. 28, the plaintiffs duly filed a Preliminary Act. Order XIX., r. 28 requires a Preliminary Act to contain a statement of the following particulars: " . . . (g) The course and speed of the vessel when the other was first seen . . . "

The plaintiffs complied with this paragraph by stating "at anchor." By their statement of claim they further alleged that the *Markwood* was "lying to her port anchor off Kent Wharf about 1 to 2 cables distant from the south shore." At the hearing the defendants applied for better particulars of the plaintiffs' answer to par. vii. of their Preliminary Act.

Langton, K.C. and *Hayward* for the plaintiffs.

Dunlop, K.C. and *Carpmael* for the defendants.

BATESON, J. held that in an anchorage case the answer to par. vii. should state the heading of the vessel. It was not a sufficient or satisfactory answer merely to state that she was "at anchor."

Solicitors: *Botterell and Roche*, agents for *Botterell, Roche, and Temperley*, Newcastle-on-Tyne; *Thomas Cooper and Co.*, for *Hill, Dickinson, and Co.*, Liverpool.

May 10, 12, and 27, 1927.

(Before HILL, J.)

THE BACKWORTH. (a)

Collision—River Thames—Vessel navigating against tide—Port of London River Bye-Laws 1914, art. 36.

By art. 36 of the Port of London River Bye-Laws 1914 "every steam vessel navigating against the tide shall on approaching points or sharp bends in the river ease her speed and if necessary stop and wait before rounding so as to allow any vessel navigating with the tide to round and pass clear of her."

Held, that the rule imposed two duties upon a vessel navigating against the tide: (i.) to ease her speed; (ii.) if necessary to stop and wait before rounding so as to allow any vessel navigating with the tide to round and pass clear.

Held, further, that the words "if necessary" meant "if necessary in order to avoid risk of collision," and did not mean "if necessary in order to allow the other vessel to round and pass clear."

Held, therefore, that a steam vessel navigating against the tide which, on approaching Blackwall Point, put her engines to slow, was not to blame for not stopping her engines and waiting until an up-coming vessel had rounded the point, since at the material time there was no necessity to do so in order to avoid risk of collision.

The *Hontestroom* (17 *Asp. Mar. Law Cas.* 123; 136 *L. T. Rep.* 33; (1927) *A. C.* 37) considered and applied.

DAMAGE ACTION.

The plaintiffs, owners of the steamship *Sentry*, claimed damages against the defendants, owners of the steamship *Backworth*, in respect of damage done to the *Sentry* in a collision between the *Sentry* and the *Backworth* which took place in the River Thames, off Blackwall Point, on the 16th Sept. 1926. The defendants counterclaimed for damages sustained by the *Backworth*, alleging (*inter alia*) that the *Sentry*, a steam vessel proceeding against the tide, was to blame under the Port of London River Bye-Laws, art. 36, for failing to stop her engines and wait before rounding the point so as to allow the *Backworth* to round and pass clear.

Art. 36 is set out in the head-note. The facts and arguments of counsel fully appear from the judgment.

Stephens, K.C. and *Dumas* for the plaintiffs.

Langton, K.C. and *Bucknill* for the defendants.

Cur. adv. vult.

May 27.—HILL, J.—The ships involved in this case are the *Sentry*, a vessel of 1354 tons gross, 230ft. long, with a draught of 13ft. 7in. forward and 16ft. 8in. aft, and the *Backworth*, a steamship of 2481 tons gross, 303ft. long, drawing 19ft. 10in. on an even keel. The *Backworth* was in charge of a pilot. The *Sentry* was bound down the Thames, the *Backworth* was bound up, and they met in collision off Blackwall Point about off Green's Upper Dry Dock and a little north of mid-river. The time was about 6.55 p.m. (B.S.T.) on the 6th Sept. 1926. The weather was fine and clear. The tide was flood, of the force of about one and a half knots. High water at London Bridge was at 7.58 p.m.

The *Sentry*—before anything happened—was proceeding down south of mid-river. As to the *Backworth* I find that she was coming up in about mid-river, not south of mid-river. There was not much other traffic in the neighbourhood. Two tugs with craft in tow were coming up, both nearer the north shore than the *Backworth*. The *Backworth* had overtaken and passed one, and was overtaking the other. There were also two motor boats, the one towing the other, coming up. They were further up the river than the *Backworth*, and when first seen by the *Sentry* were south of mid-river, but shaping to pass to the north side.

The *Sentry* and the *Backworth* were in collision, each striking with stem or close to the stem; the angle is in dispute, but is not of much importance, unless it proves that the *Sentry* starboarded. On the evidence as a whole I am satisfied that the *Sentry* did not starboard, and that whatever angle she got to the north shore was by reason of her stopping her engines and ceasing to port, as I shall

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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THE BACKWORTH.

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presently describe, and getting the stronger tide on her starboard bow. Undoubtedly the effect of that was to give her an angle to the north shore and to bring her to a position in which some part of her, at any rate, was north of mid-river. *Primâ facie*, the *Sentry*, proceeding down and being found with her bows north of mid-river in collision with the *Backworth* proceeding up, and being at the time north of mid-river, the *Sentry* is to blame.

Her case is that she could not help herself. In Blackwall Reach she was proceeding down south of mid-river in her proper water. She had been at slow, had increased to half speed for a short time, and had again reduced to slow when a little above Blackwall Tunnel. She was now approaching Blackwall Point at a speed of about four knots. Being at slow, she saw the *Backworth* approaching the point from the opposite direction. Her witnesses said that the *Backworth* was south of mid-river but that I have not accepted; the *Backworth* was in mid-river. The *Sentry* had also seen the two motor boats, which were south of mid-river but were shaping to cross to north of mid-river and to pass the *Sentry* port to port. There was nothing likely to cause any difficulty if everyone acted on the rule of passing port to port. The motor boats did in fact draw on to the port bow of the *Sentry* and were in a position to pass port to port. The helm of the *Sentry* was ordered hard-a-port for the bend and, as her master said, also for the *Backworth*; and there would have been no difficulty in the *Sentry* rounding the bend on the south side of the river while the *Backworth* went round the bend on the north side of the river. But the motor boats altered their course to re-cross to the *Sentry's* starboard bow, thus creating a position of danger and in this attempt the tow-rope parted, and the *Sentry* was then in great danger of collision with the second motor boat. The other, after attempts to get hold of the second, which failed, got away to the southward. The second was left helpless. The *Sentry* stopped her engines and steadied her helm. The effect of this, coupled with the tide, was that she got a cant to port. She thereby escaped collision with the second motor boat, which passed her starboard bow at close distance. The *Sentry* then ported, let go her starboard anchor, and put her engines full speed astern. But she could not prevent herself getting partly athwart and partly north of mid-river, and so her stem struck the *Backworth*.

The plaintiffs' witnesses say that there was nothing else the *Sentry* could do when confronted with the difficulty created by the improper navigation of the motor boats and the breaking adrift of the second motor boat. Witnesses called by the defendants agree with that view. The Elder Brethren agree. I agree. So far, then, the collision was not due to any negligence on the part of those on board the *Sentry*.

It is, however, contended that the collision was due to negligence antecedent to the time

when the motor boats created the position of difficulty by starboarding across the bows of the *Sentry*. I will consider that when I have considered the case made against the *Backworth*. I have already found that the *Backworth* was not proceeding up to the south of mid-river. The only fault that could be suggested is that she did not reverse soon enough. [The learned judge considered the evidence on this point, and held that there was no delay and that there was no fault in the navigation of the *Backworth*.] So far, then, the collision happened without the negligence on the part of either ship.

That leaves for consideration the charge made against the *Sentry* based upon rule 36 of the Port of London River Bye-Laws 1914. In the defendants' charges it is alleged thus: "They failed to ease their speed on approaching Blackwall Point, and stop and wait before rounding, so as to allow the *Backworth* to round and pass clear." The duty of a steamship approaching a point in the River Thames against the tide when other vessels are approaching the same point with the tide has been the subject of rule for many years past. But the rule has not always been expressed in the same terms. Rule 23 of the 1880 bye-laws was thus expressed: "Steam vessels navigating against the tide shall, before rounding [certain named points, which included Blackwall Point] ease their engines and wait until any other vessels rounding the point with the tide have passed clear." That rule was interpreted, and as interpreted made the basis of the decisions in *The Libra* (1881, 4 Asp. Mar. Law Cas. 429; 45 L. T. Rep. 161; 6 Prob. Div. 139) and *The Margaret*; *Cayzer, Irvine, and Co. v. Carron Company* (1884, 5 Asp. Mar. Law Cas. 371; 52 L. T. Rep. 361; 9 App. Cas. 873). Rule 47 of the bye-laws of 1898 was thus expressed: "Steam vessels navigating against the tide shall, before rounding [certain named points, which included Blackwall Point] wait until any other vessels rounding the point with the tide have passed clear." That rule was interpreted, and as interpreted made the basis of the decision in *The Ovingdean Grange* (9 Asp. Mar. Law Cas. 295; 87 L. T. Rep. 15; (1902) P. 208). The object of both rules was stated to be to prevent vessels meeting on the point, and the duty of the ship navigating against the tide was that she should "so far check her speed as to prevent her coming up to the point at the same time when the other vessel would come there. The vessel going against tide is not only to wait until the other has passed the point, but to wait until the other has passed her": (Brett L.J. in *The Libra*, *sup.*).

Rule 36 of the 1914 bye-laws is not limited to certain named points, but applies to all points or sharp bends. It is in the following terms: "Every steam vessel navigating against the tide shall on approaching points or sharp bends in the river ease her speed, and if necessary stop and wait before rounding so as to allow any vessel navigating with the tide to round and pass clear of her." The rule was the

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subject of discussion in the Court of Appeal and the House of Lords in *The Hontestroom* (17 Asp. Mar. Law Cas. 123 ; 136 L. T. Rep. 33 ; (1927) A. C. 37), but the majority of the House of Lords decided that as there was no tide at the time in question the rule did not apply. The minority (Lord Phillimore and Lord Blanesburgh) held that it did apply, but further held that the collision was caused not by the *Hontestroom* neglecting to wait but by the starboarding of the *Hontestroom*. There was therefore no actual decision based upon a breach of the rule. At the same time the judgments both in the Court of Appeal and the House of Lords throw much light upon the meaning of the rule. I need not consider what bends are included in the words "points or sharp bends." Undoubtedly the bend at Blackwall Point is a sharp bend. Nor need I consider what precisely is meant by "ease her speed." The *Sentry*, on approaching Blackwall Point—namely, when about the Thames Tunnel—did reduce her speed to slow. She was about where the *Hontestroom* was when that vessel put her engines at slow, as found by the President ; and, with regard to that, Lord Phillimore said that under the rule "a vessel proceeding against the tide and approaching a point in the river should ease her speed. That the *Hontestroom* did."

What I have to consider is whether it was the duty of the *Sentry* to stop and wait above the point until the up-coming vessels had rounded the bend and passed clear of her. If it was her duty to so hold back, she did not do it. If she had done it, she would not have reached the place of collision, and the case would be very similar to that of *The Ovingdean Grange* (*sup.*), where the *Forsete*, which did not wait, found herself hampered by a barge, and it was said that she was unable to extricate herself from a position where she should not have been. So in *The Hontestroom* (*sup.*) Lord Sumner said : "The point (*i.e.*, whether there was any tide) is crucial, for it is surely plain that if the *Hontestroom* was bound to comply with the rule and had fully done so, there would have been no collision, for she would have been waiting above the point well clear of the *Sagaporak* at the material time."

The argument for the defendants is, in effect, that the present rule means the same thing as the former rules, and that the steamship meeting the tide must so regulate her speed by easing, and, if necessary, stopping, that the vessels do not meet on the point. The plaintiffs' construction of the rule is that she must in any case ease her speed and, if the circumstances make it necessary, she must stop and wait until the up-coming vessels have rounded the point and passed clear.

In my opinion the words "so as to allow" &c., are not to be read with the words, "ease her speed." In the text-books there is a comma after "speed" and no comma before "so." I have, however, seen a print published by authority with no comma at all, and I therefore found nothing upon the punctuation. But

if "so as to allow" is to be read with "ease her speed" there was no need to provide for anything else. If the ship was bound to ease in such a way that she did not meet the other on the point, that obligation would without question oblige her to stop if that was necessary to prevent her meeting on the point. I read the rule as imposing two duties : (i.) "Ease her speed ; (ii.) "If necessary stop and wait before rounding, so as to allow any vessel navigating with the tide to round and pass clear." Again, in support of that view I quote Lord Phillimore : "Under the Thames Rule No. 36, a vessel proceeding against the tide and approaching a point in the river should ease her speed. That the *Hontestroom* did. She should also, if necessary, stop and wait before rounding so as to allow any vessel navigating with the tide . . . to pass clear. This the *Hontestroom* did not do."

The next question is the meaning of the words "if necessary." The defendants contend that they mean "if necessary in order to allow the other vessel to round and pass clear." If that be the meaning, it is ill-expressed by the phrase "so as to allow." I do not think that that is the meaning. I think "if necessary" means "if necessary in order to avoid risk of collision." In that view I am strengthened by what was said in *The Hontestroom*, both in the Court of Appeal and in the House of Lords. The Court of Appeal asked their assessors these questions : "Having regard (a) to rule 36. . . . (b) the presence of the *Corfe Castle* and the *Durham Castle* . . . (c) the sailing barge crossing from north to south, were those in charge on the *Hontestroom* guilty of want of care and proper seamanship, (i.) in starboarding for the barge, (ii.) in not stopping and allowing the *Sagaporak* to pass clear ?" When they so asked the second question the Court of Appeal cannot have thought that, in all circumstances, the *Hontestroom* was bound to stop and wait until the *Sagaporak* had rounded. They treat it as a question of seamanship depending on the state of traffic at the time. Similarly, in the House of Lords, Lord Sumner said the rule "adapts the action (if action there is to be) to the circumstances of the moment by distinguishing between obligatory easing of speed and stopping only if there is also necessity." Lord Phillimore said that object of the rule "is to prevent the simultaneous passing of a point . . . if such simultaneous passing be dangerous."

It is true that, if in the opinion of the majority there had been any tide, the House of Lords would with one voice have held the *Hontestroom* to blame—but the circumstances have to be remembered. It was night. The *Hontestroom* was light. She had ahead of her the *Durham Castle* (of more than 8000 tons), which backed out of the East India Dock Basin and straightened down a little north of mid-channel, the *Corfe Castle* just below the basin waiting to enter, the *Sagaporak*, of over 5000 tons, coming up Bugsby's Reach, and a sailing barge crossing the bows of the *Hontestroom*. The position

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was very different from the position in the present case. Here it was daylight and fine and clear; there was no traffic out of or into the dock; there was no sailing barge; both the *Sentry* and the *Backworth* were of moderate size; the tugs and craft proceeding up near the north shore were in nobody's way; the *Backworth* was not south of mid-river; and the two motor boats, though they were south of mid-river were shaping to pass to their proper side and on to the port bow of the *Sentry*, as indeed they did. Such being the circumstances of the moment, the Elder Brethren are of opinion that there was no want of due care or seamanship in the *Sentry* continuing at slow speed, and that there was nothing to make it dangerous or risky for her to pass the point at the same time as the *Backworth*. The risk of collision was created by the faulty manœuvre of the motor boats. I am entirely of that opinion.

I hold that the *Sentry* was not guilty of any breach of r. 36. Both claim and counterclaim, therefore, fail.

Solicitors, *Parker, Garrett, and Co. ; Botterell and Roche.*

Judicial Committee of the Privy Council.

May 3, 5, and 24, 1927.

(Present: Lords HALDANE, SHAW, and WARRINGTON.)

A. H. BULL AND CO. v. WEST AFRICAN SHIPPING AGENCY AND LIGHTERAGE COMPANY. (a)

ON APPEAL FROM THE SUPREME COURT OF NIGERIA.

West Africa—Negligence—Hire of lighter with lightermen—Negligence of lightermen—Loss of lighter—Lightermen under control of hirers—Liability of hirers.

The appellants let a lighter manned by two lightermen to the respondents for the purpose of loading one of their vessels. The lighter was moored to the vessel in Lagos harbour. During the night the lightermen negligently left the lighter with the result that she parted from her moorings and drifted out of the harbour and eventually ran ashore and broke up.

Held, that the lighter manned by the two lightermen having passed into the control of the respondents during the entire period of hiring, it was the duty of the respondents to keep an eye upon the lightermen or to furnish others so that the chattel might not be lost. The respondents were therefore responsible for the negligence of the lightermen who were at the time their servants. *Donovan v. The Laing, Wharton, and Down Construction Syndicate Limited* (68 L. T. Rep. 512; (1893) 1 Q. B. 629) approved.

Judgment of the Supreme Court of Nigeria reversed.

APPEAL from a judgment of the Supreme Court of Nigeria dated the 8th March 1926 reversing a judgment of the Divisional Court pronounced by Tew, J.

The appellants were shipowners and acted as agents for the United States Shipping Board Emergency Fleet Corporation. The respondents were shipowners and acted as agents for the Holland West Afrika Lijn. On the 15th Aug. 1925 the appellants instituted proceedings against the respondents in the Supreme Court claiming damages for the loss of a lighter which they had hired to the respondents together with the service of two lighter boys for the purpose of loading produce on a ship belonging to the Holland West Afrika Lijn. They alleged by their statement of claim that the lighter whilst under the respondents' control and lying alongside the steamship *Rijnland* in the Pool, Lagos, broke adrift, owing to the respondents' negligence, and was carried out to sea. By their statement of defence the respondents denied that the lighter was under their control and alleged that, owing to the negligence of the appellants and their servants, the lighter broke adrift and was carried out to sea. By their particulars of negligence they said (1) that the lighter boys were not on the lighter at the time she broke adrift; (2) that the appellants were negligent in making fast the lighter to the ship; and (3) that the ropes supplied by the appellants were not suitable for the purpose of making a lighter fast to the ship. The action was heard in the Divisional Court of Lagos, before Tew, J., who in the course of his judgment found (1) that it was the duty of the lighter boys, or one of them at least, to remain on the lighter during the night; (2) that the lighter went adrift because of the parting of a 4in. hemp rope supplied by the appellants; (3) that this rope was sufficient for the purpose to which it was put and parted owing to a latent defect which was not apparent on examination; and (4) that the lighter was lost owing to the negligence of the lighter boys in being absent from the lighter at the time when she broke adrift. The learned judge accordingly held that the lighter boys were in law the servants of the respondents, who were consequently liable for their negligence, and gave judgment for the plaintiffs (the present appellants).

An appeal to the full court was allowed by Combe, C.J. and Van der Meulen, J. (Maxwell, J. dissenting), upon the grounds that Tew, J. had misdirected himself in holding that it was the duty of the respondents to secure the presence of at least one of the lighter boys on board the lighter during the night, and that it was their failure to do so which caused the loss of the lighter.

The plaintiffs appealed.

Langton, K.C. and Pritt, K.C. for the appellants.

Neilson, K.C. and G. S. Pilcher for the respondents.

The considered opinion of their Lordships was delivered by

a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

LORD SHAW.—This is an appeal from a judgment of the full court of the Supreme Court of Nigeria reversing, on the 8th March 1926, and by a majority, the judgment of the Divisional Court, dated the 21st Dec. 1925. The Divisional Court had given judgment in favour of the appellants for 237*l.* 5*s.* 2*d.* with interest and costs.

The substance of the claim was for the value of a lighter which became a total loss in circumstances about to be mentioned.

The facts are very simple. Both parties are shipowners, and according to the requirements of their trade the one is in the habit of letting lighters to the other. In June 1925 the appellants let on hire to the respondents a lighter. There was no written agreement of hiring. Part of the agreement was that the lighter should be, as is usual, manned by two lighter boys, that is coloured labourers. The lighter was transferred on the 2nd June, and the mischance sued for occurred upon the night of the 5th June. The coloured labourers were, from the moment of the transfer, out of the control of the appellants, and subject to the orders and under the control of the defendants.

The use to which the defendants put the lighter was for the purpose of loading ground nuts on to their steamship *Rijnland*. She was lying in the harbour of Lagos, and on the evening of the 5th June a strong ebb tide was running. Among the duties to be performed by the labourers was, of course, the obedience to all orders regarding the attachment of the lighter to the *Rijnland*; and it was a necessity of the case that they, or one of them, should be on board to do for themselves, or to obey orders to do what was required should the ropes be unable to stand the strain of the current. The simplest of all things would have been to catch a rope if thrown from the *Rijnland*, and the boatswain of the *Rijnland* explains that if one of the boys had been there he would have thrown a rope.

Unfortunately both of the labourers had decamped; and they had forsaken the duties which they were bound to perform, both of taking charge of the barge and of giving obedience to the orders of the officers of the *Rijnland*. The consequence was that the barge, having parted her moorings, drifted with the current out of the harbour of Lagos, and subsequently ran ashore at a point about six miles distant therefrom and broke up before she could be saved.

These are substantially the relevant facts as found in the judgment pronounced by the learned judge, Tew, J. Their Lordships think it right to say in a word, with regard to that judgment, that in their opinion the learned judge not only came to a right conclusion upon the facts, but that his review as a clear and accurate review of this part of the law, and the decided cases thereon, meets with the Board's entire approval.

The full court (Maxwell, J. dissenting) reversed this judgment—in particular upon the ground that there was no evidence that the

lighter boys were at any time necessary except when the craft was under weigh or in active use. One of the plaintiffs' witnesses had said, "I do not think it advisable as a precaution for one lighter boy to remain on board all night. I don't think it could do any good." Upon this the learned Chief Justice observes: "I can find nowhere in the other evidence before the court an expression of an opinion to the contrary of that held and expressed by the plaintiffs' representative." Their Lordships have some difficulty in understanding this opinion which seems to be quite out of accord, not only with the defendants' evidence, but with the admissions made in the court below.

Fontein, the defendants' agent, swore: "When a lighter is alongside a ship at night my boys have orders to remain on board the lighter all night."

Brunt, the master of the *Rijnland*, says: "There was nobody on board that lighter. If there had been anybody to throw a line to, lighter would have been saved"; and on the special point in issue Van Duyn, the boatswain of the *Rijnland* says plainly: "In my opinion all lighter boys ought stay on lighter."

It is somewhat difficult to understand how such evidence should have been disregarded or rather stated to have been non-existent. Their Lordships do not refer further to the matter except to say that they think the proved facts are correctly viewed by Tew, J. and not by the full court.

The full court, however, went further, and held on the question: "Would the owner of a lighter taking reasonable precautions for the safety of the lighter . . . keep a boy on board the lighter at night?" in the negative. In the opinion of their Lordships this was wrong. The appellants had entrusted for the period of the hiring the control of their chattel to the respondents. The lighter was manned by two coloured labourers, and from the very nature of the case the lighter and the men both went out of the control of the plaintiffs, and it is unreasonable to suggest that this control only lasted while the active work of lighterage was being carried on; and the suggestion that the lighter boys passed into the control of the defendants during that active lighterage, but out of the control and back into the service of the plaintiffs when the ship was tied up for the night, seems to have nothing to commend it. The sense, as well as the law of the position, is that during the entire period of hiring the barge had to be watched over by the bailee, and it was the bailee's duties to keep an eye upon the labourers, or to furnish others so that the chattel might not be lost.

Upon the law of the case it may be said, the facts being as just put, that the cleavage of opinion in *Laugher v. Pointer* (5 B. & C. 547), in which the judges were equally divided, has been long disposed of in *Quarman v. Burnett* (6 M. & W. 499). Parke, B. thus dealt with it, at p. 509: "We are therefore compelled to decide upon the question left unsettled by the

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case of *Laugher v. Pointer* (*sup.*) . . . We have considered them fully, and we think the weight of authority, and legal principle, is in favour of the view taken by Lord Tenterden and Littledale, J."

Quarman's case (*sup.*) was stronger on the facts than that of *Laugher* (*sup.*). In *Laugher's* case (*sup.*) the facts had been that the owner of a carriage hired a pair of horses to draw it for a day, and the owner of the horses provided a driver through whose negligent driving an injury was done to a horse belonging to a third person. In *Quarman's* case (*sup.*) the owners of the carriage were in the habit of hiring horses from the same person, to drive them for a day, or for a drive. The owner provided a driver through whose negligence an injury was done to a third party, and it was held that the owners of the carriage were not liable to be sued for such injury. It appeared that the hiring was quite a customary thing, so much so that the owner of the carriage even provided the driver with a livery which he left at his house at the end of each drive.

Their Lordships think it only necessary to refer to *Donovan v. The Laing, Wharton, and Down Construction Syndicate Limited* (68 L. T. Rep. 512; (1893) 1 Q. B. 629) for a clear exposition of the question to whom attaches responsibility for the act of a servant transferred, so to speak, for the convenience of working a chattel lent or hired to another. In a sense, that is to say a general sense, he is the servant of the master who sends him, but upon the practical point of responsibility when he is doing the work of and under the orders or control of the other employer to whom he is sent, he is, in the eye of the law, the servant of the latter and the latter is, in the eye of the law, his employer.

In *Donovan's* case (*sup.*) the defendants contracted to lend to a firm who were engaged in loading a ship, a crane with a man in charge of it; the man received directions from the firm or their servants as to the working of the crane, and the defendants had no control in the matter. It was held that though the man in charge of the crane remained the general servant of the defendants, yet as he had parted with the power of controlling him with regard to the matter on which he was engaged, they were not liable for his negligence while so employed. Bowen, L.J. put the matter thus: "The law on the matter now before us seems to me to be perfectly clear. . . . We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act. . . . It is clear here that the defendants placed their man at the disposal of Jones and Co., and did not have any control over the work he was to do."

The same law had practically been laid down in *Rourke v. Whitmoss Colliery Company Limited* (36 L. R. Rep. 49; 2 C. P. Div. 205). In the opinion of their Lordships the law

stands exactly where Cockburn, C.J. there put it, namely, as follows: "When one person lends his servant to another for a particular employment the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

These cases have a habit of repeating themselves, and there are others in the books to the same effect, but their Lordships think it only necessary to refer to *Bain v. Central Vermont Railway Company*, decided by this Board (1921, 2 A. C. 412), in which Lord Dunedin approves of the language of Cross, J. in the Court of King's Bench of Quebec, who had adopted the suitable phraseology of "patron momentané" and "patron habituel." The responsibility in respect of which negligence on the part of a servant in circumstances such as of that and of the present case attaches to the former and not to the latter.

Two further points may be mentioned in a word. It is argued that the men being away from the barge was not negligence. They had deserted their duty at a moment, as it turned out, which was critical for the safety of the ship. While doing so, and at that moment, they were in the service of the defendants. The defendants had not provided any other servants to supply their place in what was a continuous duty. It seems out of the question to suggest that these circumstances did not constitute negligence for which the respondents were responsible.

Their Lordships will humbly advise His Majesty that this appeal ought to be allowed, the judgment of the full court set aside with costs, and the judgment of the Divisional Court restored.

The respondents will pay the costs of the appeal.

Appeal allowed.

Solicitors: for the appellants, *Lawrence Jones and Co.*; for the respondents, *Botterell and Roche.*

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, May 31, 1927.

(Before BANKES, ATKIN, and LAWRENCE, L.JJ.)

R. F. BROWN AND CO. LIMITED v. T. AND J. HARRISON ; HOURANI v. THE SAME. (a)

Bill of lading — Carriage of goods by sea — Loss of goods — Non-delivery — Theft — Pilferage — Exceptions clause — "Navigation of the ship" — Construction of "or" — Carriage of Goods by Sea Act 1924 (14 & 15 Geo. 5, c. 22), Schedule.

(a) Reported by R. A. YULE and T. W. MORGAN, Esqrs., Barristers-at-Law.

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R. F. BROWN AND CO. LIM. V. T. AND J. HARRISON; HOURANI V. THE SAME.

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The plaintiffs in Jan. 1925 shipped a case of goods, from Liverpool to a Mexican port, on the defendants' steamship *S.*, under a bill of lading issued by the defendants, who acknowledged the receipt of the goods in good order and condition and agreed to carry them to Mexico and there deliver them. On arrival at the port of destination it was found that the case had been broken into and the goods had disappeared. The plaintiffs claimed damages for the non-delivery by the defendants of the goods. Alternatively, the plaintiffs said that the defendants had received the goods for carriage and had negligently lost them. The defendants denied liability and pleaded that the goods, if lost in fact, were lost owing to theft and (or) pilferage on the part of Mexican labourers at a Mexican port without the fault, privity, or neglect of the defendants, their servants, or agents, and that the loss was therefore covered by an exceptions clause in the bill of lading, which relieved the defendants from liability for "loss . . . caused by or arising from . . . robbers and thieves of whatever kind, whether on land or afloat or in the service of the carriers or not. The defendants also pleaded that they were not liable because of the provisions of art. IV., r. 2 (a) and (q) of the Schedule to the Carriage of Goods by Sea Act 1924 which provided that neither the carrier nor the ship should be responsible for loss or damage arising or resulting from (a) any act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship, or "(q) any other cause arising without the actual fault or privity of the carrier or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

Held (affirming the judgment of MacKinnon, J. *infra*, (1) that the loss of the goods did not occur in the course of or in the management of the ship within the meaning of the exception contained in rule 2 (a) of art. IV. of the Schedule to the Carriage of Goods by Sea Act 1924; (2) that rule 2 (q) of art. IV. must be read conjunctively, that is, the word "or" must be read as "and," and the defendants, the shipowners, had failed to discharge the onus of showing that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss of the goods within the meaning of the exception contained in rule 2 (q) of art. IV.; and (3) that the defendants were liable to the plaintiffs for the loss of the goods.

Decision of MacKinnon, J. (*infra*) affirmed.

APPEAL from an order of MacKinnon, J. in an action tried by him without a jury.

In these two cases the plaintiffs gave goods to the defendants for carriage to Mexican

ports. In the first case the goods were consigned to Saltillo via Tampico in the defendants' steamship *Spectator*, and in the second case to Vera Cruz in the defendants' steamship *Dramatist* from Liverpool under bills of lading dated the 15th Jan. and 25th March 1925 respectively. The first case concerned the loss of a bale or case of cotton piece goods, and the second a bale or case of silk and cotton piece goods. The value of the lost bales was not large, but the actions were brought as test cases. The bills of lading contained a clause, No. 7, excepting risks from "Loss, damage . . . caused by or arising from . . . robbers and thieves of whatever kind, whether on land or afloat or in the service of the carriers or not." The evidence disclosed that the goods in question were lost at Vera Cruz, where, owing to the internal political situation, wholesale pilfering took place at the hands of the independent contractors employed as stevedores with the passive if not active connivance of the customs officials of that port. The plaintiffs claimed damages for breach of contract. The defendants relied on the clause in the bill of lading referred to above, and also on the provisions of the Carriage of Goods by Sea Act 1924, Schedule, art IV., r. 2, clauses (a) and (g). It was contended that in clause (g) the word "or" could not mean "and," and the defendants having proved that the loss did not occur through any fault or privity on their (the carriers') part, they were immune from liability, and it was not necessary for them to prove that the loss did not occur through the fault or neglect of the stevedores who, under the recent decision in *Heyn and others v. Ocean Steamship Company* (*ante*, p 228; 137 L. T. Rep. 158) were to be regarded as their agents or servants. In the alternative, if the defendants were not protected by this clause then they pleaded they were protected by art. IV., 2 (a), "act, neglect or default . . . of the servants of the carrier in the management of the ship." It was argued that the process of discharge of cargo was covered by the words "management of the ship."

A. T. Miller, K.C. and Sir Robert Aske for the plaintiffs.

Clement Davies, K.C. and William Proctor for the defendants.

MACKINNON, J.—In these two cases the facts are very similar, and the question involved in each of them is the same. In the first case, Brown's case, there was a shipment at Liverpool under a bill of lading, dated the 15th Jan. 1925, on the steamship *Spectator* of one case of goods for carriage to Tampico. At Tampico that case was found to be empty, and there is, I think, no doubt upon the evidence, that it had been broken open and its contents stolen at Vera Cruz (the previous port of call) by the Mexican labourers employed by the stevedore to discharge this ship. In the other case, that of Messrs. Hourani, there was a shipment of several cases for Vera Cruz from Liverpool under a bill of lading dated the 12th March

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1925, and at Vera Cruz one of these cases was found to be broken open and part of its contents stolen. As regards that there is still less doubt that that case was interfered with and part of its contents taken out by one of the Mexican stevedore's labourers, because the officer of the ship who gave evidence before me actually saw him in the act of doing this.

In those circumstances each of the plaintiff companies claims damages for the loss of, in the one case, the whole contents of their case, and in the other case the part contents of their case; and the question of the liability of the defendants turns on the contract in their bills of lading. Each of the bills of lading has a clause in it providing that it shall have effect subject to the provisions of the rules set out in the schedule to the Carriage of Goods by Sea Act 1924. The question, therefore, arises whether by those rules the defendants are relieved from their *prima facie* liability for failure to deliver these goods.

First of all, the defendants rely upon art. IV., r. 2, sub-sect. (g), which provides that "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (g) any other cause"—which means other than the causes specified under (a) to (p)—"arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier"; and I pause at that point. The defendants have formally proved that the loss of these goods did arise without any actual fault or privity of the carrier, that is to say, either the defendants as managers of the steamship company or any of the actual owners of the vessel; and the first question that then results is whether, having proved that, the defendants have proved enough to establish an immunity. That raises the question whether it is sufficient to prove merely that there was no fault or privity of the carriers, or that there was no fault or neglect of their servants or agents, or whether the defendants must establish both those facts, and that depends upon the question whether the word "or" in that sentence in (g) means what it says or is a mistake for the word "and," and whether I ought to substitute the word "and" in place of the word "or." I say substitute the word "and," because I do not think it is possible to say that "or" can be construed to mean "and." The truth is that the suggestion is and must be that one ought to substitute the word "and" in place of the word "or."

In a previous case that was before me of *Heyn v. Ocean Steamship Company (sup.)*, I referred to this point and made some remarks about it, but I did not decide it because it was not then taken before me or argued. I have now, with the assistance of argument, been able to consider the question critically. I still remain of opinion that if the sentence ended at the point where I stopped in reading the particular clause (g), it would not be possible to read "and" in place of the word "or" because of any supposed idea that I

might form as regards the policy of the Legislature in passing this Act; but that was my opinion on the previous occasion when reading the clause and stopping at that point without a very critical examination of the remainder of it. But the clause continues in this way: "but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage." I think there is the clearest inconsistency between the two halves of the clause which are separated by the word "but." In the first part of it: "Any other cause" down to the word "carrier," I think the clear meaning of the words is that it is sufficient to show one of two things; but when the same provision is repeated in the second part beginning with the words "but the burden of proof," there again, quite clearly, the meaning of that provision is that the carrier, to escape, must show two things. If the two parts of the sentence are to be made consistent either "and" in the first part must be substituted for "or," or if that is not to be done and "or" is to be left in the first half, then in the second half the word "neither" must be crossed out and the word "or" substituted for the word "nor." I think the result of that is that there is a clear inconsistency between the two halves of the sentence, and in those circumstances, as it is a question of re-reading or amending the clause so as to make two inconsistent parts of it sensible, and to give a proper meaning to both of them, I think it is legitimate to read the word "and" in place of the word "or." It seems to me that that is very much the situation that arose in the case cited to me, of *Walker v. York Corporation* (94 L. T. Rep. 744; (1906) 1 K. B. 724), where it was held that as one part of the section there in question was contradictory and could only be construed by reading the word "or" in the first part of the section as "and," so here you must, to make this whole clause intelligible, alter either the one word "or" in the first part, or you must alter the two words "neither" and "nor" in the second part. It might be said why do one or the other, but if some alteration is to be made then I do think that it is legitimate to pay some attention, so far as one can, to what one may suppose to be the policy of the Legislature in using this language, and it gives a much less surprising result if you change "or" into "and" than it does if you leave "or" and cross out "neither" and change "nor" into "or."

The result is that I shall read this section, and I hold that it ought to be read, as though "and" had been printed in the first part of the clause instead of the word "or." Therefore the defendants have, I think, got to make out both that there was no fault or privity of themselves and that there was no fault or neglect of their agents or servants.

As regards this second part—their agents or servants—I am satisfied that the ship's officers

and crew did their duty as well as they could under the very difficult circumstances. Apparently it was perfectly well known that these Mexican stevedore's labourers would loot the cargo if ever they had the slightest opportunity. It was suggested by Mr. Miller for the plaintiffs that there was some neglect by the officers of the ship in that they did not take more serious steps to watch the Mexican workmen while at work, so as to prevent them stealing. I am not at all satisfied that there was any such neglect. I rather fancy that nothing short of having a separate overseer and watchman to stand alongside every one of these stevedores, who worked in gangs of eight, would have been sufficient to guard against their dishonest action, but it is not necessary really to come to a final conclusion upon that, because in this case, as in the other case that I have decided, of *Heyn v. The Ocean Steamship Company (sup.)*, I think that these stevedores must be treated as being agents or servants of the defendants within the meaning of this section. In this case, as in that, they were not servants of the shipowners in the sense of being employed and their wages paid by the shipowners. The defendants made a contract with a firm of stevedores for the discharge of the ship at a tonnage rate, and these workmen were the employees of that stevedore contractor; but I do not think that that prevents the people who are doing the work of discharging the ship under such a contract rather than by personal employment of each of them, from being agents of the carrier within the meaning of this clause. Therefore, if the defendants have to rely only upon clause (q) of art. IV., rule 2, I think they do not establish that this loss happened both without their own actual fault or privity and without the fault or neglect of their servants or agents.

But Mr. Clement Davies, for the defence, says—and the point is well worthy of consideration—that he need not rely upon subsect. (q). Subsect. (q) only deals with any other cause than those already specified under (a) to (p), and he says that he can rely on one of those previously mentioned things, namely, that which is specified under (a): “act, neglect, or default of (amongst other people) the servants of the carrier in the management of the ship.” Of course the stevedore's labourers would be, upon the reasoning that I have accepted, servants of the carriers within the meaning of that phrase in clause (a). The second proposition must be this, that the act of the stevedore's labourers in stealing these goods is an act, neglect or default within the meaning of those words in clause (a); and I think the case of *Marriott v. Yeoward Brothers*, decided in 1909 by Pickford, J., as he then was, and reported in 11 Asp. Mar. Law Cas. 306; 101 L. T. Rep. 394; (1909) 2 K. B. 987, does establish that proposition. But there is a third thing which it is necessary for the defence to make out, namely, that this act of the servants of the

carrier was in the navigation or in the management of the ship. Now, he does not suggest that it was in the navigation of the ship; he does suggest that it was in the management of the ship. I should despair, personally, of ever attempting to define what was meant by “management of the ship” in this clause, and I doubt if any human being ever has lived or ever will live, who can give it anything like a reasonable definition, so that some set of facts would not hereafter arise which would show that that definition was wrong. The phrase is so vague that it is almost impossible, except in the broadest manner, to say whether a thing is or is not in the management of the ship; nor is it likely that there is any particular guidance in the decided cases. The only possible assistance that has been supplied to me is by the citation of *The Ferro* (7 Asp. Mar. Law Cas. 309; 68 L. T. Rep. 418; (1893) P. 38), which decides that the act of stevedores in stowing cargo and in stowing it improperly is not an act in the management of the ship.

I am not satisfied that the act of the stevedores, assuming them to be the servants of the carrier, in discharging the cargo or in stealing the cargo while they ought to be discharging it, can be held to be an act in the management of the ship, and therefore I have come to the conclusion that the defendants fail to bring themselves within the protection of clause (a).

The result is that, in my judgment, the defendants do not excuse themselves for the failure to deliver these goods, either under clause (q) or under clause (a) of rule 2 of art. IV., and, in the result, that they have no defence to either of these actions. The amount of damages it was arranged I should not be concerned with, and I have very little doubt it can be agreed without difficulty.

Judgment for the plaintiffs.

The defendants appealed.

Clement Davies, K.C. and *William Procter* for the appellants.

A. T. Miller, K.C. and *Sir Robert Aske* for the respondents.

BANKES, L.J.—This is an appeal, or rather two appeals, from a judgment of *MacKiunon*, J., which undoubtedly raises a matter of great importance to the shipping community under existing conditions.

The matter arises in this way. The dispute is between a bill of lading owner and shipowners. The bill of lading holder is complaining of the loss of certain goods during a voyage. The fact, as proved before the learned judge, was that in the case of both vessels goods had been consigned by the bill of lading holder from this country to ports in Mexico, and at one port the cargo, or portions of the cargo, had been stolen by the men employed by the stevedore in the discharge of the goods, and the shipowners contended that under the terms of the bills of lading they were exempt from

liability. The bills of lading incorporated the articles contained in the schedule to the Carriage of Goods by Sea Act 1924, and the question which the learned judge had to decide was whether or not the theft of these goods by the servants of the stevedore employed by the ship in the discharge of the cargo came within the exceptions contained in art. IV. of the Schedule to the Carriage of Goods by Sea Act 1924 so as to exonerate the shipowners from liability.

Mr. Clement Davies, who has brought to our attention every point which could be raised, has relied on three points. He has said, first of all, that the loss of these goods occurred in the course of or in the management of the ship. That was his first point. His second point was that upon the true construction of sub-sect. (g) of rule 2 of art. IV. inasmuch as the loss of these goods occurred without the actual fault or privity of the carrier, he came within the exception contained in sub-clause (g). His third point was that even assuming that he was wrong on the first two points, in this particular case, the theft having been by the servants of the stevedore employed by the shipowner to carry out the discharge, the servants acting in that capacity were not his agents within the meaning of the article. Every one of those points is, of course, of extreme importance nowadays, because shipowners are bound by the terms of these articles and cannot contract themselves out of the obligations imposed upon them by the statute.

The two material articles which we have to consider are, first of all, art. III., sect. 2, which imposes a statutory obligation upon the shipowner in reference to the carriage of the goods—and when I say “the carriage of the goods” I include, what the second section includes, not only the carriage, but the loading, handling, stowing, carrying, keeping, caring for, and discharge of the goods carried.

In construing these articles which form part of the statute, I think one must begin by realising that here the Legislature have imposed this distinct statutory obligation in reference to the goods which the carrier undertakes to carry. The statute then proceeds to set up what under former practice would have been the exceptions agreed upon between the parties, and those are the exceptions cutting down the statutory obligation which is imposed by sect. 2 of art. III. The first of these, which is in art. IV., sect. 2, sub-sect. (a), is the one in reference to which the main and most important point raised in this argument arises. The material words are these: “Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship”; and the first question raised which the learned judge had to decide, and which we have to decide, is, what is included in those words “management of the ship.” Can it be said that the act of these stevedores’ servants in

raiding the cargo and stealing these goods, within the meaning of this sub-section is an act which occurred in the management of the ship? MacKinnon, J. has said that it cannot, and I agree with him, and I agree with him whether you consider the question upon the language of the statute by itself, or whether you consider the language in reference to the decisions to which we have been referred and of which there are a number, not only decisions of this court, but one decision in particular in the Supreme Court of the United States. Speaking first of all in reference to the language of the statute itself, I think that, as an ordinary rule of construction of this language, when you find in the first place the Legislature imposing this particular statutory duty upon the shipowner in reference, amongst other things, to the discharge of the goods carried, and then when it comes to enumerate the exceptions it has no exception dealing specifically with the goods, but it has an exception dealing with the ship and the management of the ship as it may affect the goods, in order to bring any particular matter within the exception it must be something which can be said to be in the management of the ship. Therefore I should say, apart altogether from authority, that if all the shipowners can prove is an act which has relation to the goods, and the goods alone, and has no relation to the ship itself, it is an act which is a well-recognised act in relation to a ship, it is true, but it is a separate and an independent act and independent of the ship itself, which is the taking of the goods out of the ship and discharging them from the ship.

So far as the authorities are concerned, I should like to begin with the test which Bowen, L.J., I notice, laid down in the case of *Canada Shipping Company v. British Shipowners' Mutual Protection Association* (6 Asp. Mar. Law Cas. 422; 61 L. T. Rep. 312; 23 Q. B. Div., at p. 342). There the question was whether the act in question could be said to come within the expression “improper navigation,” and Bowen, L.J. addresses himself to the point in this way: He says: “The question is whether the damage in this case was caused by ‘improper navigation,’ and depends on the meaning of that expression. I should have thought it clear that ‘damage caused by improper navigation’ was equivalent to damage caused by navigation of an improper kind, and consequently that damage, caused by something which was not navigation at all, was not caused by improper navigation.” I should like to apply those words to the point that we have to decide, and to apply them to “management of the ship” instead of “navigation of the ship”; and I ask myself: Can it properly be said that this particular damage here was caused by mismanagement of the ship? My answer is, No, because it was not management of the ship at all. Now, is there any support for that view, that this particular act of these men cannot be said to come within the term “management of the ship”? I think the

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more one looks into the authorities the more authority one finds for the proposition that such an act as this, a mere discharging of the cargo, cannot properly be said to come within the expression "management of the ship," as used in art. IV. of the Carriage of Goods by Sea Act, or in the Harter Act.

There are three cases to which I should like to refer. There is first of all *The Ferro* (7 Asp. Mar. Law Cas. 309; 68 L. T. Rep. 418; (1893) P. 38). That was decided in the year 1892. Before that case was decided there had been a number of cases before the courts in which the exception had been confined to matters arising in the navigation of the vessel, and cases in which the exceptions had not included the word "management." A number of decisions had been given in reference to matters which, on the one hand, were said to come within the expression "in the navigation of the vessel," and on the other side, were said not to. Some were clear cases: for instance, the case of *Good v. London Steamship Owners' Mutual Protection Association* (L. Rep. 6 C. P., p. 563), where damage was done by the leaving open of a seacock, and there Willes, J. held that that was clearly improper navigation, because it was something improperly done with the ship or part of the ship in the course of the voyage. Then in *Carmichael v. Liverpool Sailing Shipowners' Mutual Indemnity Association* (6 Asp. Mar. Law Cas. 184; 57 L. T. Rep. 550; 19 Q. B. Div. 242), a further difficulty arose, because there the damage was done owing to leaving a port open, and the damage was done before the vessel commenced her voyage. The court got over the difficulty because they held that it was improper navigation because it was not an act which, if the vessel had proceeded on her voyage, would have been an act of improper navigation by leaving the port open. But difficulties such as those that were raised in the case of *Carmichael v. Liverpool Sailing Shipowners' Mutual Indemnity Association* (sup.) are got over when the section includes not only "improper navigation" but "improper management of the ship," and I think the first of the cases in which there was a discussion as to the meaning of the word "management" is the case of *The Ferro* (sup.). There the point was whether improper stowage constituted mismanagement of a ship. There had been previously a dictum by Charles, J. in the *Canada Shipping Company* case (61 L. T. Rep. 312; 23 Q. B. Div. 342), in which he had said that in that particular case, and confining his language to the facts of that case, he thought the improper stowage in that case was an act of mismanagement of the ship; and when the facts are looked into, it is quite plain that when he used that language he was referring to the state of the holds, and the state of the holds as having been improperly and insufficiently cleaned and prepared before the cargo was put on board; and attention is called to that in some of the later cases. But in *The Ferro* (6 Asp. Mar.

Law Cas. 309; 68 L. T. Rep. 418; (1893) P. 38), both the President (Sir Francis Jeune) and Gorell Barnes, J. state their view very clearly that such an act of damage, done merely in the stowing of the cargo, and apart altogether from anything done in reference to the ship, is not mismanagement of the ship. Gorell Barnes, J., in emphatic language, says (6 Asp. Mar. Law Cas., at p. 311; 68 L. T. Rep. 418; (1893) P., at p. 46): "It seems to me a perversion of terms to say that the management of a ship has anything to do with the stowage of the cargo"; and it seems to me on principle it is quite impossible to draw a distinction between mere stowage and mere discharge, and that if the facts in that case had been in reference to the discharge of cargo instead of the stowage of cargo, Gorell Barnes, J.'s language would have been just as emphatic. Then *The Glenochil* case (8 Asp. Mar. Law Cas. 218; 73 L. T. Rep. 416; (1896) P., at p. 10) again one finds, as it seems to me, equally emphatic language, and language which I think points quite clearly to the line which is to be drawn between acts which can properly be said to be acts done in the course of the management or mismanagement of a vessel, and the acts done which cannot come within that expression; and in this case of the *Glenochil* (8 Asp. Mar. Law Cas., at p. 220; 73 L. T. Rep. 416; (1896) P., at p. 16) the President said this: "This court had before it the same sort of question in the case of *The Ferro* (sup.), and I adhere to what I said then, that mere stowage is an altogether different matter from the management of the vessel. It may be that the illustration I gave in that case, as to the removal of the hatches for the sake of ventilation, was not a very happy one; but the distinction I intended to draw then, and intend to draw now, is one between want of care of cargo and want of care of vessel indirectly affecting the cargo." It seems to me that in that short sentence the President very happily draws the distinction between cases which do and do not fall within the protection of an exception which contains the words "management of the ship." Gorell Barnes, J., in the same case (8 Asp. Mar. Law Cas., at p. 221; 73 L. T. Rep. 416; (1896) P., on p. 18), says: "Here we have a case in which there is an act of mismanagement which it might, perhaps, be said is not strictly navigation. I do not think it is now necessary to decide whether it is or is not; but it certainly seems to me to be a fault in the management of the vessel in doing something necessary for the safety of the ship herself. In the course of the argument two principal points seem to have been taken. It is said that the word 'management,' having regard to the other sections of the Act, cannot mean management of the vessel which may affect the cargo by letting water into the ship. But I think if those sections are looked at there will be found a strong and marked contrast in the provisions which deal with the care of the

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cargo and those which deal with the management of the ship herself; and I think that where the act done in the management of the ship is one which is necessarily done in the proper handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words 'management of the said vessel.'"

The last case to which I should like to refer is the case of *Rowson v. Atlantic Transport Company*, which is reported in 9 Asp. Mar. Law Cas. 349; 87 L. T. Rep. 717; (1903) 1 K. B. Div., at p. 114, where Kennedy, J., in giving his judgment, concludes his judgment in these terms: "This seems to be in accordance with the language of Gorell Barnes, J. in *The Rodney* (9 Asp. Mar. Law Cas. 39; 82 L. T. Rep. 27; (1900) P. 112)"—which is an earlier case—"where he says: 'I think that the words "faults or errors in the management of the vessel" include improper handling of the ship as a ship, which affects the safety of the cargo'"—bringing out again, as it seems to me, the line of distinction that has been referred to by the President in the case to which I have already referred. When you come to what Vaughan Williams, L.J. said in the Court of Appeal in the same case (9 Asp. Mar. Law Cas., at p. 461; 89 L. T. Rep. 204; (1903) 2 K. B. 666), the way he expresses it is this: "Though it is not necessary for me to construe sects. 1 and 2, yet I do construe them to this extent: it is the contrast between the dealing with the stowage of the cargo, and the dealing with the vessel itself, that leads me to say, when I come to sect. 3, that 'management of the vessel' means management of the vessel *qua* ship—not *qua* navigation, but *qua* ship." It is in that case that Stirling, L.J. goes into the authorities at very considerable length, and he draws from them the same principle and the same distinction that I have been trying to draw between a dealing or damage resulting from some act relating to the ship herself and only incidentally damaging the cargo, and an act dealing, as is sometimes said in some of the authorities, solely with the goods and not directly or indirectly with the ship herself.

So much for the English authorities, the whole bearing of which I think is conclusive against the argument which Mr. Clement Davies has pressed upon us. Reference has been made to a decision in the Supreme Court of the United States in which Holmes, J. delivered the opinion of the court, and I think it is satisfactory to find that the law as interpreted in this country in reference originally to exceptions in bills of lading, and then in reference to the Harter Act, and now in reference to our own Carriage of Goods by Sea Act, so exactly corresponds with the view of the law as expressed by Holmes, J. in reference to the Harter Act in this American decision. The

facts of that case were interesting from this point of view, and the facts brought the case very nearly to the line of distinction between the one class of case and the other, because the question there arose in reference to the shifting of the cargo, and it was said that the shifting of the cargo was done for the purpose of securing the safety of the ship. On the other hand, it was said: No, it may incidentally have had an effect in reference to the trimming of the vessel, but the act which caused the damage was primarily an act of discharge of cargo and, therefore, it cannot be said to be an act done in the management of the ship, although it might have been said to be an act in reference to the management of the ship if it could have been established that the dealing with the cargo was a dealing for the purpose of trimming the vessel or securing the greater safety of the vessel. Holmes, J. deals with that matter and says that in the Supreme Court they must proceed upon the finding of the court below that the dealing with the cargo was a dealing with the cargo in the course of the discharge, and that the matter must be regarded from that point of view. I will read a passage from his judgment, which seems to me to put the case very clearly and very admirably, if I may say so. This case is reported in 196 United States Reports, and I am reading from p. 596. Holmes, J. says: "The petitioner contends that any dealing with the ship or cargo which affects the fitness of the ship to carry her cargo is 'management of the vessel,' within the meaning of sect. 3"—of course, he is referring to the Harter Act. "To support this contention the case of *The Glenochil* (*sup.*) is cited." Then he goes into the facts of that case, and then he refers to the case of *The Silvia*, in 171 United States Reports. "We see no reason," he goes on, "to criticise this decision and, therefore, lay on one side at once the fact that the vessel had come to the end of her voyage and was in dock. We assume further that the captain retained authority over his ship, so that it was in his power and perhaps his duty to intervene in any case that needed his control. On these assumptions the argument is that cargo has also a function as ballast, that if, for instance, the loss is caused by the improper shifting of pigs of lead, it does not matter whether they are called ballast or cargo, but in either case, so far as the change affects the fitness of the ship as a carrier, it is management of the vessel within the Act. The thing done is the same and the name of the object cannot affect the result. Nevertheless, in a practical sense, the ship was not under management at the time, but was the inert ground or floor of activities that looked not to her, but to getting the cargo ashore. And this consideration brings to light the limitation of this section, adopted by the court in *The Glenochil* (*sup.*), and sanctioned by this court in *Knott v. Botany Mills* (179 U. S. 69, 73, 74), to faults "primarily connected with the navigation or the management of the vessel and not with the cargo." In the case supposed, the

name given to the pigs of lead is not important in itself, to be sure, but may indicate a difference in the purpose and character of the change of place. If the primary purpose is to affect the ballast of the ship, the change is management of the vessel, but if, as in view of the findings we must take to have been the case here, the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make it the less a fault of the class which the first section removes from the operation of the third. We think it plain that a case may occur which, in different aspects, falls within both sections, and if this be true, the question which section is to govern, must be determined by the primary nature and objects of the acts which cause the loss."

I think, therefore, both upon the construction of the statute taken by itself and applying the ordinary meaning to the word "management," it cannot be said that the acts of these stevedore's men in pillaging the cargo in the way they did, can come within such an expression as acts done in the management of the ship. Apart from that, I think both by English law and decisions of these courts, and by the decision of the Court of the United States of America, the authority is practically unanimous against the view contended for by Mr. Clement Davies, and in support of the view taken by the learned judge. I think, therefore, whatever the consequences may be, it does seem to me clear that particular acts of this class, acts done in the course of the discharge and in the course of the discharge merely, cannot be held to come within the exception which is applied to acts which may affect the cargo but which are acts done in the course of the management of the ship.

The next point taken was this. It was said that, even assuming that they were wrong on that point, yet they were entitled to the benefit of the exception contained in sub-clause (g) of sect. 2, of art. IV. That article I must read in order to indicate the point and the answer to the point. The sub-clause is in these terms: it is the last exception: "Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage." Now the structure of this exception is, first, to indicate what the exception is, and next, to establish what is the necessary proof which brings the person seeking the benefit of the exception within it, and it lays the onus of proof upon the person claiming the benefit of the exception. So far as the burden of proof is concerned, and the latter portion of the clause, it is plain that the obligation is laid upon the person seeking the benefit of the exception to establish not only that the loss has been without his actual fault or privity, but also that it has been

without the fault or neglect of his agents or servants; and that, one would think, is reasonable and natural, because really to contend that the statute has conferred an exception from liability upon a carrier who deliberately incites a man to steal the goods and then claims exemption from his act because his servants or agents had been guilty of no fault or neglect, is to impose an obligation upon the court which it would be extremely loth to accept unless it was absolutely compelled to do so. Now Mr. Clement Davies says that the court must put that construction upon the statute because of the opening words which define the exception and which, as he says, draw a distinction between the act of the carrier and the act of his servant, and that it is sufficient to bring himself within the exception if he proves either that the loss was without his actual fault or privity or that it was without the fault or neglect of his agents or servants, and he lays the whole stress of his argument upon the fact that the clause is drafted in this form, "Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants," and he says that the word "or" is there read disjunctively, and that you cannot read it otherwise, except by assuming that the draftsman has made a mistake or that it is competent for the court to alter "or" into "and." But with great respect, it is doing no injustice either to the draftsman or the language, to use the word "or" conjunctively and not disjunctively. There is abundant authority for doing that. It seems to me that it is quite imperative upon the court to do it in this case, first, because it is only by doing it that you can bring the two branches of the sub-section into agreement, and, secondly, that unless you do it, you adopt a construction of the exception which it seems to me inconceivable that the Legislature should ever have contemplated for a moment. I think, therefore, that that point fails.

The last point is that the servants of the stevedore in this particular case being employed by the stevedore, and the stevedore himself being employed as an independent contractor by the shipowner to carry out the discharge, the servants of the stevedore are not agents of the carrier within the meaning of this exception clause (g). I think Mr. Clement Davies has answered that point himself, because he points out in a case which he referred to for another purpose, the case of *Machu v. London and South-Western Railway* (2 Ex. 415), that in a very similar case the court held that for the purpose of construing an Act of Parliament in somewhat similar terms to this statute, the servants of the independent contractor would be the agents of the railway company for the purpose of the construction of the statute; and so here, it seems to me impossible to put any reasonable construction upon this statute except by regarding the servants of the persons who are employed by the shipowner in order to fulfil his statutory obligation to

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discharge the vessel, as being his agents for that purpose.

On all points, therefore, I think that the judgment of the learned judge was right and that the appeal must be dismissed.

ATKIN, L.J.—I agree. This case does raise an important point upon the construction of the rules which are scheduled to the Carriage of Goods by Sea Act 1924, and the particular clause is in the nature of a statutory exception, "Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship." Those are words which were found, and no doubt are still found, in old bill of lading and charter-party exceptions, and they are words that are found in legislation which preceded this Act and upon which this Act was founded, and especially, it is to be noted, are to be found in the Harter Act, which was the forerunner of all Acts of this kind, in relation to the carriage of goods by sea. I think it is very important in commercial interests that there should be uniformity of construction adopted by the courts in dealing with words in statutes dealing with the same subject-matter, and it is a matter of great satisfaction to me to find that the decisions of these courts seem to correspond with the decisions given by the courts of the highest authority in the United States.

I do not propose to add anything at any length to what has been said by my Lord, with whose judgment I entirely agree, but I think perhaps one might point out this, that in this statute it is plain that a very clear distinction is drawn between dealings with goods and dealings with ships, and that "ship" is defined in the Act. "Ship" is defined as being "any vessel used for the carriage of goods by sea," and it is quite plain that what is meant by "ship," when the word is used, is the actual vessel, the *res*, the actual thing itself. One will find phrases in art. IV. that "Neither the carrier nor the ship shall be liable for loss," and in par. 2: "Neither the carrier nor the ship shall be responsible for loss." That means, the ship as a *res* shall not be responsible for loss; and while it is quite true that, in general language, in another context, "management of the ship" might be construed as meaning management of the business of carrying goods by ship, it seems to me plain that that is not the meaning here, but that there is a clear distinction drawn between goods and ship, and when they talk of the word "ship" they mean the management of the ship, and they do not mean the general carrying on of the business of transporting goods by sea. The effect of it is that, in the words of Gorell Barnes, J., as he then was, in *The Rodney* (9 Asp. Mar. Law Cas. 39; 82 L. T. Rep. 27; (1900) P. 117): "Faults and errors in the management of the vessel include improper handling of the ship as a ship which affects the safety of the cargo," and that construction merely follows, I think, and was intended by the learned judge to follow, his decision in

The Glenochil (which is reported in 8 Asp. Mar. Law Cas. 220; 73 L. T. Rep. 416; (1896) P. 10), and the decision of Sir Francis Jeune and Gorell Barnes, J., and both those cases of *The Glenochil* (*sup.*) and *The Rodney* (*sup.*) are supported in terms by Stirling, L.J. in the case of *Rowson v. The Atlantic Transport Company*, to which my Lord has referred (9 Asp. Mar. Law Cas. 347, 458; 89 L. T. Rep. 204; (1903) 2 K. B. 680), and I think that those statements of the meaning of the word "management" must be taken, so far as this court is concerned, as being authoritative.

I do not quite agree with what is said by the learned judge as to the impossibility of defining the words "management of the ship" in this context. I agree that a definition which is made before a full and complete observation of the different phenomena to which you are to apply the definition is unsatisfactory, but it may very well be that the time has not yet come to attempt a complete definition of the word. On the other hand it is impossible for a reasoning and logical tribunal to try and construe the word without forming for itself some idea of what it means, and we may say how far the definition goes so far as the observed facts are at the present moment, and clearly the partial definition given by Lord Gorell in the words that I have cited amount to something which binds the court and which affords a guide to construction. Therefore you are dealing with the question of management of the ship and not management of the business of the ship.

The only other thing that I want to deal with is this. In the case which was cited of *Rowson* (*sup.*) the members of the Court of Appeal, without deciding the matter, suggest, I think all of them, some doubt as to whether or not a defect in the management of the apparatus in the ship could be said to be a defect in the management of the ship if that apparatus applied solely to the cargo or was introduced into the ship for the mere purpose of protecting the cargo. I wish to guard myself at the present moment against being supposed to accept that definition or that view of the construction. It was not necessary for the Court of Appeal in that case to lay down an actual decision on the matter, and it is unnecessary for us to do so. I merely wish to point out this, that at the present day a part of the proper equipment of cargo-carrying ships is very largely concerned with appliances for the safe carrying of the cargo, appliances that have nothing to do with the navigation of the ship but have everything to do with the safety of the cargo, and amongst other things, one would mention in particular the refrigerating machinery which was the subject of discussion in *Rowson's* case (*sup.*), and other matters dealing with ventilation, fans, pumps—a great many pumps on board a ship, the sole object of which is to deal with the cargo—the pumps of an oil tanker and matters of that kind, and winches and derricks, and so forth, which have nothing to do with the

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navigation of the ship, but still which are part of the structure of the ship, and without which the ship would clearly not be seaworthy, either if they were not fitted at all or if they were not in a proper condition when the ship started sailing. For my part, at the present moment, I have a difficulty in seeing if there was a defect in the management of those appliances in the ship which are an essential part of the ship, that that would not be a defect in the management of the ship. This case clearly is not, and could not be, brought within the definition mentioned by Lord Gorell. It appears to me that here we are not dealing with anything which is or can be said to be part of the ship as a ship. The stevedores brought in were employed by the ship for the purpose of discharging the cargo, and that which was done was not a defect in the ship or a defect in the management of the ship as defined, but merely a default of a person dealing with a particular case of cargo, and in my view it is clearly not within the meaning of the words "management of the ship" as defined by the authorities.

The other question is the question of the construction of the words in the exception (g) in the second clause of art. IV. Really, I do not propose to say more about that than to say that I think, upon the whole, the point that has been taken in that matter is the worst point that has ever been taken in the Court of Appeal in my time. It is a most hopeless proposition—not that it has not been very well argued by Mr. Clement Davies. Again, I disagree with the learned judge in his view that the word "or" can never have a conjunctive sense; I think it quite commonly and grammatically can have a conjunctive sense. It is generally disjunctive, but it may be plain from the collocation of the words that it is meant in a conjunctive sense, and certainly where the use of the word as a disjunctive leads to repugnance or absurdity, it is quite within the ordinary principles of construction adopted by the court to give the word a conjunctive use. Here, it is quite plain that the word leads to an absurdity, because the contention put forward by the shipowners in this matter amounts to this, as my Lord said, that if a shipowner himself breaks open a case and steals the contents of it he is exempted from liability under this section if none of his servants stole the part of the case or broke it open. That seems to me to be a plain absurdity. In addition to that, there is a repugnancy because it is plainly repugnant to the second part of the section. Therefore I say no more about that.

The other question is the question as to whether or not the servants of the master stevedore at Vera Cruz can be said to be, within the meaning of the clause, the agents or servants of the ship. Mr. Clement Davies did not dispute that the master stevedore himself was to be considered an agent of the ship, and I think he was quite right in so holding. There was a statutory obligation on the ship to discharge,

and they performed that duty by entering into a contract with the master stevedore, who for that purpose was their agent in performing their statutory duty, and to my mind that in itself would be sufficient to support the matter, because it is plain that the master stevedore, according to our law, would be responsible for the tortious acts of his servants done in the scope of their employment; but quite apart from that, I think that the servants of the stevedore for this purpose are also the agents of the ship, and I think that is made plain by the reasoning of the court in the case that my Lord referred to of *Machu v. London and South-Western Railway* (2 Ex. 415), where the court had to deal with words which were narrower in their meaning, where they had to deal with the word "servants," and where the court held that the servants of the subcontractor of the carrier were, within the meaning of the Carriers Act, servants of the carrier, and I think that that is sound and applies to this case.

For these reasons it appears to me that the shipowners have not discharged themselves from their liability, and that the judgment of the learned judge was quite right, and that this appeal should be dismissed with costs.

LAWRENCE, L.J.—I entirely agree with the judgments which have just been delivered by my Lords, and I do not think that I could usefully add anything.

Appeal dismissed.

Solicitors for the appellants, *Pritchard, Englefield, and Co.*, agents for *Simpson, North, Harley, and Co.*, Liverpool.

Solicitors for the respondents, *Thain, Davidson, and Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Thursday, April 28, 1927.

(Before Lord HEWART, C.J., AVORY and SHEARMAN, JJ.)

RADCLIFFE v. BUCKWELL. (a)

Merchant shipping—Load-line—Submersion at arrival port—No submersion at port of loading—Cargo partly on deck—Saturation by heavy weather—Addition to weight—Meaning of "loaded"—Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 442 (1).

The appellant was the master of a British ship, which loaded at a Finnish port a cargo of sawn boards, part being carried on deck. When the ship left port, the centre of the disc indicating the load line was not submerged, but she encountered heavy weather and the timber on deck became saturated, and when she reached the Humber the centre of the disc was submerged by reason of the saturation having increased the

^a Reported by J. F. WALKER, Esq., Barrister-at-Law

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weight of the timber. The appellant was convicted under sect. 442 (1) of the Merchant Shipping Act 1894, of allowing the ship to be so loaded as to submerge in salt water the centre of the disc indicating the load-line.

Held, that the section covered the case where a master was charged with allowing the centre of the disc to be submerged at the port of arrival, and the conviction must be affirmed.

CASE stated by the stipendiary magistrate for Kingston-upon-Hull.

The appellant, the master of the British ship *Olavus*, was charged with unlawfully allowing the ship on the 22nd Sept. 1926 at the Victoria Docks, Hull, to be so loaded as to submerge in salt water the centre of the disc indicating the load-line, contrary to sect. 442 of the Merchant Shipping Act 1894.

On the 14th Sept. 1926 the *Olavus* completed loading a cargo of sawn boards at a Finnish port. The total cargo was 695 standards, of which 194 standards were carried on deck. The cargo at the time of loading was very dry, and it was loaded in fine weather. The hatches were properly secured.

The ship left port with the centre of the disc not submerged and almost at once encountered a gale of hurricane force. The master had to heave to for a whole day, the ship listed to starboard, and a quantity of water was shipped. When the Kiel Canal was reached the ship was deep, but the master did not do anything to lighten her, as he had faith in her ability to reach Hull and there were no facilities for discharging at Kiel.

Heavy weather was again encountered in the North Sea. On entering the Humber the ship had a list, and was found in the dock to have the centre of the disc submerged eight and a quarter inches, after making the proper allowances for water in the bilges and the specific gravity of the water. That submersion indicated an excess of 134 tons over the proper load.

All the timber on the fore deck and 20 per cent. of that on the after deck was found to be saturated. That below deck was dry except just below the hatches. Ninety-seven standards of timber, weighing when dry $247\frac{1}{2}$ tons, were found to be so saturated as to account for the 134 tons excess weight.

The magistrate was of opinion that the master had allowed the ship to be so loaded as to submerge in salt water the centre of the disc indicating the load-line, and accordingly convicted him and fined him 50*l.* and 5*l.* 5*s.* costs, or sixty days' imprisonment.

Clement Davies, K.C. and Cyril Miller for the appellant.

Sir Douglas Hogg, K.C. (A.-G.), and W. Bowstead for the respondent.

LORD HEWART, C.J.—The argument for the appellant is that the ship was not overloaded within the meaning of sect. 442 (1) of the Merchant Shipping Act 1894 at the Victoria Dock, Hull, which, it is to be observed, was not the place where the process of putting the

timber on board was carried out. That process was carried out on the 14th Sept. 1926 in Finland. Sect. 442 is one of a group of sections of the Merchant Shipping Act 1894 dealing with the safety of those who go down to the sea in ships, and is not the least important of those sections. It provides :

(1) If—(a) any owner or master of a British ship fails without reasonable cause to cause his ship to be marked as by this Part of this Act required, or to keep her so marked, or allows the ship to be so loaded as to submerge in salt water the centre of the disc indicating the load-line . . . he shall for each offence be liable to a fine not exceeding one hundred pounds. . . .

No doubt as a mere matter of grammatical construction, the words "allows the ship to be so loaded" are ambiguous. They may refer to the actual process of loading, but they may equally refer to the condition of the loaded ship. In my opinion, they are wide enough to cover the position in this case.

The very same words occur in sect. 439 dealing with the detention of unsafe ships. If the contention of the appellant is correct, the moment, and the only moment, at which the question can be raised is the moment at which the process of putting the cargo on board has just been carried out.

If the vessel were then overloaded she would be liable under sect. 439 to be detained. But if she received a considerable addition from the sky or the waves to her cargo on the voyage and was driven to take refuge in another port, being then in a condition which would have made her an unsafe ship at the port of loading, still, if the appellant is right, she would not be an unsafe ship there, and could not be detained. With all respect to the counsel who put forward that argument, it seems to me the *reductio ad absurdum* of the matter.

I think that the words mean the same in both sections and cover a case where a master is charged with allowing the mark to be submerged at the port of arrival. In my opinion the magistrate was right. I think he might well hold that it was the duty of a reasonably careful master in all the circumstances to take into consideration at the time of actual loading the likelihood of bad weather and its probable effect upon a heavy deck cargo of sawn boards.

AVORY, J.—I am of the same opinion. The words of sect. 442 (1), "allows the ship to be so loaded as to submerge in salt water the centre of the disc indicating the load-line," ought, in my view, to be construed to mean, "permits the ship to be overloaded at the particular place where he is charged with the offence." I see no reason for attributing to those words in sect. 442 (1) a different meaning from that which they bear in sect. 439. If this ship had been found at an intermediate port in the condition in which she was found at Hull, there can be no doubt that she would have been liable to be detained as an unsafe ship.

SHEARMAN, J.—I agree. In my opinion the master of a ship allows her to be so loaded as to

submerge the centre of the disc whenever he allows an act of loading which may reasonably be expected to cause such submersion at any time during the voyage and it in fact does so.

Appeal dismissed.

Solicitors for the appellant, *Pritchard and Sons*, for *Andrew M. Jackson and Co.*, Hull.

Solicitor for the respondent, *Solicitor to the Board of Trade*.

Thursday, May 19, 1927.

(Before MacKINNON, J.)

AKTIESELSKABET DAMPSKIBS STEINSTAD v. WILLIAM PEARSON AND CO. (a)

Charter-party — "Cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary" — *Pit props loaded into railway wagons at quay-side* — *Custom of the port of discharge* — *Claim for extra expense involved* — *Custom of West Hartlepool* — *Voluntary payment made under mistake of law.*

The plaintiffs were the owners of the steamship *S.*, and the defendants were the charterers. In the autumn of 1921 the vessel carried a full load of pit props from Finland to West Hartlepool according to defendants' order. Under the charter-party the cargo was "to be brought to and taken from alongside the steamer at the charterers' risk and expense, as customary." The cargo was discharged direct into railway wagons at quay-side, and a sum of 509*l.* 16*s.* 7*d.* was paid by the defendants to the stevedores for the work of discharge. This sum of 509*l.* 16*s.* 7*d.* was debited to the plaintiffs' account with the defendants, and the amount finally due to the shipowners was agreed in an account stated between the parties and had been paid. In *The Rensfjell* (1924, 16 *Asp. Mar. Law Cas.* 438; 131 *L. T. Rep.* 764) Lord Merrivale held that at West Hartlepool the cost of stowing the props in the railway wagons fell on the receiver. The plaintiffs sought to recover 335*l.* 9*s.* 6*d.*, which represented the cost of such stowage into wagons and which had been included in the 509*l.* 16*s.* 7*d.* paid to the stevedores, but which, in accordance with the above decision, ought to have been paid by the defendants and not debited to the shipowners', i.e., plaintiffs', account.

Held, that the payment on account of the receiving and stowing into wagons was a voluntary payment. There was no compulsion, nor had there been any protest. The work was undertaken voluntarily under the mutual mistake of both the parties, and the authorities were clear that a voluntary payment in such circumstances was not recoverable. The action therefore failed.

ACTION tried before MacKINNON, J. without a jury.

(a) Reported by R. A. YULE, Esq., Barrister-at-Law.
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The plaintiffs were the owners of the steamship *Steinstad*. By a charter-party dated the 18th Aug. 1921 the defendants chartered the vessel to proceed to a port in Finland and there load a full cargo of pit props and carry the same to West Hartlepool and there discharge according to defendants' order. The charter-party contained the following clauses:

Clause 3: "The cargo to be brought to and taken from alongside the steamship at charterers' risk and expense as customary."

Clause 15: "The steamer to be reported at the customs at loading and discharging ports by charterers' agents on customary terms and employ charterers' stevedores both ends at current rates. Steamer to be free of all lighterage."

The cargo was discharged direct into railway wagons at quay-side by stevedores nominated by the charterers' agents at a cost of 509*l.* 16*s.* 7*d.* The method of discharge is thus described by Lord Merrivale in *The Rensfjell* (1924, 16 *Asp. Mar. Law Cas.* 438; 131 *L. T. Rep.* 764, at p. 767): "Timber discharged into a wagon is received in the wagon by two men and roughly stored there. For the purpose of such stowage they place props or other suitable timber upright at the sides of the wagon, and by means of hooks dispose of the successive shiploads which are lowered into the wagon and pile the timber to such a height as the uprights admit of. . . ." In that case it was held that the cost of receiving and stowing into wagons fell upon the receiver. Accounts between the plaintiffs, as shipowners, and the defendants, as charterers, had been settled between them in an account stated in which the whole of the 509*l.* 16*s.* 7*d.* had been debited to the plaintiffs. The plaintiffs now sought to recover 335*l.* 9*s.* 6*d.* (the cost of receiving and stowing into wagons) by way of damages for breach of the charter-party or, alternatively, as moneys paid by the plaintiffs on behalf of the defendants at their request. The defendants pleaded that there had been no breach of contract, and that in any case the payment was a voluntary payment made under a mistake of law and was not recoverable.

Le Quesne, K.C. and Sir *Robert Aske* for the plaintiffs.

Clement Davies, K.C. and *G. Cooper* for the defendants.

MACKINNON, J.—In this case the plaintiffs by the endorsement on the writ claim from the defendants moneys paid by the plaintiffs to the use if the defendants, or, alternatively, damages for breach of a charter-party. By their points of claim they somewhat vary that endorsement and claim damages for breach of the charter-party or, alternatively, for moneys paid by the plaintiffs on behalf of the defendants at their request. The case arises out of the following circumstances. On the 18th Aug. 1921 a charter-party was entered into between the plaintiffs, as shipowners, and the defendants, as charterers, by which the

K.B.] AKTIESELSKABET DAMPSKIBS STEINSTAD V. WILLIAM PEARSON AND CO. [K.B.]

ship was to proceed to a place in Finland and there load a cargo of short props to be carried to West Hartlepool at a freight of 2*l.* 12*s.* 6*d.* per intaken piled fathom of 216 cubic ft. in full of all port charges and pilotages. It was provided by clause 3: "The cargo to be brought to and taken from alongside the steamship at charterers' risk and expense as customary." It was also provided by clause 15 that the shipowner should employ charterers' stevedores at both ends at current rates. This ship loaded a cargo of pit props under that charter-party in Sept. 1921 and arrived at West Hartlepool in Oct. 1921. The customary method of discharging at Hartlepool varied according to whether discharge was on to the quay or into railway wagons. In point of fact this cargo had to be discharged into railway wagons, and the customary method of such discharge into railway wagons was then, as was stated by Lord Merrivale in the case of *The Rensfjell* (1924, 16 Asp. Mar. Law Cas. 438, at p. 440; 131 L. T. Rep. 764, in a passage at p. 767): "Timber discharged into a wagon is received in the wagon by two men and roughly stored there. For the purpose of such stowage they place props or other suitable timber upright at the sides of the wagon, and by means of hooks dispose of the successive slingloads which are lowered into the wagon, and pile the timber to such a height as the uprights admit of. The uprights come usually from the cargo under discharge, but where none such is available they are provided by the consignee. The wagons, when loaded, are removed by the dock company's employees, formed into trains, and taken by rail to the consignee's premises or elsewhere as the consignee may direct." At this date in 1921 it was the belief of both the plaintiffs and the defendants that under the provisions of the charter-party the obligation of the charterers was only to begin after the ship had caused the slings of timber from the crane to be lowered into the wagons and there arranged in the wagons by the work of the two men as is mentioned in the passage I have just read. It was thought that the words "as customary" so modified the provision as to taking from alongside that the steamship's duty of putting the cargo alongside included the duty of providing for the work by these two men in stowing the cargo in the railway trucks; and both parties being under that belief the shipowners expressly or impliedly instructed the stevedores to do that work. The stevedores did that work, and in due course rendered their bill amounting to 50*l.* 16*s.* 7*d.* to the ship's agents. The whole matter was settled up between the parties upon the basis that among other liabilities the shipowners were liable to pay the stevedores this sum of 50*l.* odd and the matter having been so settled and finished about the middle of Oct. 1921, it was forgotten by everybody concerned for some years. Shortly afterwards, I think in 1922, a case called *The Turid*; *Palgrave, Brown, and Son Limited v. Steamship Turid* (15 Asp. Mar. Law Cas. 538;

127 L. T. Rep. 42; (1922) 1 A. C. 397) which went to the House of Lords, for the first time caused a considerable alteration in the view of the shipowners and charterers in a port such as this, as to the effect of the words "as customary" in modifying or enlarging the provision about the bringing to and taking from alongside. In regard to this particular port of West Hartlepool, that particular point was discussed and decided by Lord Merrivale in the case I have referred to of *The Rensfjell*. In effect Lord Merrivale decided, following the principle of *The Turid*, that the shipowner was not bound to do more than have the slings of timber carried by the crane over to the truck so that the timber could be there released out of the slings, and that the further work in the truck of the two men receiving the props and sorting and piling them up in the wagons in the way already described was part of the charterer's duty under his obligation to take from alongside, and if, therefore, one person, the stevedore, did the whole of that operation, the cost of the first part of it, slinging the timber over to the truck so as to be available to the two men, was to be the cost of the shipowners and the subsequent expense of the labour of the two men in the truck for sorting and stacking them was a liability to be paid for by the charterers. The plaintiffs now bring this action on the 18th Dec. 1925 claiming 335*l.* 9*s.* 6*d.* as being the proportion of that sum of 50*l.* 16*s.* 7*d.* that they paid to the stevedores in Oct. 1921, applicable to the cost of the work of the two men in the trucks for sorting the timber that they had released from the slings. By agreement of the parties I am not to be concerned with the precise amount. The question here is whether that amount is a sum which in the circumstances can be recovered by the plaintiffs from the defendants. Now here is a payment made by the plaintiffs five and a half years ago to the stevedores and they are now seeking to recover part of that payment back from the defendants.

The first question that obviously arises is by what form of action can they seek to recover that amount? Mr. Le Quesne seeks to put it either as damages for breach of contract or as money paid to the use of the defendants, or as money paid under their implied request. First of all as regards the breach of contract. So far as I can see the only breach of contract suggested and that can be suggested is that inasmuch as it was the duty of the shipowners (as now realised) on a true legal interpretation of this contract to have done the work of carrying the props from the hold to the edge of the truck, or just over the truck, and it was the duty of the charterers to have the men in the truck to take the timber and stack it in the truck, the defendants committed a breach of contract in that they did not have men in the truck to do their part of the work. Assuming that to be so, can it be said in any true sense that the plaintiffs thereby suffered damages to the extent of this *x* pounds which they paid to the stevedores for doing that

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work? I do not see how it can when the true facts are remembered. Even if it be the fact that it was, as is now known, the duty of the defendants to receive timber and stack it in the truck, and that they abstained from doing so, the real truth is they abstained from doing so because both they and the plaintiffs thought at the time that it was the duty of the plaintiffs to do it. The truth is that if the defendants abstained from doing certain work in breach of their contract (though they did not know it at the time), they did so simply because the plaintiffs were doing it and were doing it voluntarily, and it seems to me quite impossible to say that now, having discovered the true legal rights in the matter, the plaintiffs can sue the defendants for this sum of money as damages for breach of contract. Secondly, the claim is made, perhaps with more plausibility, as either moneys paid by the plaintiffs to the use of the defendants, or as money paid by the plaintiffs on behalf of the defendants, and at their request. Now where A. has paid money to B., and alleges that he has, to use a neutral phrase, done it for the benefit of C., he can, I think, recover that sum from C. only in certain circumstances, namely, if he did it at the request of B., express or implied, or if he did it under some sort of compulsion, and C. has had the benefit of his payment. I have been referred to one or two cases in the course of the argument which I think lay down those principles fairly clearly. There was the case of *Pownall v. Ferrand* (1827, 6 B. & C. 439), in which the principle seems to me to be quite clearly stated by Bayley, J., at p. 443: "The law is that a party, by voluntarily paying the debt of another, does not acquire any right of action against that other; but if I pay your debts because I am forced to do so, then I may recover the same, for the law raises a promise on the part of the person whose debt I pay to re-imburse me." Similarly, in another case, *Bleaden v. Charles* (1831, 7 Bing. 246), Tindal, C.J., at p. 250, says: "There has been, therefore, a compulsory payment by the plaintiff, induced by an act of the defendant, an act of which he (the defendant) has had the full benefit. That is money paid to the defendant's use." Gaselee, J. says in the same case: "The plaintiff, therefore, was compelled to pay by the wrongful act of the defendant, and as the defendant had the benefit of the payment, the money must be considered as paid to his use."

But alongside those cases, which settle that principle, there is the equally clear principle which has been enunciated over and over again, and is in the first sentence of the passage I quoted from Bayley, J.: "The law is, that a party, by voluntarily paying the debt of another, does not acquire any right of action against that other." This same principle, that a voluntary payment cannot be recovered from the third party unless made either by request or by reason of compulsion, is discussed very lucidly and clearly by Channell, J. in the case of *North v. Walthamstow Urban Council* (1898,

67 L. J. Q. B. 972, at pp. 975 and 976). If need be to refer to one more case on the principle, I find it very clearly expressed in the judgment of Sir William Balguy Brett, M.R., as he then was, in *Leigh v. Dickeson* (1884, 52 L. T. Rep. 791; 15 Q. B. Div. 60, at p. 64), in which he sums up the matter after recording the cases in which you can recover money paid at the request of another and by compulsion, by adding: "But it has always been clear that a purely voluntary payment cannot be recovered back." Now in my judgment in this case the payment to the stevedores by the plaintiffs was a purely voluntary payment. If they had known what the House of Lords in *The Turid* in general, and Lord Merrivale as regards West Hartlepool in particular, subsequently lay down, they would have abstained from making this payment, or possibly they would have made it under some sort of protest, and if they had made it under protest, reserving their rights against the plaintiffs, no doubt for other reasons they might have recovered in this case. But as it was, it seems to me it was a voluntary payment under their mistaken belief of the liabilities to the stevedores, and that they have shown no legal ground upon which in this action they can recover part of that payment back from the defendants. In the result I think that this action fails, and there must be judgment for the defendants with costs.

Judgment for defendants.

Solicitors for the plaintiffs, *Botterell and Roche*.

Solicitors for the defendants, *Middleton, Lewis, and Clarke*, for *Middleton and Co.*, West Hartlepool.

Monday, May 23, 1927.

(Before MacKINNON, J.)

ROYAL COMMISSION ON SUGAR SUPPLY *v.* HARTLEPOOLS SEATONIA STEAMSHIP COMPANY LIMITED. (a)

Charter-party — Conclusive evidence clause — "Unless error or fraud can be proved" — Bill of lading — Shortage in number of bags discharged — Error in bill of lading number of bags shipped — No evidence to account for shortage.

A charter-party contained a clause which provided that "quantity stated on bills of lading to be conclusive evidence as to number of bags shipped unless error or fraud can be proved." On the ship's being discharged a smaller number of bags were turned out than the number shown by the bills of lading. The arbitrator found that all the bags loaded were discharged, and that there was no evidence to show how the discrepancy between the bill of lading number and the out-turn number arose. There was no suggestion of fraud.

(a) Reported by J. S. SCRIMGEOUR, Esq., Barrister-at-Law.

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Held, that in the absence of proof of some definite error to account for the discrepancy, the ship-owners were bound by the quantity stated in the bills of lading and were liable to the charterers in respect of the value of the bags not delivered.

AWARD in the form of a special case stated by Mr. Cloughton Scott, K.C. as sole arbitrator, for the opinion of the court, under sect. 7 of the Arbitration Act 1889.

1. The short question for the opinion of the court was whether upon the facts found by the arbitrator, and upon the true construction of the charter-party and the bills of lading, the Hartlepoons Seatonía Steamship Company Limited (hereinafter called the respondents) were liable to the Royal Commission on the Sugar Supply (hereinafter called the claimants) in respect of an alleged short out-turn of sugar at Greenock in June 1920.

2. By a charter-party dated the 10th March 1920 and made between the respondents as owners of the steamship *Seatonía* and the claimants as charterers, it was provided that the ship should proceed to one or two ports in Cuba and there load a full and complete cargo of sugar in bags, about 4500 tons, 10 per cent. more or less, and being so laden should proceed, as ordered, to one safe port in the United Kingdom and there deliver the same on being paid freight at the rate therein provided.

3. The charter-party also provided: "Mate's receipts to be signed for each parcel of sugar when on board, and captain to sign bills of lading in accordance therewith as requested by shippers." "Quantity stated on bills of lading to be conclusive evidence as to number of bags shipped unless error or fraud can be proved."

4. The said steamship duly proceeded to Cuba and loaded at two ports, namely, at Manzanillo and Cienfuegos, a full and complete cargo of sugar in bags.

5. As to the cargo loaded at Manzanillo, no question arose in this dispute. As to the cargo loaded at Cienfuegos the bags were tallied by the same tallymen on behalf of the shippers and the ship. The mate duly signed receipts for each parcel of sugar received on board. The captain signed bills of lading for each parcel which (save in certain respects which are not material to this issue) were in accordance with the mate's receipts.

6. The cargo was loaded at Cienfuegos, partly from alongside a railway pier and partly from lighters. It was put straight into the holds; hatches and tarpaulins were put on each night, and an A.B. was put on night duty. Each bag of sugar weighed upwards of 300lb.

7. The claimants alleged that a shortage of out-turn of 183 bags of sugar arose in a parcel of 2860 bags of sugar marked "San Lino." In respect of this parcel the tallies at Cienfuegos showed 2860 bags of sugar; the mate gave a receipt for 2860 such bags; and the captain (as appears hereafter) signed a bill of lading in accordance with these documents—namely,

for 2860 such bags. The claimants paid the shippers for the sugar in accordance with, and relying on, the said tallies.

8. By the "Berth Terms Bills of Lading," dated Cienfuegos (Cuba), the 15th May 1920, the captain acknowledged to have "received in apparent good order and condition from Manelino Garcia on board the good steamship *Seatonía* . . . three thousand bags centrifugal sugar weighing gross 947,026 English lbs., weighing net 939,526 lbs., as per margin, shipper's weights (weight, quality, gauge, contents and value unknown to the undersigned) to be delivered in like good order and condition at port of destination unto Royal Commission on the Sugar Supply. . . ."

9. The bill of lading further provided: "It is mutually agreed . . . that the carrier shall not be liable for any loss or damage arising from the insufficiency of packages . . . and that the carrier shall not be concluded as to the correctness of statements herein of quality, quantity, gauge, contents, weight and value."

"In accepting this bill of lading the shipper, owner and consignee of the goods and the holder of the bill of lading agree to be bound by all its stipulations, exceptions and conditions whether written or printed as fully as if they were all signed by such shipper, owner, or consignee."

10. The margin of the bill of lading contained the following:—

"San Lino	2860	Centrifugal Sugar.
"Portugalete ..	140	„
		3000 bags."

and two clauses: "All other conditions and exceptions as per charter-party or any other agreement covering this shipment; washed or unmarked bags in this lot to be considered as cargo bags and are to receive full credit as such on delivery." "A considerable number of bags, broken, dirty, or wet, for which ship is not responsible. Ship not responsible for mixture of cargo with any other parcel."

11. The said steamship touched at Norfolk for bunkers, where her hatches were not opened, and sailed thence to Greenock, to which port she had been ordered. She arrived at Greenock on the 13th June 1920 and began to discharge her cargo without delay. The claimants were the receivers of the cargo.

12. In accordance with the practice at Greenock, the cargo was tallied and weighed on the quay, alongside the ship, by sworn licensed weighers, who were paid partly by the ship and partly by the receivers. Some of the cargo was loaded into carts and sent direct to the refiners, some was placed in a shed and delivered later to the refiners. In the usual course of business Customs officials tallied the sugar before it was sent to the refiners, and the refiners also kept a tally. As to the "San Lino" mark, each of these three tallies showed 2677 bags of sugar only, that is to say, a shortage of 183 bags of sugar on the bill of lading number. Torn bags were tallied and counted as "bags of sugar"; no bags were completely empty.

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There was a normal amount of loose collected and sweepings.

13. The claimants claimed in respect of this alleged shortage the sum of 1460*l.* 11*s.* 1*d.*, and deducted that sum from the respondents' freight account. The respondents thereupon decided to institute proceedings for the recovery of the sum in question and invited the claimants to submit the dispute to arbitration. The claimants paid the respondents the said sum of 1460*l.* 11*s.* 1*d.*, and thus became claimants in the arbitration.

14. The parties delivered points of claim and points of defence in these proceedings. The claimants based their claim upon the charter-party and the "conclusive evidence" clause therein. The respondents relied upon the terms of the bills of lading; they denied that the bills of lading number of bags were received on board, and alleged that all the bags received on board were discharged at Greenock.

15. The only facts proved before the arbitrator as to the loading at Cienfuegos were those set out in pars. 5 and 6 hereof. The abstract of the tallies at Cienfuegos was produced. No attempt was made to prove by direct evidence that any error had arisen in making out the bill of lading, or that the tallies were inaccurate, or that they had been wrongly cast, or that entries had been duplicated, or that they contained mistakes of any kind. With regard to the other marks loaded at Cienfuegos the total of the numbers stated in the bills of lading corresponded with the total of the out-turn tallies. Fraud was not suggested.

16. The respondents contended, and brought evidence with a view to proving: (1) that the out-turn tallies at Greenock could not be relied upon and that in consequence the claimants had failed to prove any shortage; (2) that all the sugar received on board had been delivered at Greenock. They contended that if the out-turn tallies were correct and all the sugar received on board had been delivered, they had proved that the number of bags of sugar stated on the bill of lading was erroneous within the meaning and requirement of the charter-party.

17. The respondents submitted that the following points of law arose for decision in this case, namely:

(i.) What on their true construction do the words "unless error or fraud can be proved" mean? Is it necessary that the error should be a patent error, or may it be proved by or inferred from evidence that all the sugar shipped was discharged?

(ii.) Whether in view of the qualifications in the bill of lading for the "San Lino" parcel: (a) "It is mutually agreed . . . that the carrier shall not be concluded as to the correctness of statement herein of quality, quantity, gauge, contents, weight and value." (b) "A considerable number of bags broken, dirty or wet, for which ship is not responsible. Ship not responsible for mixture of cargo with any

other parcel"—the statement of quantity in the said bill of lading can be construed as being a definite statement that any particular number of bags were shipped.

(iii.) Whether the bill of lading as qualified taken in conjunction with the provision in the charter-party is conclusive evidence against the respondents save on proof by them of error or fraud of the number of bags of sugar shipped or of the number of bags shipped.

18. It was contended by the claimants that the word "error" in the charter-party meant error in the real sense of that word, for example, a copying error, or an error as to counting or the like.

19. The arbitrator, in so far as it was a question of fact found, and in so far as it was a question of law held, subject to the opinion of the court upon the points of law hereinafter mentioned:

(a) That the out-turn tallies at Greenock were correct and that only 2677 bags of sugar marked "San Lino" were unloaded and delivered.

(b) That all the bags of sugar shipped under the mark "San Lino" were discharged and delivered.

(c) That there was no evidence to show how this discrepancy between the bill of lading number and the out-turn number arose.

(d) That notwithstanding the qualifications in the bill of lading set out above, the number of bags of sugar stated in the bill of lading was a definite statement that that number of bags of sugar had been shipped.

(e) That the bill of lading taken in conjunction with the provision in the charter-party was conclusive evidence against the respondents as to the number of bags shipped, save on proof by them of error or fraud in regard thereto.

(f) That the words "unless error or fraud can be proved" meant, upon the true construction of the charter-party, unless some definite error in making out the bill of lading or in the tallies such as clerical error, or error in copying or addition or omission or the like or some definite fraud be proved, and that it excluded proof by, or inference from the fact that all the bags of sugar shipped were discharged.

(g) The value of 183 bags of sugar of the "San Lino" mark was 1460*l.* 11*s.* 1*d.*

20. The arbitrator awarded and determined (subject to the opinion of the court upon the questions hereinafter submitted) that the respondents should pay to the claimants the sum of 1460*l.* 11*s.* 1*d.*

21. The question for the opinion of the court is whether upon the facts found by the arbitrator and upon the true construction of the charter-party and bill of lading the arbitrator came to a correct determination in point of law.

G. Langton, K.C. and *Guy Cooper* for the respondents.

Sir Thomas Inskip, K.C. (S.-G.) and *W. Bowstead* for the claimants.

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MACKINNON, J.—This case raises one of the shortest points possible, but one of characteristic difficulty.

The Royal Commission on the Sugar Supply, by a charter dated the 10th March 1920, chartered the steamship *Seatonia* to go to Cuba and load a cargo of sugar. It was provided by the charter-party that mates' receipts were to be signed for each parcel of sugar when on board, and the captain was to sign bills of lading in accordance therewith as required by shippers. It was then provided later on—and this is the clause upon which the question in this case turns—"Quantity stated on bills of lading to be conclusive evidence as to number of bags shipped unless fraud or error can be proved." At one of the ports in Cuba a parcel of sugar marked "San Lino" was shipped or tendered to the ship. The mate signed a receipt for 2860 bags of that mark, and pursuant to the clause in the charter-party, the master signed the bill of lading dated the 15th May 1920, on which the amount of sugar shipped under that bill of lading was stated in the margin to be "San Lino 2860 bags centrifugal sugar" and a further parcel of another mark. It was provided by a clause in the body of the bill of lading "that the carrier shall not be concluded as to the correctness of statements herein of"—among other things—"quantity." When the ship arrived at Greenock her cargo was tallied on discharge and only 2677 bags of sugar marked "San Lino" were purported to be found by the tallymen superintending the discharge. The Royal Commission, in arbitration, claimed from the shipowners the value of 183 bags of "San Lino" sugar, the difference between 2860, the number of bags in the bill of lading, and 2677, the number of bags discharged.

Two points arise, first, whether the shipowners can say that the whole effect of the conclusive evidence clause in the charter-party was wiped out by the insertion in the bill of lading of the words: "The carrier shall not be concluded as to the correctness of statements herein of . . . quantity"; and, secondly, if the shipowners fail on that point, they can still say that they escape liability by reason of the provision in the charter-party in the conclusive evidence clause of the limitation "unless error or fraud can be proved."

The arbitrator who stated this case has found, first, "That the out-turn tallies at Greenock were correct and that only 2677 bags of sugar marked 'San Lino' were unloaded and delivered." Secondly, "That all the bags of sugar shipped under the mark 'San Lino' were discharged and delivered." Thirdly, "That there was no evidence to show how this discrepancy between the bill of lading number and the out-turn number arose." Those first two findings involve necessarily a conclusion that the figure of 2860 inserted in the bill of lading was inaccurate or erroneous, because in fact only 2677 bags can have been shipped, and the figure in the bill of lading ought to have

been 2677 and not 2860. But he has further found that there was no evidence to show how this discrepancy between the bill of lading number and the true figure of 2677 arose. The question upon those facts is whether the shipowners are liable upon this claim for the shortage of 183 bags.

As to the first points raised by the shipowners I think there is no difficulty whatever. This is a claim by the charterers against the shipowners, and the contention of the shipowners must amount to a suggestion that the charterers and shipowners by mutual agreement varied the terms of the charter-party when they signed the bill of lading, so as to substitute the words put in the bill of lading about the carrier not to be concluded by the statements herein as to quantity for the conclusive evidence clause in the charter-party. In my opinion, that contention is not sound. The shippers, the agents of the charterers, and the master would have no authority to vary the charter-party, and it is very old law that variations between the charter-party and the bill of lading, as between the charterer and the shipowner, are to be accounted of no effect at all, the bill of lading being merely a receipt for the goods, and any form of printed words in the bill of lading would be equally immaterial.

The real question in this case arises under the conclusive evidence claim in the charter-party. That clause is: "Quantity stated on bills of lading to be conclusive evidence as to number of bags shipped." Pausing there, that means clearly that the number of bags stated in the bills of lading shall be conclusive upon the shipowner of the number of bags shipped. Then there is added a qualification, "unless error or fraud can be proved." In one sense, as I have already said, the findings of the arbitrator taken together clearly involve a finding, although he has not expressly so found, that the figure of 2860 in this bill of lading was erroneous; it ought to have been 2677. That has been proved, because the arbitrator has been driven to that conclusion and has found it as a fact. It has been proved to him by a necessary inference from two other facts that have been proved, namely, that no bags were in any way lost or disposed of after shipment, and that only 2677 bags were landed. Mr. Langton contends that in those circumstances error has been proved within the meaning of this clause. It is quite obvious that if that contention be accepted, the whole of this clause might just as well never have been inserted in the charter-party at all; but I do not say that that is necessarily any solid ground for arguing that a clause in a charter-party must have a particular meaning, because frequently words are used as to which such a result could be suggested. I think there is another aspect of it that is very significant. If Mr. Langton's argument about this clause is correct, not merely is the whole clause rendered valueless to the charterer who is making this stipulation about the quantity in the bill of lading being conclusive evidence

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but some words in the qualification itself are otiose and clearly unnecessary. If his contention were correct it would apply if any mistake were proved by any satisfactory means whatever; it would not matter whether the mistake arose by carelessness or negligence or fraud. In my opinion, however, the words "unless error or fraud can be proved" afford a strong reason for thinking that something else is contemplated than a mere difference between the figure in the bill of lading and the true figure. The Solicitor-General suggests further that, reading the conclusive evidence clause from the beginning to the end one must give effect to it unless error or fraud can be proved, and that it is not enough to get rid of the effect of that clause by saying that one must infer from the facts that there has been a mistake.

I think this is an extremely difficult question, but upon the whole I agree with the view of the learned arbitrator. I think it is for the shipowner, who is relying upon the latter part of the conclusive evidence clause, to satisfy the arbitrator and this court that he comes within the condition or limitation upon which he relies. I do not think it is enough for him merely to give evidence from which one can infer, or say that it is a necessary inference, that a mistake has been made as regard the figure put in the bill of lading. I agree with the learned arbitrator in thinking that what is intended by the clause is actual proof of the error, as, for example, by comparison between the mate's receipts and the bill of lading, or some other document, so that the source of the discrepancy between the two can be pointed out. Nothing of the sort was proved in this case because, as the learned arbitrator has found, there was no evidence to show how the discrepancy between the bill of lading number and the out-turn number arose.

In those circumstances I think that the award of the learned arbitrator was right and should be upheld.

Award upheld.

Solicitor for the claimants, *The Solicitor to the Board of Trade.*

Solicitors for the respondents, *Middleton, Lewis, and Clarke*, for *Middleton and Co.*, West Hartlepool.

May 16, June 2, 14, 15, 16, and 24. 1927.

(Before WRIGHT, J.)

W. ANGLISS AND CO. (AUSTRALIA) PROPRIETARY LIMITED v. P. AND O. STEAM NAVIGATION COMPANY. (a)

Bill of lading—Damage to cargo by fuel oil taint—Defective bulk-head—Faulty design—Bad workmanship—Unseaworthiness—Due diligence—Shipbuilders not agents or servants of shipowners—Australian Sea Carriage of Goods Act 1924.

(a) Reported by R. A. YULE, Esq., Barrister-at-Law.

The defendants' steamer C. was built for the Australian trade and was designed to burn oil fuel. On the homeward passage of her second voyage to Australia a cargo of frozen lamb was damaged by oil taint. The cargo in question was in a hold separated from the fuel bunker by an insulated bulk-head. The vessel had been built by a firm of high standing to the highest class of Lloyd's Register and the work had been supervised by skilled and competent inspectors employed by the defendants.

Held, that the damage was due to inadequacy in design and to which bad workmanship was a contributing factor. Notwithstanding, however, that the design was unsatisfactory in fact, the adoption of that design at the time when the ship was built did not involve any lack of due diligence on the part of the defendants to make the ship seaworthy.

Held, also, that the shipbuilders were not the agents or servants of the defendants within the meaning of the Australian Sea Carriage of Goods Act 1924 and that the defendants were not liable for bad workmanship by the builders, as the bad workmanship complained of was not such as should or could have been discovered by the defendants' inspectors.

Semble, the case would have been different if it had been shown that the defendants' inspectors had negligently passed bad work or if it had been shown that the defendants had adopted some special kind of construction involving special risks, but no such questions had arisen.

ACTION tried before Wright, J. without a jury.

A cargo of some 9871 carcasses of lamb was shipped in the defendants' steamship *Cathay* between the 1st and 10th Oct. 1925 ex Melbourne and Sydney to London by the plaintiffs. On arrival in London it was found that 5711 carcasses had been damaged by oil taint. The plaintiffs claimed damages for breach of contract and alternatively for breach of duty in the carriage of the said cargo. The defendants pleaded that the damage (if any) was due to perils of the sea excepted under the bills of lading. To this the plaintiffs replied setting out a case that the ship was unseaworthy in the sense that she was unfit for the carriage of this particular cargo. The defendants, the shipowners, rejoined that even if the ship was unseaworthy (which they denied) the unseaworthiness was not due to want of due diligence on their part and that they were protected by the terms of the bills of lading which incorporated the provisions of the Australian Sea Carriage of Goods Act 1924 and rules thereunder. The real point in issue, therefore, was whether the damage to the cargo was due to the insufficiency of design of the *Cathay* or to bad workmanship in the building of her, and for either of which the defendants could be held to be liable.

Miller, K.C. and David Davies for the plaintiffs.

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Sir John Simon, K.C., Stuart Bevan, K.C., and Harold Stranger for the defendants.

Cur. adv. vult.

June 24.—WRIGHT, J., in the course of a considered judgment, said: This is a claim for a sum of 1672*l.* 19*s.* 3*d.*, representing damage sustained by a parcel of frozen lamb which was shipped by the plaintiffs on the defendants' steamship *Cathay* for carriage from Sydney to London. The amount of the claim is not much, but the action has taken something like sixteen days to try; a great amount of evidence, both of fact and of opinion, has been adduced, and though it may be that there are certain other cases dependent upon this, it makes one somewhat surprised that business people on both sides should have spent so much time and so much money in contesting this case. The reason perhaps may be that the action is really an underwriters' action; and it has for many years been the practice of underwriters, in dealing with a claim for loss of goods, to enforce, or seek to enforce, any claim which they think they have against shipowners if there is a *prima facie* case of unseaworthiness or breach of contract. It may be that that course is adopted rather as a matter of principle than having regard to the exact pecuniary amount. However, such is the state of things. The claim, as I said, is for damage to a parcel of frozen lamb, and the damage which was sustained (and there seems to be no dispute about the amount of damage) was caused by oil taint. The bill of lading was dated "Sydney, 1st Oct. 1925." It is an Australian Homeward Bill of Lading and it embodies, as by law such a bill of lading must now embody, by clause paramount, the Australian Sea Carriage of Goods Act 1924, that is, the Australian Act which corresponds to the English Act of the same year and of the same name. The frozen lamb in question was loaded in the No. 3 lower hold which was an insulated hold. The cargo arrived in London about the end of November 1925. The insulation was removed in order to ascertain the state of things and, if possible, the cause of the damage, and certain repairs were effected which I shall describe more in detail a little later. The defence which was put in by the shipowners, the defendants, was that the damage was due to perils of the sea. To that there was a reply which I may summarise as a reply setting out a case of unseaworthiness, that is to say, unfitness of the ship in a certain very limited part which is material for this question. There was, of course, no allegation of general unseaworthiness against this vessel. To that there was a rejoinder by the shipowners, the defendants, based on the terms of the Act to the effect that, even if the ship was unfit in the respects alleged, that unfitness was in no way due to any want of due diligence on their part. These were the issues in the case.

The ship, which was a vessel of about 16,000 tons, was at the time in question on the home-

ward limb of her second round voyage to Australia. She had been built by Messrs. Barclay, Curle, and Co. Limited, of Glasgow, well-known shipbuilders of very high standing, and they had her built to the highest class of Lloyd's Register. She had also received the Board of Trade certificate for carrying passengers. She was launched in Oct. 1924, and sailed on her first voyage in 1925 on the Australian trade, for which trade she was intended and had been built. The voyage in question—I mean the second homeward voyage—presented, in my opinion, no extraordinary features. Coming down the Australian coast in what is often called the "Roaring Forties," she met with some bad weather and laboured somewhat heavily in a heavy swell, but the weather, the wind never exceeding force nine, was not extraordinary in character; it was no more than such weather as would reasonably be anticipated on such a voyage, and it was weather which the ship ought in the ordinary course to have been able to sustain without any serious damage. A few days before the ship, on her homeward voyage, arrived at Colombo, the officers detected a faint trace of oil in the water which was being pumped out in the ordinary course from the oil well, and attention was called to that, a novel and unusual feature. The oil-leakage, however, got worse, although the oil-well was pumped out twice a day. In these circumstances it is not really contended in the result by the defendants that there was such bad weather as would account for the trouble which the ship had been subjected to, and the real point of the trial has been which of the two possible causes which have been put forward is the true cause of what has happened. The two possible causes are, on the one hand, insufficiency in design, and, on the other hand, bad workmanship, and it depends to a large extent on which of those two causes was responsible for the damage, as to how far the defendants succeed in their final rejoinder, namely, assuming that all other points are decided against them, that they are able to show that whatever happened there is no want of due diligence on their part. The only portion of this large vessel which has to be considered in this case is the No. 3 hold and the space which was just abaft of that which is called the deep tank. The ship was constructed to burn fuel oil and to carry as bunkers fuel oil, and immediately forward of the stokehold she had what I have already referred to as the deep tank, which was about 26ft. deep. That was separated from the adjoining hold, that is to say, the hold attached forward of the tank by a bulkhead. In the No. 3 hold there were laid 'tween decks about 16ft. from the ceiling of the ship, and the 'tween decks' space above them was about 10ft. high. The beam of the ship at this place was about 70ft., and in the deep tank there were placed fore and aft bulkheads attached to the athwartship bulkhead to which I have just referred, in order to separate the bulk of the oil in the deep tank and to reduce

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the trouble which might arise from the surging of that oil when the ship was labouring in a sea-way. The 'tween deck in the No. 3 hold was carried on beams, girders, and pillars. There were three fore-and-aft girders which were attached to the athwartship bulkhead, and the space between the 'tween decks themselves was left short by about $\frac{1}{2}$ in. forward of the bulkhead. The important feature of this construction was the attachment of the 'tween deck to the bulkhead, and it was on that attachment that the bulk of the prolonged and contested controversy in this case has centred. The attachment provided by the design was a single angle-bar riveted by what is called the vertical flange, and riveted by what is called the horizontal flange to the deck. It was a single angle-bar, and the riveting was single riveting. The bar in fact consisted of two principal lengths, each of about 30ft. long, meeting in the centre of the ship, and two shorter lengths, one on each side, in the wings, connected with the sides of the ship. The bulkhead itself was built with a large number of closely spaced vertical stiffeners of considerable strength, and in that way it was strengthened in excess of Lloyd's Register's requirements. There was against the bulkhead in the lower part of the deep tank a horizontal athwartship girder; there was, however, no girder for athwartship strengthening opposite the angle-bar itself. The angle-bar was 3in. by 3in. There were about 240 rivets in each flange, that is to say, taking the distance from end to end. It was not specified that the metal should be planed or machined, or that the surface of the bulkhead should be planed or machined, or that the holes should be drilled; Lloyd's Register did not require either of these precautions, and the design as approved by Lloyd's Register specified a row of plates and punched holes. There was left, as followed necessarily from the construction of the bar, a space between the bar and the bulkhead, that is to say, there were two internal surfaces, in more or less contact, which involved obviously a possibility of oil finding its way from the deep tank into that space, and when in that space it would find its way out if there was any minute aperture in the heel or toe of the bar—in the heel primarily, but I am not sure about the toe. The points of the rivets were caulked and the heel and toe of the bar were also caulked. The No. 3 hold, as I have said, was insulated, and the insulation, which was of the ordinary type, consisted of a matchboarding partition, which was about 12in. from the face of the bulkhead, then the filling of caulking, and then the inner partition, and in that way you had, as it were, a double box inside of which was the insulated hold. A gutter was provided on the ceiling of the hold up against the bulkhead in order to carry off any leakage which might come down from the face of the bulkhead and to carry it into the oil-well, there being an oil-well on each side of the ship filling one frame space, which was shut off from the rest of the bilges, and so in that way a

separate and special well with its own pumping system.

The leaks which were discovered were principally four in number, and were symmetrical in position. The two most important leaks were abreast in the way of the two places where the fore and aft bulkheads of the deep tank attached themselves to the bulkhead. There were two other leaks, one on each side, each about 8ft. from that side. There was a leakage in the centre, and there was one other leakage of minor importance. These were the leaks which were observed when the deep tank after the removal of the insulation was under a somewhat severe water test. The exact amount of leakage is a little difficult to ascertain. There was, however, undoubtedly a substantial amount of leakage at the bulkhead, and, what was even more important, it was such leakage as in the result did the damage complained of to the plaintiffs' cargo. As soon as the damage was discovered the shipowners (the defendants), acting in a way which would be expected from their high reputation, immediately put in hand certain alterations, which were done by the well-known firm of ship-repairers in London, Messrs. Green and Silley Weir and Co. What they did by way of permanent alteration was to remove the existing angle-bar and replace it by a double angle-bar, each of which bars was 5in. by 5in.; and the riveting throughout these two new bars was double riveting instead of the single riveting which there had been in the old bar. They also built a coffer-dam between the face of the bulkhead and No. 3 hold, leaving a space of about 3ft. It was admitted in the course of the case that the workmanship in this new work was unimpeachable. The evidence, however, is that notwithstanding these very drastic alterations and notwithstanding the high quality of the workmanship, the bulkhead, with its attachment by the angle-bar to the deck, again gave trouble on the homeward voyage after the voyage now in question. It was leaking again substantially, although to nothing like the same extent as in the voyage complained of.

Certain other general facts were mentioned in the course of the case. One was that contemporaneous with the building of the *Cathay*, a sister ship called the *Comorin* was being built by the same shipbuilders at their other yard. There was another ship somewhat similarly built about the same time—all these were for the same owners, the defendants—called the *Chitral*, not a sister ship; but the builders of that ship adopted the design of the *Cathay*, and I was told that similar trouble had been experienced in these two ships. There were certain other ships also built for the defendants at that time at different yards with the same arrangement of the deep tank and the attachment of the 'tween decks, and they also, I am told, had given trouble through leakage at the same place, but the hold adjoining the deep tank is not an insulated hold, and they do not carry certain sensitive cargoes in that hold.

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I come now to consider the question of the design. It is clear from the evidence that the adoption of deep tanks for the carriage of oil fuel in such a position as was adopted in this vessel is comparatively recent practice. In considering the construction, it has to be borne in mind that the length of the beam is very considerable, and that along its length there are five points of rigidity. There are the two fore and aft bulkheads in the deep tank and there are also the three girders of the 'tween decks. There is undoubtedly (and it must have been contemplated that there would be) some strain put upon the bulkhead by the surging of the oil, especially when the tanks were not full, and in addition to that there must have been—although perhaps this was not so clearly contemplated—pull or strain on the decks through its attachment to the bulkhead. The size of the bar has to be considered and it has to be considered whether it was sufficient even to have single or double riveting, and it has also to be considered whether there might not have been some longitudinal or 'thwartship strengthening on the bunker side in the way of the bar attachment. Lloyd's Register's revised rules published in 1926 contain amendments as regards the carriage and burning of oil used as fuel, and in these amended rules it is now required that in such an attachment between the bulkhead and the 'tween decks as that now under consideration there shall be either double angle-bars or a T-bar. On the other hand, they do not provide for a coffer-dam in such cases except only where the adjacent space is one for the carriage of fresh water. As I say, the use of this construction is novel for such large ships. In considering the questions of design and seaworthiness in connection with design, it has to be remembered that the obligation in respect of seaworthiness, whether it is an unqualified obligation or an obligation merely to use due diligence, is in one sense not absolute, as Lord Sumner said in the case of *Bradley v. Federal Steam Navigation Company* (*ante*, p. 265; 1927, 137 L. T. Rep. 266, at p. 268): "In the law of carriage by sea neither seaworthiness nor due diligence is absolute. Both are relative, among other things, to the state of knowledge and the standards prevailing at the material time." It is clear that the trouble with the *Cathay* was not peculiar to that case. It was part of a larger problem affecting large vessels carrying oil fuel in deep tanks, and the change in Lloyd's Register's rules to which I have referred was a consequence of the attention directed to those problems. It is curious that the new rules do not prescribe a coffer-dam, but it is understood that the introduction of a coffer-dam is now becoming general. It is clear, however, that in 1923 or 1924 highly instructed naval constructors and experts did not contemplate the danger of oil fumes penetrating insulation. The danger consequent on fumes as was shown in this case depends not on the quantity of leakage in itself but on the extent to which the leakage, whatever it is, is spread over a surface ;

it is the area, not the bulk, of the leakage which produces the dangerous fumes. In a sense it is true that damage of this character is a function of the quantity of the leakage that has to be understood with what I have just said. The question, then, of design has to be considered in the light of the then prevailing experience and knowledge, though probably now, almost certainly now, the design such as adopted in the case of the *Cathay* would not have been passed. The case was somewhat peculiar in one respect. The particulars delivered by the plaintiffs attacked not only the design but the workmanship. At the trial their attack was mainly concentrated on the workmanship, though I am not clear that they ever formally abandoned their attack on design.

The particulars especially complained of the absence of a coffer-dam, the weakness of the angle-bar, and the fact that the bar was single-riveted and not double-riveted. The defendants, in conducting their case, put forward as an explanation of the damage which had been sustained that there were defects in the design, and the defects upon which they relied were substantially those which had been put forward in the plaintiffs' particulars. It seems to me that all the witnesses on both sides in different ways think that the design was inadequate, and I accept their evidence and think that the only possible conclusion is that the design was inadequate. But on the principles which I have already stated, as put forward in the passage quoted from Lord Sumner, I think this inadequacy of design argued no want of due diligence on the part of anyone concerned. I agree that the design was perfectly good in the light of the then experience and knowledge ; the experts all seem now to agree that oil-bulkheads must leak somewhat, although it is still hoped that the leakage will be so slight as not to damage insulated cargo. I think the coffer-dam is the only complete safeguard. I also think that the design was inadequate and too weak in the size of the angle-bar and in the form of attachment. I may say, however, that in coming to the conclusion at which I have arrived as to the inadequacy of the design, I have given full consideration to all the evidence before me on the question of workmanship, which, of course, has to be considered before I could come to a conclusion as to which of the competing causes, design or workmanship, is primarily responsible for the trouble which has happened. On the whole, my conclusion is, and I find, that bad design was the primary substantial, though perhaps not the sole, cause of the damage in this case, but that it argued and involved no want of due diligence on the part of anyone concerned, and, in particular, no want of due diligence (and that is the relevant consideration) on the part of the defendants.

The next question is whether there was bad workmanship, and, if so, whether it was a contributing cause of the damage, and whether it could have been detected by the exercise

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of reasonable care and skill on the part of the defendants' agents and inspectors. Most of the trial was occupied by this question. There was a very great controversy and great difference of opinion. As I have said, the plaintiffs' main case at the trial was that bad workmanship was the sole cause of the damage. Their experts said that the workmanship was scandalously bad, and that it could and should have been detected by the defendants' inspectors. In particular they directed their complaints to the riveting, the caulking, and the injection of certain composition into the internal interstices between the bar and the bulkhead. The plaintiffs' main reliance, as a matter of evidence, was on the bar itself, which was produced as a kind of exhibit along with certain rivets. It is seldom, or perhaps never, that so dilapidated a length of steel has engrossed so much costly attention for so long a period in a case in any court. In considering the question of workmanship, I have to consider what are the functions which designers reasonably expect from the various parts of the work involved. The bar consists of two parts; there is the vertical bar which is riveted against the face of the bulkhead, and the horizontal bar which is riveted against the deck. The part which is riveted against the bulkhead is an oil-tight structure, the latter is not, or perhaps only in so minor a degree as not to be very material. From the point of view of design the main defences against leakage in this construction are the points of the rivets and the caulking at the toe and heel of the bar. The designers do not expect, and do not think that they ought to expect, the rivets at other points and in other respects to be oil-tight, nor do they expect in making a design of this character that there will be exact metal-to-metal fittings as between the plate of the bulkhead and the face of the bar. That is all they anticipate in ordinary shipbuilding work. They do not specify, in practice, drilled holes or planed or machined metal surfaces. Lloyd's Register's rules with reference to oil-tight work forbid any drifting of holes which they say ought, if unfair, to be not drifted but reamed, but in fact the evidence on all sides is that these rules are not precisely enforced, and that much is left to the discretion of the surveyor. The riveters who do the work are highly skilled men. All that can be expected is that there shall be general oversight of their work and general directions given to them as to how they should do the work. It must be left to their expert judgment how a particular hole or a particular rivet or a particular piece of tightening up is done, and that is so even in the case of a bar like this, which undoubtedly required special attention and special care. In oil-tight work ordinarily the point of the rivet is generally the sole matter which requires complete tightness, because if the rivets on the caulking side are tight, and remain tight, that is a sufficient protection against any oil coming out from the oil space on the other side, and if there is any leak at any one of

these points the leak can be ascertained at once—that is to say, if the bulkhead is open to view—and then can be cured by caulking. In such cases the heads of the rivets—that is to say, the head which is on the oil-space side—is no part of the oil-tight structure; from the point of view of oil-tightness it need not fit all round. The head ought generally to be close and the shanks ought generally to fill the holes, but according to the view of the designers of this ship that cannot be expected in every case, or with precise and mathematical accuracy. Of course, the fit of the rivets may be very material from the point of view of the risk of the rivets working loose. A bar such as the bar in question raises somewhat different considerations, because if there is a leakage at the internal shank and at the head of the rivet, that leakage—because oil is a most penetrating substance—may find its way into the inner space between the bulkhead and the bar, and it will spread there and make its way until it finds, if it does find, some weak point in the caulking, and therefore the second defence, apart from the points of the rivet, is the caulking of the edges of the bar, such as the bar in question, in order to stop that danger.

The question which I really have to decide is whether there is before me sufficient evidence that the defects, some of which certainly existed in this work, were in a greater proportion than would be right and proper in good ordinary ship-building practice. The presence of the composition, for instance, at the shanks of two or three of those rivets clearly shows that there was some interstice in the fitting of the rivet, and, in the same way, the fact that the rivets were put in on the slant shows that there was some defect in that respect. It has to be remembered, however, that there is no complaint of the general riveting work. There were in the bulkhead 7000 rivets of which only 480 were in this bar, and there is no suggestion that that riveting was not properly done. It is very difficult to come to any conclusion on this matter because the evidence is very conflicting, the material is very uncertain, and the job in question was a somewhat difficult job for the riveters because of the large proportion of three-ply work. I do not think that any reproach in this respect ought to be levelled against the general work of the Clyde riveters, who are very fine workmen, but I have come to a general conclusion, taking all the evidence together and acting rather on the general impression which it has made on my mind, that the riveting in this case might and ought to have been somewhat better. Similarly, as regards the fitting of the bar, I have to remember that that was not a machined or planed surface or surfaces, and that it was a punched bar which must involve some distortion of the holes, and that it was a bar that was joggled which would involve further distortion. The exact fitting of surfaces in such a bar is impossible. The riveters have to do the best they can in screwing up and in riveting. The caulking, however,

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at the edges tends still further to work out the bar and increase any space which there may be, and it is obvious that to the extent that there are interstices between the bar and the bulkhead, and to the extent that there was want of frictional contact of those surfaces, the whole structure would be less able to stand the strains and stresses than it otherwise would have been. I accept the view that a certain proportion of the rivets not fitting all round the circumference and not laying up against the plate or their heads, and some lack of contact between the surface of the bar and the plates, would not be outside good shipyard practice. I cannot, however, help thinking that the proportion and extent of such work was more than usual and was a source of weakness in some degree to the bar, beyond the weakness which I think was involved in the design and which weakness in design I think was the substantial and primary cause of the trouble. No doubt the coffer-dam would have obviated the consequences of this, but no doubt without such defects in design it would have involved leakage, just as later when there was first-rate workmanship and a stronger design, there was leakage in the later voyages. Having found, as I have, that there was a certain degree of bad riveting and bad fitting, I cannot be sure that if the workmanship had been better originally in the riveting and fitting, the leakage which damaged plaintiffs' goods would have occurred on that voyage or to that extent. On the whole, therefore, I am not prepared to say that to some extent some perhaps not very serious bad workmanship did not contribute to the leakage and damage complained of. There are some minor points which have been the subject of criticism which I disregard.

The plaintiffs, however, have next to contend and have to satisfy me—or perhaps the onus of proof is the other way, the defendants have to satisfy me—that the defects were such that they could not or should not have been discovered by the exercise of reasonable care and skill on the part of those charged with the examination and supervision of the work, and, for this purpose, attention is concentrated on the position of Mr. Hadley who was the defendants' resident inspector. The plaintiffs' case that the defects ought to have been apparent to any careful inspector or examiner, was originally based on the view which their experts put forward—that the caulking was abnormally heavy and the injection of composition through the shot holes was improper—and that the circumstances ought to have been noticed and ought to have put the inspectors on inquiry. I find that, in my opinion, these suggestions are unfounded. It was also contended on behalf of the plaintiffs that the inspectors might have seen that holes were unfair: that by hammer test it ought to have been ascertained that the rivets were not filling the holes; that by feelers it ought to have been ascertained that the rivet heads were not close up: and in the same way that undue spaces

existed between the vertical bar and the bulkhead. Their view was largely based on what I think was an exaggerated idea of the extent of bad workmanship. They contend that I ought to disbelieve the evidence of Mr. Hadley to the effect that he made careful examination and found no defects. On the contrary I hold that the defects in fitting and riveting which I find existed, if I am right in so finding, were such as could not be and were not discovered by Mr. Hadley, although he made, as I find, all reasonable inspection with all reasonable skill. I have seen Mr. Hadley in the witness box and I have seen him cross-examined by Mr. Miller with great skill and pertinacity, and I have formed the opinion that he is a truthful witness, a zealous inspector in his employers' interest, and a skilful and careful craftsman. The alternative is either to find that there was no bad workmanship or to find that Mr. Hadley was untruthful or negligent in these matters. I should prefer the former alternative, but I find that such bad workmanship which existed, if I am right in so finding, was only known to the workmen concerned. An inspector like Mr. Hadley is not present continuously, and his vigilance cannot be substituted for accurate work. That must depend, in the main, on the individual workman. The inspector's functions do not supersede the responsibility of the builders and their men. If rivets did not fill the holes all round, the hammer test would not show the defect once the work was done. If rivet heads do not lay close up against the plate, that fact would be practically undiscoverable by later inspection; it might show unfairness and that ought to have been corrected by the riveters as they went along, drifting or reamering as they thought proper. Examination by the testing knife at the edge of the bar might fail to show lack of contact between the edge of the bar and the plate, which again might be exaggerated by the caulking, but once the caulking was done no testing knife could penetrate into the inner spaces. The plaintiffs' contention is based on what I think is an exaggerated and wrong view of the nature and extent of the bad workmanship. I need not recapitulate the details of Mr. Hadley's evidence which I accept both as to the accuracy of his recollection and the care and skill with which he made his inspection, so far as he was able, by these examinations to discover any matter which was not latent to him. Mr. Batchelor, the Board of Trade Surveyor, was also satisfied. Mr. J. R. Clarke, Lloyd's Register Surveyor, has no specific recollection of the bar, but he seemed an experienced and competent inspector not likely to overlook any defects which could be discovered by any reasonable and careful inspection. I decide against the plaintiffs' contention that bad workmanship, such as it was, could or should have been detected by the owners' inspector or by any inspector concerned.

I summarise my findings of fact as follows:

(1) The design of the bar and of its fitting was

defective and there should have been a cofferdam. These defects of design involved no failure of due diligence on the part of any person concerned. (2) There was some bad workmanship both in riveting and in fitting the bar to the bulkhead. That was entirely the fault of the individual workman employed by the builders and could not have been detected by any reasonable care on the part of the defendants' inspector or by Lloyd's Register surveyor or by the Board of Trade surveyor or by the builders' foreman. (3) The damage to the plaintiffs' cargo was due to the defects of design though it may have been contributed to by the bad workmanship.

I have to consider the law in relation to these findings. The bill of lading recites receipt of the goods in apparent good order and condition, the goods to be delivered in London subject to the contract. The contract for material purposes is to be found in the provisions of the Australian Sea Carriage of Goods Act 1924, which by the clause paramount in the bill of lading is embodied in it. That Act is identical with the English Act in that it, like the English Act, embodies the schedule containing the rules relating to bills of lading. Clause 5 of the Australian Act, in detail in identical terms with clause 2 of the English Act, provides as follows: "There shall not be implied in any contract for the carriage of goods by sea to which the Act applies any absolute undertaking by the carrier of the goods to provide a seaworthy ship." Art. II of the schedule is in the following terms: "Subject to the provisions of art. VI., under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth. Art. III. (1) is in these terms: "The carrier shall be bound, before and at the beginning of the voyage to exercise due diligence to (a) make the ship seaworthy; (b) properly man, equip and supply the ship; (c) to make holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation." It is sub-sect. (c) which is material in this case. Then art. IV. (1) is as follows: "Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of par. 1 of art. III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section." "Carrier" is defined in art. 1 (a) as including

"the owner or the charterer who enters into a contract of carriage" (as by bill of lading) "with a shipper." The obligation of the carrier to exercise due diligence to make his ship fit is clearly not limited to his personal diligence. The carrier may be a company and, in any case, in the complication of modern affairs and by reason of the widely scattered situation of seaports, must act by agent or servant which is the phrase employed in art. IV. (2) (g). The question is, How wide is the category of agents or servants in reference to the obligation in question? It is contended by the plaintiffs that as the primary obligation on the carrier is to provide a seaworthy ship, the carrier cannot delegate any part of that obligation so as to relieve his personal liability—and hence must account for lack of due diligence on the part of the shipbuilders and their workmen, who are to be deemed to be the carrier's agents to make the ship seaworthy and fit; and, accordingly, the defendants must be held liable for the bad workmanship of which I have found the shipbuilders' men were guilty. I do not think that this contention is sound. The Carriage of Goods by Sea Acts have introduced a new and obligatory code of responsibility and immunities as affecting carriers under bills of lading in place of the former rule that carriers by sea, while under the liability of common carriers, were free by contract to vary and limit their liabilities. In particular the Acts have expressly abolished the previous obligation to provide a seaworthy ship and have substituted an obligation to use due diligence to that effect. The carrier may not be the owner of the ship but merely the charterer: he may not have contracted for the building of the ship but merely have purchased her, possibly years after she has been built. In the two latter cases the builders and their men cannot possibly be deemed to have been the agents or servants of the carrier, and it is illogical that there should be such difference in the carriers' obligations merely because he has bought the ship by contracting with the builders to build it for him. In addition, if the carrier were held liable for the bad workmanship of the builders' men, he might equally be held liable for bad workmanship by the men employed by the various sub-contractors who supply material for the builders, such as steel workers in furnaces and rolling mills, or who supply special articles such as castings, pumps or proprietary machines, which would involve an almost unlimited retrogression.

Under the old rule the only relevant question was whether the ship was seaworthy or unseaworthy. That rule was no doubt well adapted to more simple days when ships were not very complicated wooden structures of a few hundred tons; but in modern times when ships are complicated steel structures full of complex machinery, the old rule imposed too serious an obligation on carriers by sea, and I think the new Acts were intended to emphasise the growing specialisation, and, too, have

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emphasised the distinction between carrier and shipowners and have limited the carrier's obligation to due diligence in his capacity as carrier. He is to be liable for all such duties as appertain to a provident and careful carrier acting as such by the servant and agent in his direct employment. If he has a new vessel built he will be liable if he fails to engage builders of repute and to adopt all reasonable precaution; for instance, requiring the builders to satisfy one of the well-known classification societies, such as Lloyd's Register, and engaging skilled naval architects to advise him and skilled inspectors to supervise the work. In the same way, if he buys a ship he may be required to show that he has taken appropriate steps to satisfy himself by appropriate surveys and inspections that the ship is fit for the service he puts her in. But I do not think that in any case that the carrier can be held guilty of want of due diligence simply because the builders' employees have put in some bad work which in fact, though concealed, renders the vessel unfit. In the present case the defendants employed an inspector to supervise the work. I have held that that inspector used due diligence. It may well be that if he had negligently passed bad work which he saw, or even perhaps which he ought to have seen, the carrier would be liable for want of due diligence on the part of one to whom he had delegated the task of inspecting the work. Similarly, he might be held liable if the naval architect whom he employed to supervise the design failed to detect a definite error in design, though I do not think he would be so liable for an error on the part of one of the classification societies, such as Lloyd's Register, which occupy a public and quasi-judicial position. He might also be liable if, either personally or by his scientific advisers, he chose a special form of construction which involved a risk; for example if he chose to dispense with a coffer-dam in order to increase his cargo space though the best opinion thought a coffer-dam necessary. Again, the need of repairing a ship may cast on the carrier a special duty to see, as far as reasonably possible, by special advisers for whom he is primarily responsible, that the repairs adequately make good the defects. It was argued that the obligation only attached in respect of matters at the port of loading, the words being "before and at the commencement of the voyage," and the obligation being only on the carrier and dating at the earliest from the time of the material contract of carriage. In a sense I think this is true, but if the vessel were in fact unfit owing to some earlier breach of due diligence by the carrier, his agents or servants, I think the carrier would be liable on the ground of actual or imputed knowledge of the defects or failure to use due diligence. In matters pertaining to the actual conduct of the voyage a somewhat different principle may apply as to the carrier's liability for acts of servants of sub-contractors, for example, for the negligence of the stevedores' men, but to load or discharge is part of the

definite acts undertaken by the carrier in his capacity of carrier, and he is necessarily liable for the due performance of such acts by whatever persons may do them on his behalf.

I have thought it better to deal with the question involved in the construction of the Act itself because it is a new departure on new principles and it has been applied by other countries not necessarily conversant with the English case law. Nor have counsel professed to refer me to any authorities likely to afford me much assistance. I have been referred to two cases under the Harter Act in which the meaning of "due diligence to make the ship seaworthy" has been discussed, but under that Act the absolute obligation to provide a seaworthy ship is left unabrogated. In the *R. P. Fitzgerald* (212 Fed. Rep. 678), a shipowner was held liable in respect of an obvious defect in a vessel. In *The Abbazia* (127 Fed. Rep. 495), a shipowner was debarred from relying on surveyors' certificates given under circumstances known to the master and engineer to be inconsistent with proper inspection. These cases seem rather to accord with what I have said above. In the English case of *Dobell and Co. v. Steamship Rossmore Company Limited* (8 Asp. Mar. Law Cas. 33; 73 L. T. Rep. 74; (1895) 2 Q. B. 408), a shipowner was held responsible for the failure of the ship's carpenter to close a port-hole, the closing of which was necessary to the seaworthiness of the ship. This was clearly a failure of due diligence on the part of the carrier's servants. In *London Rangoon Trading Company v. Ellerman Lines* (1923, 39 Times L. Rep. 284; 14 Ll. L. Rep. 497) Sankey, J. held under a charter-party that there had been a failure of due diligence on the part of the shipowners' own servant in not observing an obvious defect, but he indicated that the ship-repairers might be regarded as the shipowners' agents to do the repairs. But it appears from *Ellerman Lines v. Smith's Dock Company* (18 Ll. L. Rep. 172) that the ship repairers had limited instructions and were not instructed to repair the particular defect. I did not gather that reliance was placed on the exception of "latent defects not discoverable by due diligence" which is contained in art. IV. (2) (g) of the schedule. Assuming that that refers to defects in the ship, it seems to me to involve the same question of the range of persons whose due diligence was involved and would also raise the difficult question of the exact meaning of "latent," as to which I may refer to a case in the Court of Appeal, *The Dimitrios N. Rallias* (1923, 16 Asp. Mar. Law Cas. 62; 128 L. T. Rep. 491).

The result is that there will be judgment for the defendants.

Judgment accordingly.

Solicitors for the plaintiffs, *Parker, Garrett, and Co.*

Solicitors for the defendants, *Freshfields, Leese, and Munns.*

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Judicial Committee of the Privy Council.

May 20, 23, and June 20, 1927.

(Present: Lords HALDANE, SUMNER, SHAW, MERRIVALE, and WARRINGTON.)

CAPTAIN J. A. CATES TUG AND WHARFAGE COMPANY LIMITED v. FRANKLIN INSURANCE COMPANY. (a)

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA.

Canada (British Columbia)—Insurance (Marine)—Sinking of vessel—Notice of abandonment—Constructive total loss—Actual total loss—Subsequent salvage—Offer by salvors to purchase—Cost of repairs—Finding by Court of Appeal—Questions of principle—Marine Insurance Act 1906 (6 Edw. 7, c. 41), ss. 60, 61, 62.

The appellants, who were the owners of a motor tugboat, had insured their vessel with the respondents under two policies of marine insurance. Both policies contained clauses which provided that in ascertaining whether the vessel was a constructive total loss the insured value should be taken as the repaired value and that nothing in respect of the damaged or break-up value of the vessel or wreck should be taken into account and that all claims were to be subject to English laws and usage. The tugboat was sunk in collision, and notice of abandonment was at once given by the appellants. As the result of salvage operations instituted by the respondents the vessel was raised and towed inshore and the abandonment was not accepted. Without the knowledge of the appellants, the salvors verbally made an offer to the respondents for the purchase of the tug, an offer which, after being put into writing, was subsequently withdrawn. At the trial the learned judge held that by reason of these communications between the underwriters and a third party there had been a binding acceptance of the abandonment and gave judgment in favour of the appellants for a total loss. That decision was reversed by the Court of Appeal.

Held, (1) that there had been no constructive loss within the meaning of sect. 60, subsect. 2 (1) of the Marine Insurance Act 1906, because it was not unlikely that at the time when notice of abandonment was given the appellants could recover possession of their tug; (2) that there had been no actual total loss (observations of Lord Halsbury, L.C. in *Sailing Ship Blairmore Company v. Macredie*, 8 Asp. Mar. Law Cas. 429; 79 L.T. Rep. 217, at p. 218; (1898) A.C., at pp. 597, 598, explained); (3) that the respondents were not estopped from denying that they had accepted the abandonment; (4) that the Court of Appeal's finding as to the true cost of repairs being based upon a judicial selection

of evidence and not on any error of principle could not be interfered with.

Judgment of the Court of Appeal of British Columbia affirmed.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for British Columbia, dated the 5th Oct. 1926, reversing the judgment of the Supreme Court of British Columbia (Murphy, J.), dated the 12th March 1926.

The plaintiffs, who were the owners of the motor tugboat *Radius*, brought an action in the Supreme Court upon two policies of marine insurance in respect of the loss of their vessel which had been sunk in collision and was subsequently raised by a salvage company. The trial judge held that the respondents, by obtaining an offer to purchase the *Radius* from the salvors, had exercised an act of ownership which was equivalent to accepting the abandonment of the vessel, and gave judgment for the plaintiffs for the full amount of both policies.

The Court of Appeal (Macdonald, C.J., McPhillips and M. A. Macdonald, JJ.) reversed that decision, and expressly decided that a constructive total loss had not been made out, that the salvage operations did not amount to an acceptance of abandonment, and that the defendants had before action tendered and subsequently paid into court more than enough to cover the partial loss. The facts are fully set out in the judgment of the Judicial Committee.

J. A. MacInnes for the appellants.

W. M. Griffin for the respondents.

The considered opinion of their Lordships was delivered by

LORD SUMNER.—The appellants were the owners of the motor tugboat *Radius* when she was sunk in collision just outside the entrance to Burrard Inlet, the harbour for the City of Vancouver, on the 26th Aug. 1925 and went down in about fifteen fathoms.

She was covered at the time by two policies of insurance, issued by the respondents, one for \$24,000 so valued, on hull (\$12,000), and machinery (\$12,000), against all risks, and the other on disbursements for \$6000 on the like value, against total or constructive total loss only, with a limited part of any general average and salvage. Both policies contained the following clauses: "In ascertaining whether the vessel is a constructive total loss, the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account. . . . Warranted to be subject to English law and usage as to liability for and settlement of any and all claims," and also use and labour clauses in the usual terms. The disbursements policy further contained the words "to follow Hull underwriters in the event of total or constructive or compromised total loss."

a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

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The plaintiff company sent to the underwriters' agents notice of the accident on the day of the collision and notice of abandonment on the day after, which on the 3rd Sept. the respondents refused in writing to accept "at that stage." Prompt arrangements were also made by the agents to ascertain the exact position of the sunken tug. This was done without difficulty, oil being observed on the surface in the neighbourhood of the place of collision. The spot was buoyed on the 27th Aug., and on the 28th Aug. a diver was sent down, who reported the tug to be resting on the bottom there, right side up, and though holed in one place amidships otherwise apparently undamaged. Thereupon a contract was made with salvors on the 29th Aug. to raise her for \$6500, no cure, no pay, and by the 2nd Sept. she had been raised and towed inshore. Next day she was beached and the hole was temporarily patched. Examinations and surveys followed, those made for the underwriters being detailed surveys by skilled surveyors, those on the other side amounting to little more than a general look round without detailed estimates.

The result was that the appellants were advised by one witness (Moserop), thus: "I didn't think she would be worth fixing up. I thought it would be cheaper to build a new boat and put the money in that," and by another (Lucas), that the cost of repairing the engine would be probably four or five thousand dollars, which would make it worth about five thousand.

On the other hand, detailed estimates based on the surveys were furnished to the underwriters and tenders to do the work were made by responsible ship-repairers at Vancouver for amounts ranging from \$10,348 to \$14,730. There were further admitted items for expenses of various kinds, amounting to \$3042. The appellants' witnesses did not address themselves to the point that the expense of repair had to be compared with an insured value of \$24,000, or realise that the question could not be solved by asking merely whether it would pay the owners best to abandon at the outset and buy a new tug, or to undertake the work of effecting the necessary repairs. On the underwriters' figures, which were the only figures presented "in accordance with English usage in the settlement of claims," there could be no constructive total loss, unless the highest estimate and no other was adopted, and even then the margin would only be \$272.10.

While the surveys and estimates were being made, the salvors happened to ask the underwriters' representative whether, if the wreck were to be sold, they could be given a chance to purchase. A non-committal reply was given at the moment, but a little later an offer of \$12,500 was made by word of mouth, to include the \$6500 salvage. In return a request was made that the offer should be put into writing, which was done, but after an interval of some three weeks this offer was withdrawn. The appellants knew nothing of this incident until

after litigation had begun, so that, whatever else may be made of it, estoppel, on the basis of a representation available to the appellants and a consequent change of position on their part, is out of the question.

It was on this incident that the judgment turned, which the trial judge gave in favour of the appellants for a total loss. He held that, by reason of these communications between the underwriters and a third party, there had been a binding acceptance of the abandonment, which had been tendered by the assured, in spite of their formal refusal of it. He held that they had done an act which could only be justified under a right derived from abandonment, "for," said he, "does not the solicitation and receipt of a *bona fide* bid to purchase necessarily imply power to make title should the bid be accepted?" Their Lordships can only say, as the Court of Appeal said, that it does not. The underwriters in this tentative negotiation did not act as owners of the tug or exercise dominion over it, and they did not purport to sell and convey or to make a title for that purpose. An agreement to sell, had it been concluded, would only have been an executory contract, which they would be able to perform if and when they chose to accept the abandonment, but in itself it could not be an act of ownership. As a matter of fact, this everyday proceeding was nothing more than a precaution, equally available in connection with proving a defence in case they should resist the claim or with preparing to make the best of the loss if they should give up the contest and elect to pay. The analogy of goods sold by sample, or delivered on approbation to a person, who thereupon sells them over to a third party and so determines his right to elect whether he will take the goods or return them, is one which, though it was urged on their Lordships by counsel at the bar, it is impossible to adopt.

As the trial judge had not tried the issues of actual constructive or partial loss, or of the amounts payable accordingly, the Court of Appeal proceeded to determine them on the shorthand notes of a very copious examination and cross-examination of the witnesses on both sides. To this course no objection was taken. The plaintiffs did not seek to have the case sent back to the trial judge to complete the hearing; the defendants were content to take the decision of the Court of Appeal. In the result the court, having the fullest materials before them on questions which were essentially questions of figures and of fact and depended little on the credibility of the respective witnesses, came in effect to the conclusion that the loss was not an actual total loss, for the tug was clearly capable of being salvaged and repaired, as any prudent uninsured owner would have seen; that, on a comparison of the aggregate cost of salvage, repairs and incidental expenses with the insured value, there was such a margin as made the loss partial only, and that as to the amount of that partial loss the \$11,500, tendered before action and paid

into court, taken together with the amount of the salvage bill, which the underwriters had discharged, sufficed to satisfy the assured's claim.

The contentions of the appellants, before their Lordships were, (1) that there was a constructive total loss, because the assured had been "deprived of the possession of his ship . . . by a peril insured against," and because it was unlikely that he could recover (Marine Insurance Act 1906, s. 60 (2), unlikely, that is, at the time when he gave his notice of abandonment; and (2) that when the tug went to the bottom there was an actual loss, in accordance with Lord Halsbury's well-known observation in the case of *The Blairmore* (8 Asp. Mar. Law Cas. 429; 79 L. T. Rep. 17; (1898) A. C., at p. 593): "In this case a controversy has been raised which I had thought had long since been laid to rest. . . . I myself should say a ship was totally lost when she goes to the bottom of the sea, though modern mechanical skill may bring her up again, and I think, in construing a contract now for many years a common contract, no one could doubt that that contract was intended by the parties to contemplate the loss of a ship as comprehending the case of her being sunk."

The first contention is disposed of at once as soon as it is appreciated how probable the recovery of the tug was, even when the notice of abandonment was given. The tug had sunk near to a great city and within the neighbourhood of its harbour. Skilled persons and modern appliances were available to raise her. The weather caused no difficulties: the exact spot where she sunk was easily ascertained. She was neither very large nor very heavy. The diver at once found that she rested conveniently on a gravel bed and was neither broken up nor in danger of going to pieces. Experience at Vancouver showed, as experience has shown in many other similar places, that it was quite a feasible operation to raise such a vessel. Even the depth in which she lay, and the fear, in any case rather a remote one, that tides and currents might have shifted her position into much deeper water, was at once found to have nothing in it. The appellants accordingly failed to bring themselves within sect. 60 (2), and it is unnecessary to consider the question which has been raised (see Arnould on Marine Insurance, 11th edit., sect. 1097), whether or not the old rule, which makes the commencement of the action the crucial moment in considering whether a constructive total loss has occurred, has been modified by sects. 61 and 62.

As to the second argument, Lord Halsbury's observation has unfortunately been so applied in this case as in itself to reawaken controversies, which in his time were well settled. If Lord Halsbury meant to decide that, when the *Blairmore* sank, she was, then and there, totally lost, the whole discussion, on which the rest of his judgment and the judgment of his colleagues turn, was otiose, nor was any

notice of abandonment required at all. So far, however, from the action being, as in this view it was, for an actual loss, it had from the first been brought for a constructive total loss (24 R. 893), and the issue was whether, by raising her at their own expense, the underwriters could insist on eliminating this item of salvage from the comparison between her repaired value and the costs of putting her in a position to be repaired and of then repairing her, and could on this footing successfully aver that there was only a partial loss, namely, the cost of the repairs themselves: (Lord Watson, 8 Asp. Mar. Law Cas., p. 431; 79 L. T. Rep., at p. 219; (1898) A. C., at pp. 601 and 602; Lord Herschell, 8 Asp. Mar. Law Cas., p. 434; 79 L. T. Rep. at p. 222; (1898) A. C., at p. 610). What Lord Halsbury said was not necessary to the decision nor was it part of the reasoning on which the decision of the House was based, and it expresses only his opinion at that time on the particular fact which the case presented, viz., that this ship had been sunk in a squall in sixty fathoms (24 R., at p. 898), while laid up in ballast in San Francisco Bay in the year 1896. The physical possibility of raising a sunken ship depends not only on the place where she lies, her size and injuries, and the available facilities for salvage work, but also on the existing state of the salvors' art, which, since 1896, has made very considerable advances. Lord Halsbury's remark must not be taken as meaning that any ship is an actual total loss whenever she is under water, nor even when she is submerged in such circumstances as to present to salvors a problem of some difficulty. It does not therefore avail to relieve the appellants from the necessity of proving a constructive total loss in this action.

The rest of the case raises questions of figures only, as to which the Court of Appeal had materials fully sufficient to justify their findings without being open to review except upon questions of principle. It was argued that such a question was to be found in the estimates of the cost of repairs presented by the underwriters, and that, as against them, the assured was entitled to pin them down to their highest estimate, since all were put forward as worthy of credit and none could therefore be discredited by the underwriters themselves. There is one obvious fallacy in this ingenious argument. This evidence was not given in respect of a fact, which was within the cognisance of those who presented it. The subject was a matter of opinion and was strictly one of estimate, not of knowledge. The witnesses were qualified technically, and their business was, by their special skill, to assist the court in solving the question in issue, namely, the true cost of repairs. On their evidence the court had to exercise a judicial selection and this was properly done, nor can their Lordships now review it. A figure was chosen, which failed to establish either a constructive total loss or a partial loss to an amount in excess of the

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aggregate of the sum paid into court and of the salvage service, of which the plaintiffs had the gratuitous benefit, and with this conclusion their Lordships do not interfere. They will accordingly humbly advise His Majesty that this appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants, *Johnson, Jecks, and Colclough.*

Solicitors for the respondents, *William A. Crump and Son.*

May 17, 19, 20, and July 5, 1927.

(Present: Lords HALDANE, SUMNER, SHAW, MERRIVALE, and WARRINGTON.)

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CANADIAN AMERICAN SHIPPING COMPANY
LIMITED v. STEAMSHIP "WORON." (a)

ON APPEAL FROM THE EXCHEQUER COURT OF
CANADA.

Canada — Admiralty jurisdiction — Breach of charter-party—Colonial Courts of Admiralty Act 1890 (53 & 54 Vict. c. 27), s. 2, sub-ss. 2 and 3—Supreme Court of Judicature (Consolidation) Act 1925 (15 & 16 Geo. 5, c. 49), s. 22, sub-s. 1 (a) (XII.).

Sect. 2, sub-sect. 2, of the Colonial Courts of Admiralty Act 1890 provides that: "The jurisdiction of a Colonial Court of Admiralty shall . . . be over the like places, persons, matters, and things as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise."

Held, that the true intent of the Act of 1890 was to define as a maximum of jurisdictional authority for the courts to be set up thereunder, namely, the Admiralty jurisdiction of the High Court in England as it existed at the time when the Act was passed. What should from time to time be added or excluded was left for independent legislative determination.

The Exchequer Court of Canada in Admiralty has therefore no jurisdiction to try an action in rem for damages for breach of a charter-party, the defendants not being domiciled and the cause of action not having arisen within the local limits of the jurisdiction of the court, but the ship having been arrested within those limits.

Decisions of the Exchequer Court of Canada affirmed.

APPEALS in two cases from judgments of the Exchequer Court of Canada in Admiralty.

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

The two appeals, which were heard together, each raised the question whether the Exchequer Court of Canada had jurisdiction in Admiralty to entertain an action *in rem* instituted against a ship to recover damages for breach of a charter-party, irrespective of residence of the defendant or place of origin of the alleged cause of action, and to order the arrest of a vessel within its area. In one case the owners of the ship were a joint stock company registered in England; in the other case the vessel was the property of owners domiciled in Japan.

By sect. 2, sub-sect. 2, of the Colonial Courts of Admiralty Act 1890 "the jurisdiction of a Colonial Court of Admiralty shall . . . be over the like places, persons, matters and things as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise . . ." By sect. 3: "The legislature of a British possession may by any colonial law (a) declare any court of unlimited civil jurisdiction . . . to be a Colonial Court of Admiralty . . . and limit, territorially or otherwise, the extent of such jurisdiction."

By sect. 3 of the Admiralty Act (R. S. Can. 1906, c. 141), the Exchequer Court was "within Canada" created a Colonial Court of Admiralty, with all the jurisdiction, powers and authority conferred by the Act of 1890. By sect. 22, sub-sect. 1 (a) (XII.), of the Supreme Court of Judicature (Consolidation) Act 1925, the jurisdiction of the High Court in relation to Admiralty matters was extended to "any claim (1) arising out of an agreement relating to the use or hire of a ship; or (2) relating to the carriage of goods in a ship."

The Exchequer Court of Canada held that the plain reading of the Act of 1890 restricted the jurisdiction of the Exchequer Court to that of the High Court in Admiralty as it existed in 1890, that the Act of 1925 not only lacked words but also "necessary intendment" to bring it into force in Canada, and that the Exchequer Court had no jurisdiction to entertain the action.

The plaintiffs in each action appealed to His Majesty in Council.

Sir John Simon, K.C., G. P. Langton, K.C., and Wilfrid Barton for the first appellants.

W. Martin Griffin (of the Canadian Bar) for the second appellants.

Porter, K.C. and W. Lennox McNair for the first respondents.

Sir Leslie Scott, K.C. and Sir Robert Aske for the second respondents.

The considered opinion of their Lordships was delivered by

LORD MERRIVALE.—These appeals are brought against judgments of the Exchequer Court of Canada in Admiralty by plaintiffs who had sued out in the District Court of British Columbia writs *in rem* and warrants of arrest,

with a view to the trial at Victoria of claims for damages under charter-parties made and alleged to have been broken outside the local area of jurisdiction by parties not resident within that area.

In the case of the steamship *Woron* the arrest was in respect of damages stated at about 18,000 dollars. The plaintiffs are a Canadian company. The owners of the ship appear to be a joint stock company registered in England. The *Woron* was said to have been chartered for a voyage from ports in British Columbia to Yokohama, and it was alleged that her master had wrongfully deviated upon the agreed voyage and thereby caused loss to the plaintiffs.

In the case of the steamship *Yuri Maru* the plaintiffs are an Italian corporation. The vessel is Japanese, registered at Kobe, the property of owners domiciled in Japan, who have alleged *inter alia* that they became owners since the accrual of the alleged cause of action of the plaintiffs and that judgment in respect thereof had already been recovered by the plaintiffs against their predecessors in title. The claim of the plaintiffs in respect of which the arrest was made was 290,000 dollars for damages for breaches of a charter-party for nine months made in Dec. 1919.

In each case the owners of the arrested ship moved to set aside the writ and warrant of arrest for want of jurisdiction. These motions respectively were dismissed by Martin, J. in the District Court, but upon appeal were allowed in the Exchequer Court of Canada.

In view of the fact that the substantial question for argument was the same in each of the appeals, counsel for both appellants and both respondents were heard by their Lordships in the course of one hearing. The question which is immediately raised in both cases is whether, irrespective of residence of the defendant or place of origin of the alleged cause of action, a Court of Admiralty in the Dominion may by arrest of a vessel within its area be called upon to adjudicate upon all claims of plaintiffs suing under any charter-party made in respect of the vessel.

Incidentally, the further question arises whether, throughout the Empire, there is a like right of litigants in Courts of Admiralty jurisdiction of proceeding, by process *in rem*, in respect of like claims, under like circumstances of absence of local residence of parties impleaded and non-existence of any cause of suit arising within the local jurisdiction.

The claim of the appellants is that by virtue of the Colonial Courts of Admiralty Act 1890, which provides for the establishment in British possessions overseas of Courts of Admiralty jurisdiction in lieu of the Vice-Admiralty Courts theretofore existing; and the Canadian statutes which have brought that Act into operation in the Dominion and invested with Admiralty jurisdiction thereunder the Exchequer Court of Canada; whatever jurisdiction in Admiralty is from time to time exer-

cisable in the High Court of Justice in England is exercisable in Canada in the Exchequer Court. The jurisdiction of the Exchequer Court of Canada in Admiralty is exercised in the maritime provinces of Canada by district judges, of whom the judge sitting in British Columbia is one.

By the Act of 1890 every court of law in a British possession which (a) is declared by the local legislature to be a Court of Admiralty or (b) has unlimited civil jurisdiction, is constituted a Court of Admiralty, with the jurisdiction defined in the Act in terms the meaning of which is now in question. The Act provides further (sect. 17) for the abolition, on the "commencement" of the Act in any British possession of every Vice-Admiralty Court in the possession which theretofore had exercised Admiralty jurisdiction.

The due investment of the Exchequer Court of Canada in Admiralty with the jurisdiction defined in the Act of 1890 and the competence of the District Judge in British Columbia to exercise that jurisdiction are not in dispute.

The jurisdiction in Admiralty of the High Court of Justice in England did not extend to claims upon charter-parties at the time when the Colonial Courts of Admiralty Act 1890 became law. Jurisdiction over such claims was given in the first instance by the Administration of Justice Act 1920, s. 5, in terms which have no apparent reference to courts out of England, since a proviso in the section limits the costs of actions recoverable thereunder in certain events by the amount of the costs which "might have been recovered if the proceedings had been brought in a County Court." The Act of 1920 was among the numerous jurisdictional statutes extending in date from 1873 onward which are consolidated in the Judicature (Consolidation) Act 1925. The jurisdiction so conferred on the High Court in England is that on which the appellants rely.

In the statutes of 1920 and 1925 there are no words indicative of any express intention on the part of the legislature of conferring any extended jurisdiction on Admiralty Courts overseas.

The words for construction in the Act of 1890 are these: "The jurisdiction of a Colonial Court of Admiralty shall . . . be over the like places, persons, matters and things as the Admiralty jurisdiction of the High Court of England whether existing by virtue of any statute or otherwise." The appellants claim that these words can only be understood as applying to conditions which are to come into being upon and after the passing of the Act. They offer, in effect, to make the meaning clear by reading into the sentence before the word "existing" the words "from time to time." The respondents, on the other hand, contend that the jurisdiction defined by the section is sufficiently and indeed unmistakably described as the jurisdiction of the High Court in Admiralty "existing" at the point of time

when the Colonial Courts of Admiralty Act 1890 became law.

Inasmuch as the use of words in the English tongue is not so rigidly governed by rule as to render impossible either of the alternative constructions of the parties, counsel on both sides properly discussed the subject-matter, origin and scope and apparent policy of the Act of 1890, with a view to demonstrate the true intent of the language used.

The establishment, in the overseas dominions of the Crown, of Courts of Admiralty jurisdiction under one common system, in place of the pre-existent Vice-Admiralty Courts called into being as occasion dictated in the course of two or three centuries at the discretion of the home authorities, is the most prominent of the facts in question. In a material passage in the judgment of Martin, J. in favour of the appellants, the view taken by the learned judge as to the nature and scope and apparent intention of this transaction is thus stated: "The Vice-Admiralty Courts in Canada were abolished upon the coming into force of this court as established under the Canadian Act of 1891, but if those former courts were still in existence and exercising locally the jurisdiction of the High Court of Admiralty, it would, I apprehend, be clear that their jurisdiction would march with that of the said High Court and increase or decrease as the case might be in accordance with Imperial legislation affecting that Imperial Court. Such being the case, it follows, to my mind, that the present Admiralty Court of Canada . . . likewise marches in the same jurisdiction, and it would require clear language to the contrary to deprive it of the same continuous jurisdiction as is cumulatively possessed by the Imperial Court for the local exercise of whose jurisdiction it is in reality the local machinery and nothing more."

To appreciate the extent to which the jurisdiction of the old Vice-Admiralty Courts was subject to automatic enlargement in harmony with an expanding jurisdiction in the High Court of Admiralty in England it is necessary to bear in mind the relation of the Vice-Admiralty Courts to the High Court during their period of development, the circumstances under which the ambit of the authority of the High Court and of the overseas courts has been enlarged, and the mode in which as to each the process of expansion has gone on.

The extension of the powers of the High Admiral and his lieutenants or deputies in order to meet the needs which resulted from the growth of the Empire does not need to be described with particularity: (See Marsden, *Law and Custom of the Sea*, vol. I., xiii.). Selden gives the early form of the commission of the High Admiral, when the jurisdiction had been centred in one officer of State under that title: (*Mare Clausum*, p. 196). Marsden sets out the first commission which—in 1643—extended beyond "England, Ireland and Wales and the Dominions and Isles of the same." It included "all the islands and English planta-

tions within the bounds and upon the coasts of America": (Marsden, p. 531).

The creation of Vice-Admiralty Courts overseas is also dealt with by Marsden (*Marsden, Law and Custom of the Sea*, vol. 2, pp. xiv., xv.); and Brown's *Civil Law and Admiralty*, published in 1802, presents from the standpoint of a learned civilian a broad view of the then existing system of Vice-Admiralty Courts constituted under commission of the High Admiral or the Lords Commissioners of the Admiralty. The substance of the matter as things stood before 1890, is concisely presented by an experienced public servant, Sir Henry Jenkyns, in these terms (Jenkyns: *British Rule and Jurisdiction Beyond the Seas*, p. 33): "In civil matters, the most important branch of extra-territorial jurisdiction, that of the Admiralty Court, was, until 1890, mainly exercised by Vice-Admiralty Courts established by an instrument under the seal of the office of Admiralty, issued in pursuance of authority given to the Commissioners of the Admiralty in England by a commission under the Great Seal of the United Kingdom. In practice, a judge of the Superior Court of the possession was always made judge of the Vice-Admiralty Court, but he held that office by virtue of an appointment from the British Admiralty and not by virtue of his position as judge of the possession. His jurisdiction was vested in him personally, and not in the colonial court."

The jurisdiction exercised by the Vice-Admiralty Courts was commonly that of the High Court of Admiralty. The area of the exercise of the jurisdiction was enlarged as the Empire grew. Its juristic extent was not. For centuries that had been stabilised and strictly limited so far as the High Court of Admiralty was concerned by the vigilant supervision of the Court of King's Bench. The High Court of Admiralty never shared the inherent capacity for development which marked the English courts of law and equity.

Great extensions of the Admiralty jurisdiction in England were made during the nineteenth century, before the passing of the Colonial Courts of Admiralty Act 1890. Notable extensions had also been made during the same period by Acts of the Imperial Parliament in the jurisdiction of the Vice-Admiralty Courts. It would be wholly incorrect, however, to suppose that these were extensions of jurisdiction granted to the High Court of Admiralty here and thereupon automatically operative in the courts overseas. Parliament made its separate grants to the High Court of Admiralty as an English court. Dr. Lushington, as judge of the court, pointed out as early as 1859 that the extensions so made had no effect in the Vice-Admiralty Courts: (see *Rajah of Cochin*, Swabey, 473). At this Board in the same year the same conclusion was stated: (*Lapraik v. Burrows*; *The Australia*, 13 Moore P. C. 132, at p. 160). Parliament in fact legislated for the High Court and the overseas courts by numerous unconnected statutes.

The Admiralty Court Acts of 1840 and 1861 conferred specific powers, carefully identified and limited, upon the High Courts in England. The Vice-Admiralty Courts Acts of 1863 and 1867 (26 Vict. c. 24; 30 & 31 Vict. c. 45) extended the powers of the Admiralty Courts overseas, not by reference to the powers of the High Court in England, but by scheduled statement of the causes of action in respect of which jurisdiction was newly conferred and specification of other amendments.

So far as the appellants' case rests upon a theory that without statutory action there was before 1890 an historic and progressive growth of Admiralty jurisdiction which was common to the High Court and the Vice-Admiralty Courts, or upon a supposition that any statutory enlargement of the jurisdiction of the High Court in England operated automatically to enlarge the jurisdiction of the Vice-Admiralty Courts, it cannot be sustained.

How then did Parliament, by the Colonial Courts of Admiralty Act 1890, deal with the condition of affairs which had grown up under the old law?

The Act has three outstanding characteristics. So far as the "instance" jurisdiction is concerned, its plain intent is the establishment as part of the machinery of self-government within each autonomous area of courts locally constituted, wherein judges locally nominated should exercise such a measure of jurisdiction in Admiralty within prescribed limits as the government on the spot might think convenient. Subject to specific reservations the statute applied to the Empire, and it provided that on the commencement of the Act in any British possession, and subject to its provisions, every Vice-Admiralty Court in the possession should be abolished.

By sect. 2 (1) and sect. 3, the Legislature of an overseas possession is enabled, at its will, to declare a court of unlimited civil jurisdiction within its area to be a Court of Admiralty; to limit territorially or otherwise the extent of the jurisdiction in Admiralty to be exercised in such courts; and to confer partial or limited jurisdiction in Admiralty upon subordinate or inferior courts. In the absence of local legislative action, a court of "original unlimited civil jurisdiction" in any possession is constituted a Court of Admiralty. And by sect. 2 (1) "where in a British possession the governor is the sole judicial authority, the expression 'court of law' includes such governor."

Incidentally to the fact that the Act of 1890 empowers self-governing communities to decide for themselves within defined limits what shall be the ambit of the jurisdiction to be exercised by their courts by means of process *in rem*, it is necessary to bear in mind that, even in England conflict of opinion long existed as to the advantage of extending the availability of this process, and that the right of trial within a local jurisdiction of actions arising elsewhere is not always an unmixed benefit. Opinion may well differ between State and State as to whether, e.g., a port which is chiefly a port of call will be

benefited by the existence of a power in all and sundry to arrest vessels found within its limits in order that strangers may litigate in the local court questions which have arisen elsewhere.

The Act of 1890 empowers the Legislature in any of the dominions to determine by its own statute, subject to the Royal Assent on the prescribed special reservation, what shall be the extent of the Admiralty jurisdiction of the courts for which the local legislation provides. Yet, if the contention of the appellants in this case is sound, an Act of the Imperial Parliament, purporting on the face of it to apply to England and the High Court in London, has without any choice of the self-governing States in the Empire peremptorily enlarged the jurisdiction of their Courts in Admiralty, subject only to a power in them under sect. 3 of the Act of 1890 to limit such jurisdiction anew by a new local law, after compliance with the conditions of sect. 4 whereby such a law, unless previously approved by a Secretary of State, must be "reserved for the signification of His Majesty's pleasure therein or contain a suspending clause."

The present case arises upon an enlargement by the Imperial Parliament of the Admiralty jurisdiction of the High Court in England. But the fact cannot be overlooked that during the last half-century the distribution of business in the High Court in England has been the subject of very numerous enactments, and there is involved in the question now presented for determination the further question whether the withdrawal of any cause of action from Admiralty process in England would *ipso facto* operate a corresponding diminution in Admiralty jurisdiction in the courts overseas. A construction of the statute of 1890, which would have the singular effect of introducing by an automatic process unasked changes in the jurisdiction and procedure of the courts of self-governing dominions, with possible power in the local legislature by a cumbrous process to revoke an extension of jurisdiction *in rem*, but no power to undo an unwelcome abatement, manifestly could not be adopted unless the words of the statute should be found to leave no alternative.

Neither the early history of the overseas courts, the course of modern legislation, continuity of policy, nor practical convenience appear to their Lordships to require that the jurisdiction defined in the Act shall be declared to be that "from time to time existing" in the High Court in England.

On the whole, the true intent of the Act appears to their Lordships to have been to define as a maximum of jurisdictional authority for the courts to be set up thereunder, the Admiralty jurisdiction of the High Court in England as it existed at the time when the Act passed. What shall from time to time be added or excluded is left for independent legislative determination.

Their Lordships will humbly advise His Majesty that in their opinion these appeals fail.

The costs of the respondents must be paid by the appellants.

Appeals dismissed.

Solicitors for the first appellants, *Stephenson, Harwood, and Tatham.*

Solicitors for the second appellants, *William A. Crump and Son.*

Solicitor for the first respondent, *W. W. Stocken.*

Solicitors for the second respondent, *Botterell and Roche.*

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 9, 10, 1926; June 27, 28, and July 15, 1927.

(Before BANKES, ATKIN, AND LAWRENCE, L.JJ.)

THE FAGERNES. (a)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Jurisdiction — Bristol Channel — Waters inter fauces terræ — Action in personam — Tort — Statement by Attorney-General — Place of collision not within the limits within which His Majesty claims jurisdiction.

In an action in personam against foreign ship-owners for negligence causing a collision between vessels belonging respectively to the plaintiffs and defendants, which took place in the Bristol Channel at a point some miles to the eastward of a line drawn from Bull Point to Port Eynon Head, leave was granted to serve the writ out of the jurisdiction, and Hill, J. refused to set aside the order granting leave, holding upon the authority of *Reg. v. Cunningham* (1859, *Bell's Crown Cases* 72) that the place of collision was within the jurisdiction of the English courts.

Upon the Attorney-General stating that the place of collision was not within the limits to which the territorial jurisdiction of His Majesty extended,

Held, upon appeal from Hill, J., that the limits of the territorial jurisdiction being a matter of which the court took judicial notice, and that the court having informed itself by inquiry addressed to the Attorney-General that this place was not within the territorial jurisdiction, the appeal should be allowed. Leave to serve the writ out of the jurisdiction ought to have been refused.

Decision of Hill, J. (17 *Asp. Mar. Law Cas.* 111; 135 *L. T. Rep.* 543; (1926) *P.* 185) reversed.

Per Bankes, L.J.: If the case had been presented in the same form and on the same materials as in the court below, he would have hesitated

before accepting the conclusion of Hill, J., because the circumstances of the present case were different from those of *Reg. v. Cunningham* (sup.), the width of the channel in the present case being much greater, and because there was an entire absence of anything indicating effective occupation of the place of collision.

Per Atkin, L.J.: If the case had been presented as in the court below, he would have decided as Hill, J. decided it, there being no definite rule of international law to regulate territorial claims to the waters of gulfs and bays: in any case any such rule must be subject to exceptions. Further, the fact that the waters of the Bristol Channel were treated as territorial waters in *Reg. v. Cunningham* (sup.), and the *Direct United States Cable Company v. Anglo-American Telegraph Company* (1877, 36 *L. T. Rep.* 265; 2 *App. Cas.* 394) (Conception Bay), the narrowness of the channel at the place of collision, the situation of the Glamorganshire ports and the port of Bristol on its banks, the fact that Lundy Island, part of Devonshire, was twenty miles to the westward, and the fact that the Bristol Channel was part of the King's Chambers were considerations to which importance should be attached if the court were purporting to do more than give effect to the authoritative pronouncement of the Government.

Per Lawrence, L.J.: There was no settled rule of international law as to the territoriality of land-locked waters the entrance to which exceeded six miles; the fact that the Bristol Channel had been within the King's Chambers could not be relied upon as proving that it was within the territorial jurisdiction of the High Court; and the learned Lord Justice agreed with Bankes, L.J. that the decision of Hill, J. could not have been supported upon the authority of *Reg. v. Cunningham* (sup.).

APPEAL from Hill, J.

The appellants (defendants) were the *Société Nazionale di Navigazione*, an Italian corporation domiciled in Italy, and owners of the Italian steamship *Fagernes*. The respondents (plaintiffs) were the owners of the steamship *Cornish Coast*.

On the 17th March 1926 a collision took place between the *Cornish Coast* and the *Fagernes* in the Bristol Channel at a point approximately twenty miles to the eastward of a line drawn from Bull Point, Devonshire, to Port Eynon Head, Glamorganshire. The distance across the Bristol Channel at this point is approximately twenty sea miles, the English coast being distant ten and a half or twelve and a half sea miles, and the Welsh coast nine and a half or seven and a half sea miles. The places of collision alleged by the parties did not materially differ. The *Fagernes* sank.

The respondents thereupon commenced an action in personam to recover damages for injuries sustained by the *Cornish Coast* by the negligent navigation or management of the appellant's vessel. Leave to serve the writ upon the appellants out of the jurisdiction under R.S.C. Order XI., r. 1 (e) was granted by Hill, J.

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

The appellants entered an appearance to the writ under protest, and moved to set aside the writ and subsequent proceedings upon the ground that the place of collision was not within the jurisdiction of the English courts, and that there was therefore no jurisdiction to grant leave for service abroad.

Hill, J. dismissed the appellants' motion (*The Fagernes*, 17 Asp. Mar. Law Cas. 111; 135 L. T. Rep. 543; (1926) P. 185) holding, upon the authority of *Reg. v. Cunningham* (1859, Bell's Crown Cases 72), that the place of collision was within the jurisdiction.

The appellants appealed.

E. Aylmer Digby, K.C. for the appellants.

Balloch for the respondents.

The arguments presented by counsel were substantially the same as those presented to Hill, J. (see 17 Asp. Mar. Law Cas., at p. 112; 135 L. T. Rep., at p. 543). During the hearing of the argument the court intimated that the case was one in which in the opinion of the court the Attorney-General ought to be given facilities to appear and be heard should he desire to do so. Upon the Attorney-General intimating that he desired to be heard, the case was accordingly further adjourned to enable him to appear.

Sir Douglas Hogg, K.C. (A.-G.) and *Giveen*.—There is no settled rule of international law, nor is there any agreement amongst authoritative writers as to the territoriality of land-locked waters the entrance to which exceeds six miles. Consideration of the following authorities shows that different views of the matter have been entertained from time to time: Martens (*The Law of Nations*, 4th edit., trans. by William Cobbett, 1829, at p. 166) states that those parts of the coast which are land-locked, such as those which are situate within cannon shot of the shore, that is within a distance of three leagues, are so entirely the property and subject to the dominion of the master of the coast that such parts should be looked upon as forming part of the territory of the sovereign who is master of the shore. Westlake (*International Law*, Part 1, Peace, 1910, at p. 187) states that a gulf capable of occupation by the sovereign of the land is therefore capable of becoming his territorial water. "The means of occupation consist partly in the forts and batteries along the shore, or in the shore itself considered as a platform from which guns not stationary can be fired." At p. 191 it is stated that if the entrance to a bay is not more than twice the width of the littoral sea enjoyed by the country in question, i.e., usually six nautical miles, and there is no access to the bay except through the territorial water, the inner part of the bay will belong to that country, no matter how widely it may expand. It is pointed out that by immemorial usage certain bays are recognised as the territorial sea of the States into which they penetrate, notwithstanding that their entrance is wider than the general rule would fix—e.g., Bay of Conception (British), Chesapeake and

Delaware Bays (United States) and Bay of Cancale (French). It is further pointed out that such sovereignty was formerly claimed in respect of the British Channel, but it is not admitted that such claims are well founded. The claim in respect of these places, including the Bristol Channel, surrounding the coasts of England, was probably advanced upon the ground that these places were formerly claimed under the name of the King's Chambers. The line of delineation of the King's Chambers was drawn from Land's End to Milford Haven. Phillipson and Buxton (*Question of Bosphorus and Dardanelles*, at p. 11) state that the entrance to inlets of the coast over which sovereignty is claimed should not exceed six miles. In the *Moray Firth* case, Lord Fitzmaurice, Under-Secretary of State for Foreign Affairs, adopted the view that the waters of bays the entrance to which does not exceed six miles in width, and of which the entire land boundary forms part of the territory of a State, are within the territorial jurisdiction of that State, though by custom and treaty the six-mile limit has been extended to more than six miles (Hansard, Parl. Deb. IV., Series, vol. 169, col. 989, Feb. 21, 1907).

The above authorities adopt the view that jurisdiction can only be asserted where the entrance to the bay does not exceed six miles. But there are authoritative writers who consider that the width of the entrance may be as much as ten miles. Thus Manning (*Commentaries on the Law of Nations*, edit. Amos., 1875, at p. 120) states that "in the case of bays, harbours, and creeks it is a well-recognised custom, provided that the opening be not more than ten miles in width as measured from headland to headland, to take the line joining the headlands for the purpose of measuring the limits of the territorial jurisdiction. Sir Cecil Hurst (*Brit. Year Bk. of Int. Law*, 1922-3, p. 42, art. "The Territoriality of Bays," at p. 54), after an examination of the authorities, concludes that the distance may be taken for working purposes as ten miles from headland to headland. Pitt-Cobbett (*Leading Cases on International Law*, 1922, iv. edit., vol. i., p. 147) states that there is no uniform practice amongst nations or writers as to six or ten mile distances, and he points out that whilst it is generally admitted that bays whose entrance does not exceed six miles are within the territorial jurisdiction, many writers have extended this distance to ten miles. A similar view is taken by Despagnet (*Cours de Droit International Public*, iv. edit., 1910, s. 406). Hall (*International Law*, 8th edit., p. 193, *seq.*) rejects the six-mile limit. Vattel (*Law of Nations*, edit. Chitty, 1834, bk. 1, ch. XXIII., sect. 291, at p. 129) adopts the test of whether the entrance of the bay can be defended, in which case it may be possessed and rendered subject to the laws of the sovereign. Calvo (*Le Droit International*, Deux^e. edit., 1870, Tome 1^{er}. Liv. V., sect. 190, p. 308) expresses the view that bays which are naturally defended by islands, sandbanks or rocks, or by the crossfire of cannon placed at their

entrance form part of the territory of the neighbouring sovereign. Wheaton (International Law, 5th edit., p. 285) states that it has been claimed by some jurists that inlets having an entrance more than ten miles wide cannot be held to be territorial, but that there is no unanimity on the subject: (see also p. 286). Halleck (International Law, 4th edit., 1908, vol. 1, pp. 175, 176) considered that the jurisdiction of the British Crown has immemorially extended to the bays or portions of the sea cut off by lines drawn from one promontory to another, along the coasts "commonly called the King's Chambers." [Reference was also made to Fulton's Sovereignty of the Sea, p. 118; Selden's Mare Clausum, ch. xxx; Grotius' De Jure Belli ac Pacis, vol. II., ch. 3; Marsden's Law and Custom of the Sea, vol. ii., p. 231].

The view that the seaward boundary of the sovereign is to be drawn from headland to headland is rejected in the despatch of Mr. Bayard, United States Secretary of State, to Mr. Manning, United States Secretary of Treasury, of the 28th May 1886, where it is stated that the boundary follows closely, at a distance of three miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign. (Quoted: Wharton, Int. Law Digest, 2nd edit., 1887, vol. 1, ch. ii., sect. 32, pp. 107, 108.) The matter was also discussed at the International Conference of 1893, without any conclusion being reached. It is submitted that the place of collision in this case is therefore outside any of the suggested limits of the territorial jurisdiction except the limits established by drawing a line from headland to headland from which line the extent of the territorial waters is measured. The above authorities show that this method of determining the limits of the jurisdiction has been uniformly rejected, although there is in fact no agreement as to the true rule for defining these limits.

Sir E. Coke (Reports, edit. Thomas and Fraser, 1826, pt. xii., p. 306) adopts the test of vision. In considering the boundary of jurisdiction of the Admiral and the courts of common law, he states that "where a man may see that which was done of one part and the other of the water, &c., in that place the county may have cognisance, and it may be tried by a jury which proves also that that which may be tried by the common law doth not belong to the Admiral's jurisdiction." This distance is not the same as that adopted by Lord Hale De Jure Maris. "where a man may reasonably discern from shore to shore": (see also East, Pleas of Crown, edit. 1803, vol. ii., c. xvii., sect. 10, p. 804). In *Rex v. John Bruce* (1812, 2 Leach C. C. 1093), where the question was whether murder committed within Milford Haven was within the jurisdiction of the Admiral or the common law courts, the construction of Lord Hale was preferred by Lord Ellenborough and the judges, except Grose, J., to that of Sir E. Coke. The test of vision has also been considered in two United States cases upon the conflict of the state and

federal jurisdiction. In *Commonwealth v. Peters* (1847, 12 Met. 387, 392, Massachusetts Reports) cited in *Manchester v. Massachusetts* (1890, 139 U. S. Rep. 240, 256), the vision test was adopted and it was held that "a bay not so wide that persons and objects upon one side may be discerned by the naked eye by persons on the opposite" was within the body of a county. "Discern" may mean that objects the size of men on the opposite shore can be identified. In the *North Atlantic Coast Fisheries Arbitration* which was decided in 1910 between this country and the United States, the United States contended that the expression "bays" used in the Convention of 1818 was limited to territorial bays whose entrances did not exceed six miles. The question was considered, but in the result it was unnecessary for any conclusion to be reached: (see Scott, Hague Court Reports, 1916, pp. 141, 180, 181; in particular qn. 5: U. S. Journal of International Law, 1910).

[Reference was also made to *Rex v. Keyn* (1876, 2 Ex. Div. 63), Territorial Waters Jurisdiction Act 1878 (41 & 42 Vict. c. 73), s. 2, *Harris v. Hamburg America Line* (1876, 2 C. P. Div. 173) (*The Franconia* case), *Direct United States Cable Company v. Anglo-American Telegraph Company* (1877, 36 L. T. Rep. 265; 2 App. Cas. 394), *Mortensen v. Peters* (1906, 14 Scots Law Times Reports, 227; 8 Sess. Cas. (5th series) 93), *Duff Development Company v. Kelantan (Government) and Attorney-General* (131 L. T. Rep. 676; (1924) A. C. 797), and *Foster v. Globe Venture Syndicate* (82 L. T. Rep. 253; (1900) 1 Ch. 811).] [The two latter cases were cited with reference to the certificates given by the Foreign Office that certain States were recognised as sovereigns.]

At the conclusion of the Attorney-General's argument, the court intimated that a majority of the Lords Justices were of opinion that they were entitled to ascertain from the Attorney-General as representative of the Government whether the Government claimed that the place in question was within the territorial jurisdiction. The case was accordingly adjourned to enable the Attorney-General to obtain the answer of the Government upon this question. Upon the case again coming before the court, the Attorney-General stated that after consulting the Home Secretary he was instructed to say that the place of collision was not within the limits to which the territorial jurisdiction of His Majesty extended.

July 15—BANKES, L.J.—On the 17th March 1926 two vessels came into collision in the Bristol Channel. One vessel was British owned, the other Italian owned. As a result of the collision the Italian vessel sank. The British owners sought to make the Italian owners responsible for the collision. As no action *in rem* was possible owing to the loss of the Italian vessel, the British owners commenced an action *in personam*,

and applied for leave to issue the writ out of the jurisdiction, upon the ground that the action was founded on a tort committed within the jurisdiction, and, therefore, within Order XI., r. 1 (*ee*).

An order having been obtained in chambers, the defendants moved to set it aside upon the ground that the place where the collision occurred was not within the jurisdiction. The point thus taken necessarily raised an extremely important and very interesting question which was fully dealt with by Hill, J., in a careful and exhaustive judgment. He finds that the collision occurred more than twenty miles to the east of Lundy Island, and some miles to the eastward of a line drawn from Bull Point in Devonshire to Port Eynon in Gower, which is part of Glamorganshire. The nearest point on the English coast is a little west of Ilfracombe; the nearest point on the Welsh coast is Oxwich Head. The distance across is about twenty miles, the English coast being distant ten and a half to twelve and a half miles and the Welsh coast nine and a half to seven and a half miles. In speaking of miles the judge is referring to sea miles.

The learned judge commences by defining the question which he has to decide as being whether the place where the collision occurred was "within the territorial jurisdiction of the King." He then refers to what is the undoubted fact, that within limits inlets of the seas into the land are part of the territory of the State which owns the land on both sides; and after referring also to the fact that the expression *inter fauces terræ* has high authority as an indication of what the limits are, he asks himself this pertinent question: "What are the inland waters contained within the land? What are the bays, gulfs or estuaries *inter fauces terræ*? What is the metaphor? the open mouth of a man or of a crocodile?" This question has never been authoritatively answered, except in cases where some effective occupation has been proved, or some statutory recognition established, or where the opening is so narrow as to admit of no doubt. The answer to the question can be sought either in the domain of international law or, in the case of our own country, in our common law. The learned judge considers both. I do not propose to discuss the various and varying opinions of jurists and text-writers, to which the learned judge, and to even a fuller extent this court, has been referred, because it is common ground from the point of view of international law no agreement on the question has been reached. The learned judge so treats the matter.

His decision upholding the plaintiffs' contention is founded on his view of the common law, based on the language of the judgment in *Cunningham's* case (*Reg. v. Cunningham* (1859; Bell's Crown Cases, 72). In that case the question was whether a collision which occurred between two vessels, and which resulted in the death of a member of the crew, had occurred in the county of Glamorgan, where the indictment for manslaughter was laid.

In the present case the only evidence before the court is that the collision occurred at the spot ascertained and described by Hill, J. as above set out.

In *Cunningham's* case a number of facts were proved. In the first place the collision occurred considerably higher up the Bristol Channel, where its width is not much over ten miles. The place of the collision was within the port of Cardiff, and between an island which is part of the parish of Cardiff and the Welsh shore, and only three miles from that shore. It was with reference to these facts that Cockburn, C.J. used the language upon which Hill, J. founds his judgment. The passage in the judgment is as follows: "The only question with which it becomes necessary for us to deal is whether the part of the sea on which the vessel was at the time when the offence was committed forms part of the body of the county of Glamorgan; and we are of opinion that it does. The sea in question is part of the Bristol Channel, both shores of which form part of England and Wales, of the county of Somerset on the one side and the county of Glamorgan on the other. We are of opinion that, looking at the local situation of this sea, it must be taken to belong to the counties respectively by the shores of which it is bounded; and the fact of the Holms, between which and the shore of the county of Glamorgan the place in question is situated, having always been treated as part of the parish of Cardiff and as part of the county of Glamorgan, is a strong illustration of the principle on which we proceed, namely, that the whole of this island sea between the counties of Somerset and Glamorgan is to be considered as within the counties by the shores of which its several parts are respectively bounded."

If the case in this court had been presented in the same form and on the same materials as it was presented to Hill, J., I should have hesitated in accepting his conclusion, because it appears to me that the court in *Cunningham's* case had not to consider the circumstances of the present case, where the width of the Channel is so much greater, and there is an entire absence of anything indicating effective occupation, but were merely using language applicable to the facts of the case before them, without intending to lay down any rule applicable to other parts of the Bristol Channel. This view of the judgment in *Cunningham's* case is not, in my opinion, inconsistent with Lord Blackburn's comments on that judgment in the *Conception Bay* case (*Direct United States Cable Company v. Anglo-American Telegraph Company*, 1877, 36 L. T. Rep. 265; 2 App. Cas. 394). It is not, however, necessary to express a decided opinion upon this question, because, for a reason which I will proceed to indicate, the case as finally presented to this court has assumed a different aspect.

When the appeal first came on some time ago, the court felt that the question was one so materially affecting not only the rights and

interests of the Crown but public interests also, that the Attorney-General should be given the opportunity of appearing, if he desired to do so. He did appear; and in the first instance he gave the court an exhaustive statement of the opinions of jurists and text-writers from very early times upon this much-discussed question of the territorial jurisdiction over creeks, bays, &c., and he referred the court to all the relevant authorities, with the view of inducing the court not to lay down any rule on the question, but to content themselves merely by saying that there was no authority for holding that the place of this collision was within the jurisdiction. The question of what is within the realm of England being one of the matters of which the court takes judicial notice, we thought it right to ask the Attorney-General whether the Crown did or did not claim that particular part of the Bristol Channel where this collision occurred, as being within the territorial jurisdiction of the King; and he replied that the Crown did not. This information was given at the instance of the court, and for the information of the court. Given under such circumstances, and on such a subject, it does not, in my opinion, necessarily bind the court in the sense that it is under an obligation to accept it.

Having regard, however, to the position created by the information given to the court by the Attorney-General to absence of authority, and to the general trend of the more recent opinion on the question of limiting the width of the *fauces terræ* to which the rule of territorial jurisdiction should apply, I think the court ought to be guided by the information given to the court by the Attorney-General, to the extent of saying that they do not consider that there is sufficient authority for supporting the judgment of Hill, J., and that the order appealed from must be set aside and the decision of Hill, J. reversed with costs here and below. I confine my judgment to the particular part of the Channel where this collision occurred and to a case where no evidence of any effective occupation is given.

I desire also to say that the court is indebted to the learned counsel who have argued this case for the assistance they rendered to the court. The only reason why I do not deal with their arguments at length is because, having regard to the course the case took, it does not appear to me to be necessary to do so.

ATKIN, L.J.—The question to be decided in this case is no less momentous than whether the Bristol Channel is part of the realm of England. What is the territory of the Crown is a matter of which the court takes judicial notice. The court has, therefore, to inform itself from the best material available: and on such a matter it may be its duty to obtain its information from the appropriate department of Government. Any definite statement

from the proper representative of the Crown as to the territory of the Crown must be treated as conclusive. A conflict is not to be contemplated between the courts and the executive on such a matter, where foreign interests may be concerned, and where responsibility for protection and administration is of paramount importance to the Government of the country. In these circumstances the court requested the assistance of the Attorney-General, who, after elaborate and valuable argument on the municipal and international law, so far as it affects the question, eventually informed the court that he had consulted the Home Secretary, and was by him instructed to say that the place of collision was not within the limits to which the territorial jurisdiction of His Majesty extends. I consider that statement binding upon the court, and constrains it to decide that this portion of the Bristol Channel is not within British jurisdiction, and that the appeal must be allowed.

I think, however, that it is desirable to make it clear that this is not a decision on a point of law, and that no responsibility rests upon this court save that of treating the statement of the Crown by its proper officer as conclusive. Speaking for myself alone, if I had to decide this case upon the materials before Hill, J. and the further authorities brought before us, I should have been inclined to come to the same conclusion as he did. It is quite certain that there is at present no such agreement in the practice of civilised States as to afford a definite rule to regulate territorial claims to the waters of gulfs and bays for the future; still less to determine what has been in fact the territorial jurisdiction in the past. And it is also clear that whenever a rule can in the future be recognised as a principle of international law it will have to admit exceptions where territorial jurisdiction has been effectively exercised beyond the limits of the general rule, whatever it may be. And in determining the existence of those exceptions, I do not know a better statement of the considerations that must be taken into account than is to be found in the award of the Permanent Court of Arbitration at The Hague, in *The North Atlantic Coast Fisheries* case, in 1910: "The interpretation must take into account all the individual circumstances which for any of the different bays are to be appreciated: the relation of its width and the length of penetration inland, the possibility and the necessity of its being defended by the State in whose territory it is indented: the special value which it has for the industry of the inhabitants of its shores and the distance which it is secluded from the highways of nations on the open sea, and to other circumstances not possible to enumerate in general." That is from the Award, Cmd. 5396, Misc. No. 3, 1910, p. 22.

One bears in mind that at this particular point the Channel is only about twenty miles wide, that it has on its north bank the teeming population of Glamorganshire with its coal

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ports, that it penetrates into the vitals of England, having towards the end of its course one of the oldest ports of the kingdom, Bristol. One has also to bear in mind that the whole of the Bristol Channel was part of one of the King's Chambers, which were delimited by an order of James I. in 1604, which will be found set out in Selden's *Mare Clausum*, bk. II., c. 22.

The statement of the Crown in this case makes it unnecessary to trace the history of the claim to the King's Chambers, but I think it relevant that though some modern writers on international law have doubted whether the claim to them would be maintained in these days, yet they were treated as material to the decision of cases in prize by Sir Leoline Jenkins in the cases of *St. Anne*, *Biscay*, *Delamothé* and *Hope*, from 1665 to 1675 (Wynne's *Life of Sir Leoline Jenkins*, vol. ii., pp. 727, 732, 755, 780). The existence of the territorial jurisdiction over them was maintained in the leading English work on international law of last century, Phillimore, throughout its editions; was admitted by Wheaton, the leading American authority of that century; and also by Major-Gen. Hallack, of the United States of America; and was supported by the English Attorney-General in the *North Atlantic Coast Fisheries Arbitration* in 1910. The alleged limit of ten miles in width which the Attorney-General contended was the boundary of that part of the Channel which was wholly territorial (apart from the three miles' coast limit) is not yet accepted and undoubtedly has admitted exceptions in the case of British, American, French and other national waters. Finally, though neither the case of *Reg. v. Cunningham* (*sup.*), nor the case of the *Direct United States Cable Company v. Anglo-American Telegraph Company* (*sup.*) (the *Conception Bay* case) determined this question as a matter of law, it seems to me plain that Cockburn, C.J. in the former case, and Lord Blackburn in the latter, treated the Bristol Channel as territorial waters in that part of it which is between Glamorgan and Somerset, *i.e.*, at a width exceeding ten miles. And, in my view, considerable importance should be attached to the fact that Lundy Island, twenty miles to the westward of the *locus in quo*, is part of Devonshire. I mention these considerations, without further discussion of the various questions and authorities concerned, to support the statement that I have already made that, in arriving at its conclusion, the court is not purporting to do more than give effect to the authoritative pronouncement of the Government. The appeal must be allowed, and the order for service of notice of the writ and the service be set aside with costs here and below.

LAWRENCE, L.J.—I agree. The question of whether the alleged tort was committed within the jurisdiction of the High Court has given rise to an interesting discussion on the subject of the territorial character of inlets of the sea such as bays, gulfs, estuaries, and creeks, all

of which for the sake of brevity I will call "bays."

As the territorial jurisdiction of the High Court extends over the whole of England (including the principality of Wales and the town of Berwick-on-Tweed) it follows that, if the spot where the collision occurred is in the realm of England, the alleged tort was committed within the jurisdiction. The real question, therefore, is whether that part of the Bristol Channel where the collision occurred is in the realm of England.

It is common ground that there is no international treaty or convention expressly sanctioning or recognising any territorial rights of the Crown over the Bristol Channel. Further, no evidence has been adduced that the Crown has possessed itself of, or has effectively asserted any territorial rights over, that part of the Bristol Channel where the collision occurred. In the absence of any express treaty or controlling executive act of the Government, the question arises whether there is any established general rule of international law for determining the territorial character of bays. The consideration of this question has occupied the greater part of the hearing both in the court below and in this court.

The Attorney-General, in the course of his able argument, has cited and commented upon the opinion of jurists, the practice of nations and the relevant judicial decisions. I do not propose to deal with these sources of information in detail, but content myself by saying that in my judgment the Attorney-General has established the proposition that, although the principle of claiming territorial rights over bays is well established as a rule of international law, and although there is no question as to the applicability of that principle in the case of bays, the entire land boundaries of which form part of the territory of the same State and the entrances of which do not exceed six sea miles in width, yet there is no recognised general rule of international law by which it can be determined whether any given bay, with an entrance wider than six sea miles, does or does not form part of the territory of the State whose shores form its land boundary. Each such case must depend upon its own special circumstances.

There is another matter which deserves mention here, namely, the suggestion that because the Bristol Channel is within the limits of the so-called King's Chambers, therefore it is necessarily within the King's territory. An interesting historical account of the King's Chambers is to be found in Fulton on the Sovereignty of the Sea (see chap. iv., commencing at p. 118), which records the fact that in 1604 James I. issued a proclamation prohibiting all hostile actions of belligerents within certain limits along the English coast, which were fixed by a jury of thirteen skilled men appointed by Trinity House. This proclamation had reference to the continuance of the war between the United Provinces and Spain (from which James had himself withdrawn), and according

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to Fulton (see p. 9) is not to be regarded as in any sense an assertion of maritime sovereignty or jurisdiction beyond what was then customary.

Oppenheim in his work on International Law, 2nd edit., vol. 1, p. 263, 1912, states that: "It must be specially observed that it is hardly possible that Great Britain would still, as she formally did for centuries, claim the territorial character of the so-called King's Chambers, which includes portions of the sea between lines drawn from headland to headland." In a note on the same page the author—after pointing out that whereas Hall (sect. 41, p. 159) says that England would no doubt not attempt any longer to assert a right of property over the King's Chambers, yet Phillimore (3rd edit., vol. 1, sect. 200) still keeps up this claim—states that the attitude of the British Government in the *Moray Firth* case would seem to demonstrate that this claim is no longer upheld. The author is there referring to the fact that after the decision in *Mortensen v. Peters* (8 S. C., p. 93), Parliament passed the Trawling in Prohibited Areas Prevention Act 1909 (9 Edw. 7, c. 8).

In the present case the Attorney-General has put forward no claim on behalf of the Crown, to the territorial character of the British Channel by reason of its being within the King's Chambers, and his statement to the court, to which I will refer later, expressly negatives such a claim. In these circumstances, the fact that the Bristol Channel is within the limits of the King's Chambers cannot, in my opinion, be relied upon as proving that it is within the territorial jurisdiction of the High Court.

The next matter for consideration is whether *Cunningham's* case (*Reg. v. Cunningham, sup.*), upon which the learned judge in the court below based his decision, covers the present case. For the reasons stated by Bankes, L.J., with which I agree, I do not think that it does. That case was concerned with a different locality, and evidence was adduced there which satisfied the court that the place where the offence was committed was within the parish and port of Cardiff, and therefore within the body of the County of Glamorgan. It was not necessary to decide and, in my opinion, the court did not purport to decide that the Bristol Channel at the spot where the collision occurred in the present case, was part of the territory of England. Therefore even if the present case had been left where it was in the court below, I should have felt great hesitation in agreeing with the conclusion reached by the learned judge. But the matter does not rest there. It is the duty of the court to take judicial cognisance of the extent of the King's territory and, if the court itself is unacquainted with the fact whether a particular place is or is not within the King's territory, the court is entitled to inform itself of that fact by making such inquiry as it considers proper.

As it is highly expedient, if not essential, that in a matter of this kind the courts of the King should act in unison with the Government

of the King (see *Foster v. Globe Venture Syndicate Limited*, 82 L. T. Rep. 253; (1900) 1 Ch. 811), this court invited the Attorney-General to attend at the hearing of the appeal, and at the conclusion of the arguments asked him whether the Crown claimed that the spot where the collision occurred was within the territory of the King. The Attorney-General, in answer to this inquiry, stated that he had communicated with the Secretary of State for Home Affairs, who had instructed him to inform the court that "the spot where this collision is alleged to have occurred is not within the limits to which the territorial sovereignty of His Majesty extends."

In view of this answer, given with the authority of the Home Secretary upon a matter which is peculiarly within the cognisance of the Home Office, this court could not, in my opinion, properly do otherwise than hold that the alleged tort was not committed within the jurisdiction of the High Court.

In the result, therefore, I am of opinion that the appeal succeeds, and that the order for service of notice of the writ on the defendants in Italy must be discharged with costs here and below.

Appeal allowed.

Solicitors: *Godfrey, Warr, and Co.*, agents for *Batesons and Co.*, Liverpool; *Stokes and Stokes*; *Treasury Solicitor*.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

June 27, 28, 29, and July 1, 1927.

(Before BATESON, J.)

FIREMEN'S FUND INSURANCE COMPANY v. WESTERN AUSTRALIAN INSURANCE COMPANY LIMITED AND ATLANTIC INSURANCE COMPANY LIMITED. (a)

Insurance (Marine)—Re-insurance—"To pay as paid thereon"—"Seaworthiness admitted" clause in the policy of re-insurance but not in original policy—Re-insurers liable only to extent of original insurers—Marine Insurance Act 1906 (6 Edw. 7, c. 41), s. 39, sub-s. 4.

A contract of re-insurance is a contract to indemnify the original insurer against losses suffered by him; not against gifts made by him. There must not only be a payment but also a liability to pay under the original policy. An insurer cannot waive a defence without the consent of his re-insurer if by so waiving he extends the liabilities of the re-insurer.

ACTION tried before Bateson, J. (sitting as an additional judge of the King's Bench Division) without a jury.

The plaintiffs were the insurers of 300 cases of gunpowder shipped in the wooden steamship

(a) Reported by R. A. YULE, Esq., Barrister-at-Law.

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Hyannis from New York to La Plata. Besides the gunpowder the ship carried a large quantity of high explosive and a large number of drums of sulphuric acid. The drums of acid were badly stowed and loaded and were leaky. Bad weather was encountered on the voyage with the result that several drums of acid burst and the acid spreading over the ship corroded the woodwork and disabled the pumps and other machinery. The ship put into Barbados in distress. The harbour-master refused to allow her into port with the explosives on board. The gunpowder was jettisoned. After repair the ship was enabled to return to New York, where she was sold for \$900 only. The original policy and the policies of re-insurance included perils of the sea and jettison, but only the policies of re-insurance were endorsed "seaworthiness admitted" and "to pay as paid thereon." The owners of the gunpowder made a claim against the plaintiffs, which they paid on the 13th Oct. 1921 without raising any objections or making a proper inquiry into the cause of the loss. The plaintiffs now sought to recover from the re-insurers, the defendants. The plaintiffs contended that even supposing that the cargo of sulphuric acid in leaky drums rendered the vessel unseaworthy at the commencement of the voyage, then the words "seaworthiness admitted" amounted to estoppel by agreement and the defendants could not rely on the defence of unseaworthiness. They also contended that if they, as original insurers, honestly paid a claim even though further discovery of the facts would have disclosed a good defence, the words "to pay as paid thereon" in the policies of re-insurance was a promise to indemnify them. They also alleged that they were not bound to take the defence of unseaworthiness against the owner of an innocent cargo. The defendants contended that the ship was unseaworthy and since the plaintiffs under the original policy were entitled to avoid the policy on this account, they, the re-insurers, were not liable for any loss for which the plaintiffs were not liable. A contract of re-insurance being a contract of indemnity, the re-insurer's liability was commensurate only with the original insurer's liability towards the assured. The defendants further pleaded that the action of the harbour-master was covered by the restraint of princes, &c., clause.

Dunlop, K.C. and Simey for the plaintiffs.

Porter, K.C. and David Davies for the defendants.

Cur. adv. vult.

July 1.—His Lordship delivered the following written judgment :

BATESON, J.—In this case my judgment is for the defendants. It is a claim by an original underwriter, the plaintiffs, against re-insurers the defendants, for reimbursement of a claim paid by them, the original underwriters, to their assured. Before the plaintiffs can succeed there must be a liability on the original policy for payment. Here there is no liability

because the ship was unseaworthy. The original policy is dated the 25th April 1916, and is renewable apparently from year to year. It is an open cover, being an American policy, not the same as ours apparently, and is renewable, as I have said, from year to year. That original policy is a policy on goods to cover full interest in all shipments, to attach and cover on all goods at the risk of the assured on and after the 29th April 1916, intended for shipment by steamer or steamers sailing on and after this date. That policy contained clauses which have been referred to : "Warranted by the assured free from loss or expense arising from capture, seizure, restraint, detention or destruction or the consequences of any attempt thereat, whether lawful or unlawful and whether by the act of any belligerent nations or by Governments of seceding or revolting states," and so on. There is another clause in the policy : "Warranted by the assured if loaded with grain, petroleum and heavy cargoes to be loaded under the inspection of the surveyor appointed or approved by this company for that purpose." That clause was referred to, but nothing turns on it because any point on it was given up. It is a policy against loss by perils of the sea or jettison and all other like perils, but there is no "seaworthiness admitted" clause in it. The policy sued on is a policy by the Western Australian Insurance Company Limited dated the 19th Nov. 1920, expressed to be on goods, lost or not lost, at and from any port or ports, place or places, on the Atlantic seaboard of the United States of America to La Plata per the steamship *Hyannis* on gunpowder valued as per original policy or policies F.P.A. unless the vessel, craft or lighter be stranded, sunk, burned or in collision as per original policy or policies. It is also against loss by perils of the sea, jettison, restraints and detentions of all kings and princes and people. The clause added to that is : "Warranted free of capture, seizure, arrest, restraint or detainment and the consequences thereof or of any attempt thereat (piracy excepted) and also from all consequences of hostilities or warlike operations whether before or after declaration of war." Then attached to it there are the Institute Cargo Clauses : "Warranted free of capture, seizure, arrest, restraint or detainment and the consequences thereof, or of any attempt thereat," and by clause 8 of the Institute Cargo Clauses : "The seaworthiness of the vessel as between the assured and the assurers is hereby admitted." There is a further clause attached : "Being a re-insurance subject to the same terms conditions, clauses and warranties as the original policy or policies account F. H. and C. R. Osborn and (or) as agents and (or) as managers whether re-insurance or otherwise, and to pay as may be paid thereon." So that it is quite clear that that is a re-insurance policy covering the original insurers against their liabilities. It is also clear that on the original policy if the owner of goods lost the goods the original underwriter could avoid payment if in fact the ship was unseaworthy.

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The history of the case is this. On the 9th March 1920 the *Hyannis*, a wooden screw steamer of 2556 tons gross began loading sulphuric acid in drums from several different shippers in New York. She was a vessel with two holds and the acid was stored in drums in lighters from the ceiling up to the 'tween deck beams. The vessel had no 'tween deck. There were, I think, three tiers of these drums. They were large drums, the smallest of them weighing 15cwt. Some of the drums were noticed to be defective at the time of loading and some were rejected. Those that were noticed as being defective were rejected. Probably, I think, some drums were loaded which were in fact defective, though perhaps not noticed. Now sulphuric acid is a very dangerous cargo. It absorbs moisture, and if it does or if it gets mixed with water, it is highly corrosive and eats up metal and chars wood and generates heat. It should be stowed on deck or put under deck in an absorbent material like small coal. It was in fact only stowed with some wood dunnage in what seems to me quite an insufficient amount. The drums were mostly standing on their ends, though the top tier was on its side and not adequately secured from rolling about. The subsequent state in which the cargo was found at Barbados, where she had to put in, shows that either the drums collapsed through weakness to withstand the superincumbent weight or through being corroded through from the inside, the acid in the drums eating its way through the metal and so becoming weakened and also allowing acid to escape. At any rate, the acid did escape and corroded away the essential portions of the ship like the pumps and the main injections and did damage to the machinery or boilers to such an extent that the ship was unable to perform her voyage. The stowage was certainly insufficient, and that, or some of these causes that I have mentioned, produced the escape of acid which so affected the ship that she could not perform her voyage. On the 11th March she went to Gravesend, New York, anchored and took in some eighteen tons of explosives for different shippers. These explosives were stowed on a wooden platform on the top of the drum in the forward hold in the way of No. 4 hatch although only in two holds. It was boxed in by wooden bulkheads.

The particular cargo in question in this action consisted of 300 cases of gunpowder of about 13,500lb., over 3 tons, and shipped by John Dunn, Sons, and Co., and consigned to La Plata. On the 13th March the vessel sailed for Rio for bunkers. She started with 637 tons of bunkers, 452 tons under deck, and 185 tons on deck. It was suggested at one time, I think, that the vessel started with insufficient coal, but that point was given up. On the first night out from New York they encountered some bad weather, but it was only such ordinary weather as could be expected at that time of year and in that locality. It was nothing which a properly loaded ship ought not to have withstood. The sea was somewhat heavy, she

rolled, no doubt, badly and her coal on deck was washed overboard. It was not clear from the evidence whether the coal was stowed on deck with any protection against going over the side, as it was not proved whether the ship had a solid bulwark or only a rail. It rather looks from the fact that it all went over as if she had not a solid bulwark and any rolling of the ship would carry the coal overboard. Some of the drums shifted in that bad weather, not very many, according to the evidence, but some appear to have been broken and it was discovered that the drums were leaking. Further the fore bulkhead of the box in which the explosives were stowed gave way. On the 14th March the acid was found leaking in the tunnel. On the 17th March it was found that the pumps were disabled. The pumps became disabled one after the other because the acid had eaten away the material parts: it destroyed the oakum in the seams and the ship began to leak and the water rose steadily. The master was therefore obliged to put in to Barbados, and arrived in Bridgetown, Carlisle Bay, on the 26th March. Bridgetown has an inner harbour—I think part of it is called the Carenage—and an inner basin or dock further in. It is situated in Carlisle Bay, which is a large bay outside the inner harbour. On the 27th March there was a survey of the pumps. They were found so defective that they had to be replaced. New pumps, however, were not obtainable at Bridgetown, and on the 1st April there was a survey of the ship and cargo, and it was found she could not proceed without repair. The surveyors recommended the gunpowder to be discharged, but the authorities would not allow it in the harbour, and they ordered her out of the harbour because she was in a sinking and dangerous condition, and she went out to a place near Pelican Island, which is in Carlisle Bay. She did not go out as far as the harbour-master thought she ought to go out for safety, and on the 2nd April she was ordered to shift further out, but her position was such that she could not get up steam to do so. Then the harbour-master wrote a letter saying: "In view of the present condition of your ship the large amount of explosives that there is on board, and the consequent very great danger to this town and its suburbs, I hereby desire that you will, without loss of time, jettison all the gunpowder and also the detonators." I think that means you have got to jettison all your explosives. I do not think he was using "gunpowder" in that letter as merely a cargo which was technically known as gunpowder because the explosive consisted of various kinds of powder and explosives, and I think he meant to refer to the whole amount. But there was dynamite on board, and there was some question whether dynamite would float or not, and it was not until some days afterwards that the master, not knowing whether he might or might not discharge the dynamite, got from the harbour-master a letter saying: "In compliance with your request to be allowed to jettison

the dynamite now on board your ship, permission is hereby granted you to do so, but only on condition that the dynamite is taken out of the wooden cases, carried not less than three ships' lengths to the westward of your ship, and dropped quietly into the sea." The jettison of the gunpowder was done on the 3rd and 4th April. The jettison of the dynamite was done on the 6th and 7th, and I think that what happened at Bridgetown was this, that the authorities of the harbour restrained the master from coming in with explosives in such a shape, or at any rate, staying there, unless he got rid of it, and apparently refused to allow it to be put into hulk. But for that, of course, it could have been discharged. The vessel might in the early period have been repaired and certainly gone to another port. There might have been time perhaps to save the damage to the ship, so increasing as to make it impossible to continue her voyage, but there was considerable delay. The shipowners did not provide the master with funds as rapidly as they might have done, and it was not for some considerable time after she was in these difficulties that any money was sent at all. The direct cause of throwing the goods overboard as the captain did was the order of the harbour-master, which left the captain no other course open to him if he wanted to do any repairs at all. On the 23rd April the vessel was patched up sufficiently to go on to Martinique. There was no dock that would take her at Bridgetown, but having got rid of her dangerous cargo of explosives they were able to do some repair to the corroded portions of the ship sufficiently to allow her to proceed. She proceeded on, I think it was, either that day or early the next morning, having got a certificate of seaworthiness to go to Martinique, where she arrived on the 24th April and there discharged the cargo of acid and was more or less repaired further, and went on to Key West eventually. She was ordered to go to dry dock on the 30th June. She did not arrive at Key West until the 18th Nov.; whether there or elsewhere, I do not know, but eventually she was in such a state that she was sold and only fetched \$900. That being so, the assured made a claim upon the original underwriters for his loss, relying on apparently the protest that had been made at Martinique on the 28th May 1920.

That protest showed that he "sustained damage to ship, cargo and machinery through bad weather and was compelled to put into Barbados in distress on the 26th March. Repairs were there made as far as possible to pumps and machinery but the dry dock there not being large enough to take the *Hyannis*, I decided to bring her to Martinique. New pumps were ordered from New York and now on their way here. The fastenings of the injection valve and seacock having been loosened by the action of the acid, I had two copper plates put over them outside by divers." That was done in Bridgetown. "The explosives, gunpowder, dynamite and detonators

were jettisoned by order of the harbour-master at Barbados before he would allow the ship to come sufficiently close in to allow the divers to do this work. I then proceeded to Martinique and I now declare the steamship *Hyannis* to be under general average from the 26th March 1920 until these matters shall be finally settled by all parties concerned." That is a very ingenuous protest as to the real facts of the case. It does not indicate very much what happened. The way it was put forward to the Firemen's Fund Insurance Company, who are the plaintiffs in this case, the original underwriters, on the 8th June 1921, is this, Messrs. Wilcox, Peck, and Hughes writing to the Firemen's Fund Insurance Company on that date say: With further reference to the above claim, we now hand you copy of the extended protest which we have just received from your assured. The original insurance certificate and negotiable copy of bill of lading were handed you under cover of the 30th March and as all the necessary documents in connection with this claim are now in your possession, we trust that your cheque in settlement will be forthcoming in the very near future." So that apparently all that was sent was the insurance certificate, copy of bill of lading and the protest in order to put forward a claim. The underwriters say in answer to that on the 22nd Aug. 1921—this is another letter in the course of the correspondence—"Referring to previous correspondence in this case, please note we are now prepared to deal with this claim, but we will settle same in the form of a loan as it is not impossible there may be some liability on the part of carriers. As advised you in our telephone conversation, we have only received a duplicate bill of lading, and we understand that you will take up with the assured the question of securing the two remaining negotiable bills of lading." Then on the 13th Oct. they write: "We are enclosing herewith subrogation, also indemnity for the missing full set of negotiable bills of lading which the assured are requested to sign and return to us as promptly as possible. Our cheque in settlement of this claim was handed Mr. Wallen of your office this morning and was for \$6558.08 in settlement of various other claims for the above assured." So that it seems as if the Firemen's Fund Insurance Company, the plaintiffs in this case, having got very little material or very little information as to what really had happened, paid this claim either without knowing or without caring to find out about the real unseaworthiness of the vessel when they were not in fact liable for it. They were re-insured, and they did not apparently—I say "apparently" because the letters may not contain all the facts—bother their heads to investigate the claim. It may be that being underwriters of a small portion of the cargo they thought they would pay claims and not take any point of unseaworthiness. It is suggested that underwriters very often do that. It may be again that they thought that they would pay and subrogate

the rights of the assured who would recover from the shipper. At any rate, they did pay when I think clearly they were under no liability to pay. They then put forward their claim against the re-insurers. The first letter to the re-insurers—no doubt there were telephone conversations before—being on the 23rd Aug. 1922. The re-insurers rather wanted to know more about it than the original insurers. They insisted upon an investigation. Eventually they got discovery of the ship's papers, which entailed apparently considerable delay, and then discovered the real facts. Now that being so, the plaintiffs—I call them all through the original underwriters—brought their action in this country against the defendants, the re-insurers, the statement of claim being dated the 15th Nov. 1923, alleging a loss by jettison or perils of the sea. The defendants by their original defence on the 4th Dec. 1923 set up that the goods were not lost by any peril insured against by the original policy and some small point on the question of exchange, but then after that, getting more information and getting discovery, they added on the 8th March 1927 further pleas, namely, that at the commencement of the risk the *Hyannis* was unseaworthy, and they set out in their particulars why. I have already said what the facts were.

The particulars are in accordance with what I have stated, and as Mr. Dunlop said, in substance those particulars are accurate. He took some exception, I think, to the statement that the drums of sulphuric acid were leaking when shipped. I think some of them probably were, and he also took exception to the statement that the planking enclosing the box containing the sulphuric acid was inadequately secured. I think both those points should be found in favour of the defendants because I think the facts show that the explosives were not as well secured as they ought to be, seeing how the box in which they were contained, the forward bulkhead, gave way in ordinary weather. They also took the further point that the loss was not a loss by perils of the sea but was a loss by restraint, detention or destruction in the terms of the clause in the original policy, and they said that under the circumstances there was no liability under the original policy. That, I think, is the real defence in this case.

Those being the facts I have no doubt that the ship was so loaded and stowed with such a cargo as to affect her as a ship, and she was unfit to perform the voyage when the cargo in question was put on board of her. So far as the stowage was bad, it endangered the safety of the ship. So far as the cargo shipped was unfit for carriage, that is the acid, it also endangered the ship, and as I understand the law, if the stowage is such as to endanger the safety of the ship as a ship, the vessel is unseaworthy. *Elder, Dempster, and Co. Limited v. Paterson Zochonis and Co. Limited* (16 Asp. Mar. Law Cas. 351; 131 L. T. Rep. 449; (1924) A. C. 522); *Ingram and Royle Limited v.*

Services Maritimes du Treport (12 Asp. Mar. Law Cas. 493; 108 L. T. Rep. 304; (1913) 1 K. B. 538) are really not very much more than decisions following the old case of *Kopitoff v. Wilson and others* (1876, 3 Asp. Mar. Law Cas. 163; 34 L. T. Rep. 677; 1 Q. B. Div. 377), and the facts of this case bring the case within those decisions. I think a wooden ship loaded with sulphuric acid which can escape and destroy metal pumps, her injections and other parts of the machinery and destroy the oakum in the seams so that she cannot perform her voyage in ordinary weather, is unseaworthy. Mr. Simey, and I think Mr. Dunlop also, contended that bad stowage causing unseaworthiness is limited to overloading or loading the ship so as to be unstable by the cargo belonging to the assured, and they said it had never yet been extended to one parcel of innocent cargo where the ship was made unseaworthy by another portion of the cargo of a different owner. I can find no authority for this. I do not think they can. I think the principle stated in the cases is all against it, as well as the Insurance Act, s. 39. Mr. Dunlop, for the original insurer, made this point, that it was bad stowage and not unseaworthiness. I cannot agree. He then contended that clause 8 in the Institute Cargo Clauses, which, broadly stated, is a clause saying seaworthiness admitted, makes it impossible for the insurers to take the point that the ship was unseaworthy. He called it estoppel or an admission of a fact. I think the answer to that is this, that the re-insurance policy is a policy covering the liability of the original insurer, the original underwriter. If there is no liability on the original underwriter, then there cannot be any liability on the re-insurer. He further said that if he could not take this point, still the clause "to pay as may be paid thereon," made the re-insurer liable because in fact the original underwriter had paid and therefore the re-insurer was bound to pay, and he said the original underwriter could waive his right to say the ship was unseaworthy and pay, if he did so honestly and *bonâ fide*. I think the best answer to the waiver point is this, that so far as the evidence goes he never did waive that point. He does not seem to have known or cared whether the ship was seaworthy or not, and I do not think he could waive a point extending his own liability without the consent of the re-insurer. Further, it is said if the assured can prove a *prima facie* case, that is all that is necessary, as the original insurer is not bound to defend, if he pays honestly, he can recover over. He cited no authority for that, except possibly a Canadian case, which I will deal with in a moment, and certainly does not seem to be sound on any principle. Then it was said that it had never been decided that an original underwriter is bound to raise any defence for the benefit of the re-insurer. Again, there is an absence of any authority in support of that, and the absence of authority suggests to me that no one has ever taken such a point before.

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Then he said that it was contrary to respectable business, that a respectable underwriter did not take these sort of points against an innocent owner of a small parcel of cargo.

I am afraid that that is a matter with which I have nothing to do. Further he contended that it was not restraint, that it did not come under the clause as to restraint of princes. Mr. Porter's argument, which I adopt, was this, the ship was in fact unseaworthy. That I have found. He referred to *Ingram and Royle Limited v. Services Maritimes du Treport (sup.)*, where the remarks of Mr. Justice Scrutton might almost be read as the observations on the facts in this case. "There is no ground for cutting down the meaning of the words in a policy; 'seaworthiness' is the same whether it is in a policy or a contract of carriage." He referred to a passage in Lord Sumner's judgment in the case of *Becker, Gray and Co. v. London Assurance Corporation* (14 Asp. Mar. Law Cas. 156; 117 L. T. Rep. 609; (1918) A. C. 101). "Again it is important that the same word should mean the same thing when used in a mercantile contract, whether that contract be of one description or another. Perils of the seas do not mean one thing in a bill of lading and something else in a policy, restraints of princes do not bear a different interpretation in the one or in the other." I think one might quite fairly go on to say that seaworthiness does not mean anything different in the one case or in the other. As I understand it, a contract of re-insurance is a contract to indemnify against a liability and a payment. There must be both liability and payment, and the precise liability must be covered in each case. Clause 8, "seaworthiness admitted," does not prevent the re-insurer saying that the original underwriter suffered no loss for which he could be made responsible, he had a complete defence against the assured, the defence of unseaworthiness, and there is no necessity to plead unseaworthiness in this case. The original underwriter was not liable at all, and, if he was not liable, there is nothing for which he can claim over. The contract for re-insurance is on goods limited to the liability of the original underwriter. The re-insurer's liability is limited to the original insurer's liability under the original policy. It is only a different way of saying the same thing. Another way of putting it is to say that the contract of re-insurance properly understood is a contract to indemnify against losses which the original underwriter has suffered but not against gifts. This was a voluntary payment, so far as the original underwriter is concerned, and he did not insure himself for gifts that he might choose to make to his assured. The contract is expressed to be a re-insurance on the same terms as the original policy, to indemnify against liability for goods lost, not an insurance of the goods. The re-insurer says to the original underwriter: You have no liability, you have no loss, you have no interest. The Institute Clause as to unseaworthiness only applies if

and when the original policy contains it and if and when the original underwriter is liable for unseaworthiness. That is put in *ex majore cautela*, in case there is such a clause in the original policy. That that reasoning is sound seems clear from the decisions which were cited: *Marten v. Steamship Owners' Underwriting Association Limited* (1902, 9 Asp. Mar. Law Cas. 339; 87 L. T. Rep. 208), was a case where there was a partial loss on the policy in fact; the re-insurance was against total loss only, and it was held that the original underwriter, although he had paid over the partial loss, could recover nothing. Similarly in the *British Dominions General Insurance Company Limited v. Duder* (13 Asp. Mar. Law Cas. 84; 113 L. T. Rep. 210; (1915) 2 K. B. 394) the original underwriter only paid 66 per cent. of the loss. He made a good settlement. He sought to recover 100 per cent. against the re-insurer. It was held that he could only recover 66 per cent., that is to say, it was an indemnity against liability to the amount which he had in fact paid and no more: (See also *St. Paul Fire and Marine Insurance Company v. Morice*, 1906, 11 Com. Cas. 164). Moreover the clause "to pay as may be paid thereon" means as legally paid, though no doubt the settlement of the amount of the liability cannot be questioned: *Chippendale v. Holt* (1895, 8 Asp. Mar. Law Cas. 78; 73 L. T. Rep. 472), where Mathew, J., as he then was, pointed out that there must be a liability proved or admitted. Bingham, J., in *Marten v. Steamship Owners' Underwriting Association Limited (sup.)*, spoke of it as money which the original underwriter was compellable to pay. Kennedy, J., in *St. Paul Fire and Marine Insurance Company v. Morice (sup.)*, spoke of it, "provided he is legally liable." I think it is too late to question these decisions now, at any rate in this court. Reading the two clauses together, I think they mean this: If you are liable I will indemnify you, if you have to pay on unseaworthiness under this policy I will have to pay too. Mr. Simey says this gives no meaning to clause 8. It may be that it is like many other clauses in the policy which have no application, but if the parties wish to say that the re-insurer was liable for voluntary payments, it would be quite easy to say so, and indeed the clause has a value if a similar clause in the original policy had existed and it is put in to ensure that such a claim will be covered if they are covered by the original policy. I think I have dealt in the course of what I have said with Mr. Dunlop's points. A good many of his observations may be answered by this, that the original underwriter may pay, and very often does pay, in cases where a small parcel of goods has been lost, but he has a right then over against the carrier. It is unfortunate in this case that both the ship and the owners, the carriers, turned out to be practically worthless, but that is no reason for saddling the re-insurer with this misfortune. He did refer to a Canadian case, the *Fire Insurance and the Dominions Fire and Marine*

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Company v. Canada Fire and Marine Insurance Company in the High Court of Ontario (2 Ont. Rep., 481), which was decided in 1882-3, but that seems to be a totally different case. It seems that there was a clear liability on the original underwriter and the so-called waiver of a trivial matter took place before the re-insurance policy was taken out. I do not think it has any application to this case at all. Now that deals with the only matter that it is really necessary for me to decide. The second point as to restraint of princes, putting it in a short form, I need not decide. Mr. Porter rather pressed me to do so. I am sorry not to oblige him, but on the whole I think it is wiser not to encumber the reporters in the case or to embarrass other litigants by dicta which I ought not to pronounce.

The result is that the defendants succeed, and that disposes of the whole claim.

Solicitors for the plaintiffs, *William A. Crump and Son*.

Solicitors for the defendants, *Parker, Garrett, and Co*.

Tuesday, Nov. 22, 1927.

(Before SCRUTTON and SARGANT, L.JJ., sitting as additional judges of the King's Bench Division.

HUMBER CONSERVANCY BOARD v. FEDERATED COAL AND SHIPPING COMPANY LIMITED. (a)

Pilotage—Compulsory pilotage district—Signal for orders by vessel at sea to Lloyd's station—Claim for pilotage dues—No use of pilot boat—"Ship . . . making use of any port in the district"—Port defined by statute as including "place"—Meaning of "place"—Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 742—Pilotage Act 1913 (2 & 3 Geo. 5, c. 31), s. 11, sub-s. 1, and s. 62.

By sect. 742 of the Merchant Shipping Act 1894, "port" is defined as including "place," and by sect. 62 of the Pilotage Act 1913, that Act is to be read as one with the Merchant Shipping Act 1894. By sect. 11, sub-sect. 1, of the Pilotage Act 1913: "Every ship . . . while navigating in a pilotage district in which pilotage is compulsory for entering, leaving, or making use of any port in the district," shall be under the pilotage of a licensed pilot of the district, or under the pilotage of a master or mate possessing a pilotage certificate for the district.

"Place" in the above section is to be construed ejusdem generis with port, and therefore a vessel at sea receiving orders from a signal station at a place which has none of the characteristics of a port is not liable for pilotage dues.

Quære, whether the receiving of information by signals or wireless from a port amounts to "making use of a port" within sect. 11, sub-sect. 1, of the Pilotage Act 1913.

Observations on claims for declarations in County Courts.

APPEAL from Kingston-upon-Hull County Court.

The plaintiffs claimed from the defendants, who were the owners of a ship named the *Maud Llewellyn*, 3l. 10s. as pilotage dues and also a declaration that the plaintiffs were in the circumstances entitled to claim pilotage dues. On the 22nd April 1926 the *Maud Llewellyn*, which was on a voyage from Morocco to the north-east coast of Great Britain, approached Spurn Point, Yorkshire, which was within the plaintiffs' compulsory pilotage district, and signalled to Lloyd's station there for orders to what port she should proceed. The ship, which was then a mile and a half out at sea, proceeded on her voyage without going into the Humber, and without using a pilot, nor did she pay any attention to the plaintiffs' pilot boat. The plaintiffs contended that the vessel was liable for pilotage dues, inasmuch as she had communicated with a station within a compulsory pilotage district. The defendants contended that they did know that the vessel was in a compulsory pilotage district, and that Spurn Point was not a "port." The County Court judge held that Spurn Point was a "port" within the meaning of sect. 742 of the Merchant Shipping Act 1894, and that, as the plaintiffs' pilot boat was flying her burgee and thereby offering her services, the defendants, once they came within the compulsory pilotage district, had made use of the port within the meaning of sect. 11, sub-sect. 1, of the Pilotage Act 1913. He gave judgment for the plaintiffs.

The defendants appealed.

A. T. Miller, K.C. and W. H. Owen for the appellants.—The County Court judge was wrong in holding that the plaintiffs were entitled to pilotage dues. The plaintiffs' contention was that any vessel communicating with a signal station in a compulsory pilotage district came within sect. 11, sub-sect. 1, of the Pilotage Act 1913. There could be no question of liability but for the fact that the vessel signalled to the station, for a vessel merely passing would not be liable. It is submitted Spurn Point was not a port, and did not come within the definition clause of the Merchant Shipping Act as a "place." Every port is, of course, a "place," but every place is not a port. To render a place a "port," there must be some maritime facilities and activities, and Spurn Point had none. Further, a ship navigating in a compulsory pilotage district is obliged to take a pilot who offers his services, only if she is in the district for the purpose of making use of a port. Here the vessel was not in the area for that purpose. [He was stopped.]

R. H. Balloch for the respondents.—It is not contended that the vessel was in the

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compulsory pilotage district for the purpose of making use of a port. The respondents' case is, therefore, based on the definition section in the Merchant Shipping Act, and it is submitted that the vessel was in the district for the purpose of using a "place" in the district. She used the "place" by receiving orders from it by signal. One of the facilities of a port is the use of a signal station, and a place supplying such a facility required by ships, although not a port, is a "place" within the meaning of the Act.

SCRUTTON, L.J.—This case raises a short point with reference to a claim for pilotage dues at the mouth of the River Humber. A British steamship, the *Maud Llewellyn*, was chartered to call at some port on the north-east coast, with a provision that she should call at Spurn Point for orders, Spurn Point being a well-known signalling station at the mouth of the river Humber. She directed her course to Spurn Point and arrived within the compulsory pilotage district of the Humber Conservancy Board. It does not appear whether she showed her flags and the signalling station gave her information or whether she asked the signalling station for orders. But in some way the information that she was to proceed to Methil, a port on the Scottish coast, was communicated to her and she proceeded without stopping.

Thereupon a claim was made upon her owners by the Humber Conservancy Board for pilotage dues. Whether they are liable depends upon the meaning to be attached to sect. 11 of the Pilotage Act 1913. [The learned Lord Justice read the section, and continued:] The first question, therefore, is: Was the *Maud Llewellyn* in doing what she did, "entering, leaving, or making use of any port in the district"? She certainly was not doing anything in relation to any of the recognised ports of Hull, Grimsby, or Immingham in the Humber Conservancy district. What is said is that she was getting information by signal from Spurn Point, and counsel for the respondents very properly, considering his extensive commercial knowledge, has shrunk from saying that Spurn Point is a port.

But it is said that the Merchant Shipping Act 1894 is incorporated with the Pilotage Act 1913 and that if we turn to the definition clause of the Merchant Shipping Act 1894 we find that, unless the context requires otherwise, "port" includes "place." Spurn Point appears to be a very good place for a rest cure; it is at the extreme end of a spit of sand with no road to it, with a trolley line to it, with four inhabitants, a Lloyd's signalling station and a lighthouse, and it appears to have been successfully argued that, whatever else it is, it is a "place," and that, as "port" includes "place" according to the definition, the *Maud Llewellyn* was making use of a "place," which is the same as "port," when she received signals from it. In my view, that is putting much too wide a meaning on the word "place."

The word "place" following "port" must, in my opinion, be interpreted as *ejusdem generis* with "port" as a locality having some or many of the characteristics of a port, though by reason of the absence of charter or for other reasons it would not be spoken of as a port. I am quite clear that Spurn Point is not a port. I am equally clear that it is not *ejusdem generis* with a port. That being so, the whole foundation of the claim for pilotage dues goes because unless there is first a port, which is to be either entered, left, or made use of, there can be no claim for pilotage dues.

It is therefore not necessary to consider, and we have not heard argument on the question, whether to receive information by signals from a signalling station or lighthouse or to give information by signals or wireless from a signalling station or lighthouse, amounts to making use of a port. There is a decision of Bailhache, J. with regard to Dover—*Connell and the Corporation of Trinity House v. Lawther, Latta, and Co. and another* (12 Asp. Mar. Law Cas. 578; 112 L. T. Rep. 84; (1914) 3 K. B. 1135)—concerning which I only want to say this, that I should desire liberty to consider it, should that case ever come before me sitting in any court in which I could effectively deal with it; I must not be considered as taking a view, at first sight, that that case is right. But it becomes unnecessary to consider it in view of my finding that Spurn Point is neither a port nor a place akin to a port.

I only wish to say this further. For some unexplained reason the plaintiffs began their claim in this case by claiming a declaration, and they followed it by a claim for 3*l.* 10*s.*

We have said several times when we have been sitting as a Divisional Court, that far too much use is being made of declarations in the County Court. I need only refer to two recent cases, one the case of *Smith v. Smith* (133 L. T. Rep. 345; (1925) 2 K. B. 144), and the other a case in the Court of Appeal of *Rex v. Cheshire County Court Judge and United Society of Boilermakers; Ex parte Malone* (125 L. T. Rep. 588; (1921) 2 K. B. 694), where some very relevant remarks of Lord Sterndale, M.R. will be found.

Declarations are only to be asked for as ancillary to money claims. In what sense the declaration asked for in this case is ancillary to a claim for 3*l.* 10*s.* I have been quite unable to understand. It is claimed as one of the facts; it is asked that the learned judge shall declare that it is one of the facts which would be necessary to make a claim for 3*l.* 10*s.* But one might as well put in a claim for a declaration that he should give judgment for 50*l.* or 100*l.* The idea of declarations seems to obsess some litigants, and they seem to ask for declarations in and out of season without thinking for what they want declarations. In this case the declaration is asked for the fact which would be necessary to establish a claim for 3*l.* 10*s.*, and I hope that the very eminent practitioners who have asked for it in this

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case will not ask for unnecessary declarations in future.

In my opinion this appeal should be allowed, and the usual consequences must follow.

SARGANT, L.J.—I agree. I notice that in the learned County Court judge's judgment he says this: "Counsel for the defendants contended that the reason why the definition 'Port' includes 'place'" appeared in the Merchant Shipping Act 1894, was that a 'place' could only be a 'port' strictly by charter—by authority of the Sovereign—and in order to get rid of this technical difficulty the word 'place' was inserted in the definition in the form 'port' includes 'place.'" I cannot accept counsel's argument."

It seems to me that that argument was essentially a sound argument and that the Merchant Shipping Act 1894 in adding to the word "port" the definition that "'port' includes 'place,'" was dealing with some difficulty such as that indicated in counsel's argument, and that "port" was to be deemed to include "place" because there were certain places which had all, or most, of the facilities and advantages of a port which might not be strictly within the definition of the word "port." It seems to me that it is straining the words to an entirely undue extent to say that in this compulsory pilotage Act, because of that extension in the Merchant Shipping Act, which is to be read as one with this Act, a place such as this Spurn Point, which has not one of the facilities of a port, can be held to be a port.

The only other observation I desire to make is this, that even in the case of *Connell and the Corporation of Trinity House v. Lawther, Latta, and Co. and another (sup.)*, there was something considerably more than the sending of a signal by sight. What happened was that a message was taken out to the ship from the port of Dover by a boat, and the facility of being able to communicate by boat was, no doubt, part of the facilities of the port of Dover.

Appeal allowed.

Solicitors for the appellants, *Botterell and Roche*, agents for *Vaughan and Roche*, Cardiff.

Solicitors for the respondents, *Pritchard and Sons*, agents for *A. M. Jackson and Co.*, Hull.

Nov. 22 and 23, 1927.

(Before ROWLATT, J.)

ENSIGN SHIPPING COMPANY v. COMMISSIONERS OF INLAND REVENUE. (a)

Revenue—Excess profits duty—Compensation—Sum received by shipowner for detention of ship—Whether profits of trade.

A sum paid by the Government to a shipowner as compensation for the detention of a ship during a strike in the coal industry is assessable to excess profits duty as part of the profits of the shipowner's business.

CASE stated under the Finance (No. 2) Act 1915, s. 45 (5), and the Taxes Management Act 1880, s. 59, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

At a meeting of the commissioners, held on the 9th Nov. 1926 for the purpose of hearing appeals, the Ensign Shipping Company Limited (hereinafter called the company) appealed against an additional assessment to excess profits duty in the sum of 646*l.* 16*s.* for the accounting period of twelve months ended the 31st Dec. 1920, made upon the company by the Commissioners of Inland Revenue under the provisions of the Finance (No. 2) Act 1915, Part III., and subsequent enactments. The sole question upon which the opinion of the court is desired is whether a sum of 1078*l.*, which was paid to the company in April 1924 in respect of the detention in the year 1920 of two of the company's ships under the circumstances hereinafter set out, constitutes a trade receipt of the year ending the 31st Dec. 1920.

The company, which was incorporated under the Companies Acts 1908 to 1917 on the 4th Dec. 1919, carry on business as shipowners at Newport, Monmouth.

In and prior to the year 1920 the company were the owners of (*inter alia*) two ships, namely, the *Charlus*, which was subsequently sold in Nov. 1921, and the *Webburn*, which was sold in March 1924.

In the month of Oct. 1920 a general strike in the coal industry was in progress. On the morning of the 15th Oct. 1920 the *Charlus* completed loading a cargo of 311 tons of steam coal at Llanelly, under a charter-party dated the 6th Oct. 1920, by which she was to proceed to Granville. At 10.45 a.m., when the *Charlus* was on the point of sailing, officers of His Majesty's Customs boarded the vessel and withdrew the clearance for Granville, which had been granted on the 14th Oct. 1920. In accordance with instructions then received by the company from the Ministry of Shipping, the crew were retained and steam kept up in order that the vessel might be ready to proceed to sea at short notice.

After repeated requests for release, the vessel was ultimately released and allowed to sail at 12.30 p.m. on the 30th Oct. 1920, having

(a) Reported by J. S. SCRIMGEOUR, Esq., Barrister-at-Law.

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been detained for fifteen days one and three-quarter hours.

On the 16th Dec. 1920 the company lodged a claim with the Ministry of Shipping for payment in respect of the detention of the *Charlus*, and a formal claim in respect thereof was subsequently lodged by them in the War Compensation Court for 697*l.* 0*s.* 6*d.*, made up as follows:—

1920.

15th Oct. (10.45 a.m.)

to

30th Oct. (12.30 p.m.)

	£	s.	d.
Loss of use of steamer	506	9	0
Bunkers consumed between dates named in keeping up steam, 10 tons at 8 <i>s.</i>	42	0	0
Wages of crew on board	148	11	6
	£697	0	6

On the 16th Oct. 1920 the *Webburn* completed loading a cargo of 970 tons of coal at Newport for carriage to Rouen under charter-party dated the 6th Oct. 1920. The company had applied for clearance on the 15th Oct. 1920, but this had been refused by H.M. Customs.

In accordance with instructions received by the company from the Ministry of Shipping and the Customs authorities, the crew were retained and fires kept banked in order that the vessel might be in readiness to proceed to sea at twelve hours' notice.

Repeated requests were made to the Ministry of Shipping and to His Majesty's Customs for permission, failing sanction to complete the voyage for which the vessel was chartered, to proceed with the cargo to a home port. Clearance was ultimately granted on the 4th Nov. 1920. During the whole period of detention, namely, from the 16th Oct. to the 4th Nov. (a period of nineteen days) the crew were kept on board and the fires banked in accordance with instructions.

On the 16th Dec. 1920 the company lodged a claim with the Ministry of Shipping for payment in respect of the detention of the *Webburn*, and a formal claim in respect thereof was subsequently lodged by them in the War Compensation Court for 1656*l.* 18*s.* 3*d.*, made up as follows:—

1920.

16th Oct. to 4th Nov.

	£	s.	d.
Loss of use of the ship between those dates	1338	15	0
Coal consumed in keeping fires banked—24 tons at 8 <i>1s.</i>	97	4	0
Wages of crew kept on board	220	19	3
	£1656	18	3

With a view to a settlement of the claims of the company and other shipowners who had lodged similar claims with the War Compensation Court, prolonged negotiations took place between Messrs. Botterell, Roche, and Temperley (who were acting for the company and the other shipowners) and the Board of Trade, and it was ultimately agreed in March 1924 that a sum of 66,241*l.* should be accepted in settlement of the claims of all the shipowners and time

charterers who had lodged cases before the War Compensation Court.

During the negotiations one of the chief points urged on behalf of the shipowners was that any sum received in respect of the claims of the shipowners should be exempt from excess profits duty, but it was made clear by the Board of Trade that the sums received in settlement of the claims would be subject to excess profits duty if such duty is payable by any claimant.

Of the total sum of 66,241*l.* paid in settlement of the claim of the shipowners the company's share in respect of the detention of the *Charlus* and *Webburn* was 1078*l.*, and this sum was paid to the company in April 1924.

The auditor of the accounts of the company was called as a witness, and stated:—

(a) He considered the said sum of 1078*l.* had been properly treated in the company's accounts as a capital receipt, being compensation for the temporary sterilisation of capital assets. (b) During the year ending the 31st Dec. 1920 all proper trading expenses, including bunkers, wages of crew and insurance, had been charged in the accounts. No rebate for insurance had been claimed in connection with the detention of the *Charlus* and *Webburn*, and an allowance for wear and tear had been claimed for the whole period. (c) He agreed that on ordinary commercial and accountancy principles sums received in respect of demurrage were treated as revenue receipts, and that demurrage was an ordinary incident of trade. He did not agree that compensation recovered for compulsory detention of a steamer was identical with demurrage paid under a contract, or that such compulsory detention was an ordinary incident of trade. (d) No claim was made by the charterers of the *Charlus* or *Webburn* against the company.

The additional assessment under appeal was made upon the company in respect of the said sum of 1078*l.* received by the company in April 1924 under the circumstances hereinbefore set forth.

It was contended on behalf of the company that—

(a) The said sum of 1078*l.* was not a profit arising from the company's trade or business, and was not assessable to excess profits duty.

Alternatively,

(b) If the said sum of 1078*l.* was a profit arising from the company's trade or business, the said profit did not arise in the accounting period ending the 31st Dec. 1920.

(c) The additional assessment under appeal should be discharged.

It was contended on behalf of the Commissioners of Inland Revenue (*inter alia*) that:—

(a) The said sum of 1078*l.* was a receipt arising from the company's trade or business in the accounting period ending the 31st Dec. 1920.

(b) That the assessment was correct and should be confirmed.

K.B. Div.]

ENSIGN SHIPPING CO. v. COMMISSIONERS OF INLAND REVENUE.

[K.B. Div.]

Having considered the evidence and arguments, the commissioners held that the sum which was paid to the company in April 1924 in respect of the detention of the ships *Webburn* and *Charlus*, namely, 1078*l.*, constituted a trade receipt of the year ending the 31st Dec. 1920 and confirmed the assessment under appeal.

Latter, K.C. and *R. Needham* for the appellant company.

Sir Thomas Inskip, K.C. (S.-G.) and *R. Hills* for the Crown.

Nov. 23, 1927.—*ROWLATT, J.*—In this case two ships were in port proposing to sail with cargoes of coal on board at the moment when the coal strike of 1920 was in progress, and, under powers possessed by the Government, those two ships were ordered not to sail, but to remain with fires banked and the crews on board ready to sail. They so remained for a certain time, and then the embargo was removed. Subsequently a sum of money was agreed to be paid by the Board of Trade to a number of shipowners, including those now in question, by way of compensation for interference with their business, those being, I think, the material words in the regulation governing the matter. The question is whether the appellants' share of that compensation money is to be treated as profits arising from their trade as shipowners for the purpose of excess profits duty. Now, it seems to me that this is not a case of compulsory user by the Government of these ships, so that the payment can be regarded as on the same footing as hire. That was really determined by my brother Wright in *Fenwick's* case (136 L. T. Rep. 358; (1927) 1 K. B. 458), which has been referred to, upon precisely identical facts. What happened was a mere order immobilising these ships, but not taking them into the service of the Government. Now it is, of course, well settled and quite clear that if there is an operation which produces income, it is none the less taxable because it is a compulsory operation. That, broadly speaking, is at the bottom of the *Newcastle* case (*Newcastle Breweries Limited v. Commissioners of Inland Revenue*, 137 L. T. Rep. 426), where a sale was a sale and the price had to be brought into the accounts, but it was in substance a sale, notwithstanding that it was compulsory. So in the *Sutherland* case (1918) 55 Sc. L. Rep. 674) the ships were used as ships by the Government and money was paid on account of that user, and that money was to be treated as the proceeds of the hiring of the ships, although the hiring was compulsory under a requisition. That is all quite clear. But this, as I have already said, cannot be treated as a case of compulsory hiring of these ships for the use of the Government, as my brother Wright decided. Really what took place was that the use of these ships was interrupted, and they lay idle.

On that the Solicitor-General contended first, that these payments were to be regarded in the

same way as payments for demurrage, strictly so called, or payment for damages for detention of a ship. Now I do not think the case can be put in that way. Of course, the ship was detained; I mean we all know that, but the money following from the detention was not, I think, on the same footing as damages for detention in the ordinary case of a shipping business. Now damages for detention, although they are not demurrage, but are damages for breach of contract really, arise out of the contract which is made in the course of the trade, so that the damages are received by a trader for non-delivery or non-acceptance, or whatever it may be; they are damages, of course, but they all arise out of a contract which is made in the course of the trade, and they are really on the same footing as the money received in *Short's* case (*Short Brothers v. Commissioners of Inland Revenue*, 136 L. T. Rep. 689), which was money received for the termination of the contract in lieu of its being received in the course of the fulfilment of the contract. It is on the same footing if damages are given by a trader, I should think. Therefore, I do not think this case can be put in that way. I think it must be faced here that this is a sum which has accrued, not in consequence of any arrangements made or steps taken, or policy pursued, or action done, or anything of the sort, by the person in the course of carrying on his trade, but is a sum which is due in consequence of an interruption. It is not a tortious interruption, it is lawful; but it is money which has become payable in view of the exercise of a paramount supervening right on the part of persons outside the trade, which is wholly independent of any steps taken by the person conducting the trade. That is the accurate way, I think, of stating what this money is.

It is quite clear that if a source of income is destroyed by the exercise of the paramount right I have described, and compensation is paid for it, that that is not income, although the amount of the compensation is the same sum as the total of the income that has been lost. As Lord Buckmaster pointed out with clearness that could not be surpassed, the nature of the measure of the sum has no relation to the quality of the payment, but in this case I have got to decide the case of a temporary interference, and at first sight I thought that opened up a very wide question. Of course, a source of income, whether from property or business, may be temporarily interrupted, and the owner of it may be entitled to have his loss of profits replaced either by a claim against the tortfeasor or by recourse to an insurance company if he has been insured; and if the question were whether sums of that kind could be treated as income for taxation purposes, I should feel that I was on the threshold of a very wide and difficult field of inquiry, but with the best consideration I can give, I do not think this case does raise that question. Here these ships remained as ships

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THE GERTRUD.

[ADM.]

of the concern. Their expenses were quite properly (Mr. Latter suggested they might be taken out again) brought into the revenue expenditure of the concern; they merely could not sail for a certain number of days, and in lieu of the value of the use which they would have been to their owners in their profit-earning capacity during those days, in lieu of that receipt, this money was paid to the owners, although they were not requisitioned, as if requisitioned.

Under those special circumstances I do not think I can treat this as being a sum paid by way of compensation for the temporary interruption of the trade. I think I ought to regard this sum, as the commissioners have obviously regarded it, as a sum paid which to the ship-owners stands in lieu of the receipts of the ship during the time of the interruption. Therefore, I think the decision of the commissioners was right, and the appeal must be dismissed.

Solicitors: *Botterell and Roche*, for *Botterell, Roche, and Temperley*, Newcastle; *Solicitor of Inland Revenue*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Monday, Oct. 17, 1927.

(Before HILL, J.)

THE GERTRUD. (a)

Collision — Practice — Writ—Solicitor's undertaking to enter appearance and put in bail—No authority—Motion to set aside.

A firm of solicitors accepted service of a writ and undertook to enter an appearance and put in bail in an Admiralty action in rem claiming damages for collision. The solicitors acted in the mistaken belief that they had the authority of the defendants to do so. Subsequently it was ascertained that the defendants had in fact given no authority.

Held, upon motion by the solicitors praying for an order that the undertaking which they had given should be set aside, that the acceptance of service and the undertaking ought not to be set aside.

MOTION by Messrs. Bramwell, Clayton, and Clayton, a firm of solicitors practising at Newcastle-upon-Tyne, to set aside acceptance of service and an undertaking given by them to enter an appearance and put in bail in an action *in rem* for damages by collision by the owners of the Italian steamship *Favignana* against the owners of the Danish steamship *Gertrud*. At the time of the motion the *Gertrud* was in the River Mersey, where the collision had taken place. Messrs. Bramwell, Clayton, and Clayton received

instructions from Messrs. Wilsons, who were the agents at Newcastle-upon-Tyne for the underwriters on the *Gertrud*, and in accordance with these instructions they accepted service and gave the undertaking now sought to be set aside. Subsequently the owners adopted the attitude that Messrs. Wilsons had no authority to give instructions. Upon learning of this Messrs. Bramwell, Clayton, and Clayton at once wrote to the plaintiffs' solicitors, pointing out the position and inviting them to arrest the *Gertrud*.

Harold Stranger for Messrs. Bramwell, Clayton, and Clayton.

Balloch for the plaintiffs.

[Reference was made to *The Neptune* (1919) P. 21n.]

HILL, J.—In this case I do not see my way clear to accede to the prayer which is contained in the notice of motion on behalf of Messrs. Bramwell, Clayton, and Clayton that they should be released from the acceptance, by Messrs. Batesons and Co., as their agents, of service of the writ in the action, and also from the undertaking given by Messrs. Batesons and Co. on their behalf to enter an appearance and put in bail. If this had been an application by the owner of the *Gertrud*, the defendant named in the action, to set aside proceedings taken without his authority, I should have had to consider the question, but it is an application of the solicitors, Messrs. Bramwell, Clayton, and Clayton, who come before me and say: "Most unfortunately, we thought we had the authority of the owner and it turns out that we have not got it." Mr. Stranger has not been able to put before me any evidence from the owner himself. I have had the evidence of the solicitors and the insurance company, but not of the owner. This undertaking having been given by Messrs. Bramwell, Clayton, and Clayton by mistake, they made a contract with the plaintiffs. That the contract entered into was entered into by their mistake is no reason for setting it aside; and I do not see, the plaintiffs objecting, how I can do what is asked, namely, set aside the contract entered into by the undertaking given. It is said that I could set aside the undertaking, preserving to the plaintiffs the remedy for breach of warranty of authority, but I think that is a very difficult thing to do, because the right of action for breach of warranty of authority depends upon the undertaking having been given. In the circumstances I do not see my way to set aside this undertaking.

Whether at the moment they gave this undertaking they had not got the authority is another matter, and if any application is made to me to compel them to carry out the undertaking different considerations would arise, and I will say nothing as to what I might do if such an application was made. We have not come to that yet, and when it does it will be another

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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matter; and I hope the result will be that very quickly all the people who are behind them, or ought to be behind them, will give this authority and so honour the undertaking.

Motion dismissed with costs.

Solicitors: Stokes and Stokes, agents for Bramwell, Clayton, and Clayton, Newcastle-upon-Tyne; William A. Crump and Son.

Oct. 23, 24, and Nov. 18, 1927.

(Before HILL, J.)

THE RIVERMAN. (a)

Towage contract—Indemnity—Interpretation—
“ . . . owners or persons interested in
the vessels or craft so being towed . . . ”
—Barge hired on the “ thirds system ”—
Liability of hirers—Whether “ persons inter-
ested.”

The plaintiffs claimed damages from the defendants, the owners of the tug R., in respect of injuries sustained by the plaintiffs' barge E. in a collision between the E. and the barge B. in the tow of the defendants' tug R. The defendants admitted that the collision was caused by the negligent navigation of the R. by their servants. The barge B. belonged to one H. At the time of the collision the B. was let for twelve months by H. to F. and Co. Limited, a firm of carriers, under the terms of an agreement in writing by which F. and Co. Limited received the freights and after making certain deductions, paid two-thirds of the balance to H., themselves retaining one-third. The towage charges were paid as to one-third by H. and as to two-thirds by F. and Co. Limited. H. acted as master of the B. and paid the mate. By the terms of this agreement H. was responsible for all damages done by or to the vessel through collision or negligent navigation. This system is known in the trade as the “ thirds system.” The B. at the time of the said collision was being towed by the R. under an engagement which was held to have been made by F. and Co. Limited upon the terms on which the defendants usually undertook towage, including the following term: “ . . . the owners or persons interested in the vessels or craft so being towed or about to be towed or having been towed or the cargo on board of the same shall and do undertake to bear satisfy and indemnify the steam-tug owners against all liability for damage or loss to any ship other than the craft being towed through collision, whether or not caused by the negligence of the steam-tug owners or their servants.” The defendants joined F. and Co. Limited as third parties and claimed to be indemnified under the above clause.

Held, that F. and Co. Limited, were “ persons interested in the vessels or craft ” and were

liable to indemnify the defendants in respect of their liability for the damage to the E.

DAMAGE ACTION.

The plaintiffs, owners of the barge *Elma*, and her master, suing for his lost effects, claimed damages from the defendants, owners of the steam-tug *Riverman*, occasioned by a collision between the *Elma* and the barge *Blenheim* in tow of the *Riverman*, which took place on the 6th Jan. 1927 in the River Trent. The defendants by their defence denied negligence, but they subsequently filed an admission of liability. By a third-party notice the defendants claimed to be indemnified by Herbert Hinchsliff, the owner of the barge *Blenheim*. Hinchsliff, by his defence, denied liability and alleged that at all material times the *Blenheim* was let on hire to Furley and Co. Limited, under an agreement in writing between himself and Furley and Co. Limited, and that at all material times he was acting as the servant of Furley and Co. Limited. The defendants accordingly joined Furley and Co. Limited, as third parties, and alleged that the *Blenheim* was hired by Hinchsliff acting as their servant upon terms that Furley and Co. Limited would indemnify the defendants against all liability for collision damage. Furley and Co. Limited by their defence admitted that they hired the *Blenheim* from Hinchsliff under the terms of an agreement in writing of the 16th Aug. 1926. They denied that Hinchsliff had authority to engage the *Riverman* upon terms by which the defendants were liable to indemnify the *Riverman* in the manner alleged.

At the trial the defendants were allowed to amend their claim by alleging that Furley and Co. Limited themselves engaged the *Riverman* upon the alleged terms.

The *Blenheim* was hired by Hinchsliff to Furley and Co. Limited upon the terms of an agreement in writing dated the 16th Aug. 1926; the short effect was as follows: (1) The *Blenheim* was hired by Furley and Co. Limited for twelve months at the yearly rate of 155*l.*; (2) The *Blenheim* should carry cargoes to and from Hull and (or) Grimsby and (or) Goole and (or) any places on the Humber Ouse or Trent or the canals connected therewith as ordered by the hirers; (3) The captain was to work the vessel on the “ thirds system ” usual in the trade; (4) The captain was to obey all lawful orders of the hirers; (5) The owner was to keep the vessel in good repair; (6) The owner should be liable for all damage done by or to the vessel through collision or negligent navigation; (7) The owner should be and remain liable for all damage done by or to the vessel through collision or negligent navigation. Hinchsliff acted as captain of the *Blenheim*.

The towage terms upon which the defendants usually undertook towage, and which were printed upon their bill heads, and had been circulated by them to their customers, were as follows: “ Notice is hereby given that the above United Towing Company Limited will

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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THE RIVERMAN.

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tow vessels or craft by their own or other steam-tugs on the following conditions only, viz.: That on the hiring or employment of the tug the master and crew thereof shall be held to become the servants of and identified with the vessel or craft being towed, and under the control of the person in charge of such vessel or craft during the performance of the contract. The steam-tug owners are not responsible for the acts neglect or default of the masters pilots or crew of the steam-tugs or other persons in their employment . . . or for any loss or damage that may arise to any . . . ship [other than the ship being towed] through collision or otherwise whether such damage arise from or be occasioned by any . . . mismanagement negligence or default of the steam-tug owners or any of their servants or employees . . . and the owners or persons interested in the vessels or craft so being towed or about to be towed or having been towed or the cargo on board of the same shall and do hereby undertake to bear satisfy and indemnify the steam-tug owners against all liability for the above-mentioned matters and against all costs and charges in respect of any law expenses that may arise or be brought against the said tug owners in relation to any such loss or damage actual or alleged."

The defendants having admitted liability, the issue as to the indemnity was tried between them and the third parties.

Langton, K.C., and Brightman, for the defendants, relied upon the towage condition as establishing a right to indemnity against whichever of the third parties was held to have made the contract for the engagement of the *Riverman*.

Dunlop, K.C. and Balloch, for the third party, Hinchsliff, contended that the contract with the defendants had not been made by him.

Digby, K.C. and Stranger for the third parties, Furley and Co. Limited.—If the *Riverman* was engaged by Furley and Co. Limited, which is denied, Furley and Co. Limited were not "persons interested in the vessels or craft so being towed." The expression is altogether too wide and ambiguous to fasten these third parties with liability to indemnify. Such liability can only be successfully imposed by the employment of clear and unambiguous language. "Interested" means interested as owners. The expression must be construed subject to some limitation, or the chain of liability would be endless. It is submitted that this is a reasonable limitation.

Cur. adv. vult.

Nov. 18, 1927.—*HILL, J.*—On the 6th Jan. 1927, the keel *Blenheim*, which was in tow of the defendants' tug *Riverman*, was in collision with plaintiffs' keel *Elma*. The collision was caused by the negligence of the defendants' servants in charge of the tug. The defendants were sued by the owners of the *Elma* and her master and have admitted liability. The defendants allege

that they are entitled to be indemnified either by the third party, Mr. Hinchsliff, who is the owner of the *Blenheim*, or by Furley and Co. Limited, for whom the *Blenheim* was working under an agreement between Hinchsliff and Furley and Co. Limited, or by both.

The defendants set out to prove a contract of indemnity. The questions are: Had they a contract with Hinchsliff? Had they a contract with Furley and Co.? Did that contract contain a term that the party contracting with the defendants should indemnify the defendants against liabilities to the plaintiffs incurred by reason of the negligence of the defendants' servants in charge of the tug *Riverman* while towing the *Blenheim*? It is, of course, for the defendants to prove a contract, and to show that, in clear and unambiguous terms, it shifts on to the other contracting party a liability which otherwise would rest upon the defendants alone. There is no question that there was a contract that the tug should tow the *Blenheim*. With whom was it made? Furley and Co. Limited carried on business as river and canal carriers and forwarding agents. They owned a number of keels or barges, they hired others. *Inter alia*, by an agreement dated the 16th Aug. 1926, and made between themselves and Hinchsliff, they hired the *Blenheim* for twelve months. From time to time they furnished the defendants with a list of the "boats owned and hired by them." There was an arrangement, current at the material times, between the defendants and Furley and Co. that in respect of towages of all such boats the defendants should debit Furley and Co., and render accounts to Furley and Co., and be paid by Furley and Co. The *Blenheim* is among the boats in the accounts so rendered and paid in respect of towages in August, September, October, November, and December 1926, and also in an account rendered on the 14th Nov. 1927, and paid on the 25th March in respect of Jan. 1927, towages which include the towage of the *Blenheim* on the 6th Jan. 1927. The voyage on the 6th Jan. 1927 was from Hull to Gainsborough, from the dock in Hull. The defendants' managing director, who was called, was unable to say how the order for this particular towage was given; he said in the ordinary course of business, orders were given by telephone from the office of Furley and Co. or by the master of the craft calling at the defendants' office, or by the defendants' manager at the dock, who saw that a boat was ready, applying to Furley and Co. or to the master, and receiving an order. No other evidence was called by the defendants. Mr. Hinchsliff was called on his own behalf, and said he did not give the order on the 6th Jan. 1927. He said that he loaded and went to Furley and Co.'s office and obtained a bill of lading and that they rang up the defendants and told them that the *Blenheim* was for Gainsborough. I disregard that as evidence against Furley and Co., but it is evidence that Hinchsliff did not give the order. Mr. Beaver, a director of Furley and Co., was called and said

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that he had no knowledge as to how the particular order on the 6th Jan. was given. I find that the order was not given by Hinchsliff. But it undoubtedly reached the defendants, and was accepted and carried out, and Furley and Co. were debited with the charge for the work done and paid it.

I find, therefore, that, immediately, Hinchsliff was no party to the contract. I find also that, immediately, Furley and Co. were parties to the contract. It is, I think, a necessary conclusion from the facts already stated that Furley and Co. contracted as principals and not merely as agents for Hinchsliff. It was submitted for Furlays, but not strenuously argued, that Hinchsliff was liable, and I must therefore consider whether there is any ground for saying that Furley and Co. contracted on behalf of themselves and Hinchsliff. Hinchsliff gave no express authority to contract on his behalf. If authority there was it must be extracted from the agreement between Hinchsliff and Furley and Co.

This contract is with Hinchsliff as owner of the *Blenheim* for twelve months, and Hinchsliff undertakes to keep in repair the *Blenheim* at the disposal and under the control of Furley and Co. and to carry cargo within certain areas as ordered by Furley and Co., and the agreement provides that Furley and Co. shall pay hire at the rate of 155*l.* per annum which shall be the owner's sole remuneration and that in certain events Hinchsliff, as owner, shall discharge himself as master and appoint a fresh master. As master the Hinchsliff contract is this, "the captain . . . shall work her on the thirds system usual and customary in the trade, and that the rate of freight shall be the usual and current rate of freight at the present time paid by the hirers on similar cargoes." This requires some explanation. Furley and Co. received freights. They did not account for them to Hinchsliff. They took a fixed rate of freight, as provided by the agreement, and multiplied it by the amount of cargo and debited themselves with that. Against the amount so ascertained they credited themselves with "brokerage," bill of lading stamp, advances to the master for the ordinary working expenses of the voyage; the amount due for towage, and the balance was divided one-third to Furley and Co. and two-thirds to Hinchsliff as master, and the master paid the crew, that is the mate. In view of these facts it cannot be said that Hinchsliff was a partner of Furley and Co. in the running of the ship. He did not share in the profits. Nothing at all was said about the losses. He received two-thirds of a sum that was ascertained at fixed rate less certain deductions. It was a method of ascertaining his remuneration varying with the work done. I therefore cannot hold that the contract made by Furley and Co. was made for themselves and Hinchsliff. It was made for Furley and Co. only.

Did Furley and Co.'s contract with the defendants contain the indemnity clause relied on? The defendants printed at the head of a

printed tariff of towage rates which they circulated to their customers, a notice that they would tow vessels on the following conditions only, setting out the terms. They say that they sent this document to Furley and Co., and it is highly probable that they did so. The defendants also printed at the head of all the accounts rendered to Furley and Co. a notice in the same terms. Furley and Co.'s manager said that they knew that the words so printed contained conditions, and that they had tried to understand them. When Furley and Co. bespoke the services of a tug to tow the *Blenheim* they were offering to enter into a contract at the rate mentioned in the defendants' tariff and on the terms which the defendants had said were the only terms upon which they would tow, and that offer was accepted by the defendants' sending the *Riverman*. I therefore hold that the contract must be construed as incorporating those terms.

The next question is, Did those terms, in clear and unambiguous language, impose upon Furley and Co. as the contracting parties, the obligation to indemnify the defendants?

It is said that the first sentence of the conditions is quite inapplicable to the case where more than one ship is in tow. That may be. But because that sentence is inapplicable, it does not follow that the remainder is inapplicable. The next sentence is a very long one and is in two parts—the first part is an exception clause, it closes with a semicolon. Then follows an indemnity clause, "The owners or persons interested in the vessels or craft so being towed, or about to be towed, or having been towed, or the cargo on board of the same, shall and do undertake to bear, satisfy and indemnify the steam-tug owners against all liability for the above mentioned matters and against all costs and charges," &c. The "above mentioned matters" are the matters mentioned in the exception clause and include damage to tug or ship or other property through collision, whether occasioned by the negligence of the servants of the tug owners or otherwise.

Furley and Co. were not the owners of the *Blenheim*, but when they, being hirers of the *Blenheim*, entered into a contract for her towage they were persons interested in the *Blenheim*, at least for the period of the performance of this contract.

I therefore hold that they entered into the contract of indemnity.

In the pleadings something is said about a term of the agreement between Hinchsliff and Furley and Co. as to Hinchsliff being liable for all damage done by the *Blenheim*. This is irrelevant to the question I have to decide. And as to whether Furley and Co. have any claim against Hinchsliff I say nothing. Nothing was said in argument as to a particular point raised in the pleadings as to the plaintiffs' right being only for a partial indemnity on the ground that it ought to be split up among the owners of the six craft in tow. There was nothing in that and I am not surprised that very little was said about it. If Furley and Co.

contracted to indemnify, they contracted to indemnify, whatever other persons contracted to do. Of course the defendants could not be indemnified twice over. The result is judgment for Hinchliff against the defendants with costs. Judgment for the defendants against Furley and Co. with costs.

Solicitors for the defendants, *Botterell and Roche*, agents for *Sanderson and Co.*, Hull.

Solicitors for the third party, Hinchliff, *Stokes and Stokes*, agents for *Hearfield and Lambert*, Hull.

Solicitors for the third parties, Furley and Co. Limited, *Cunliffe, Blake, and Mossman*, agents for *Moss, Lowe, and Co.*, Hull.

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 16, 17, and 18, 1927.

(Before Lord HANWORTH, M.R., ATKIN and LAWRENCE, L.JJ.)

FORBES, ABBOTT, AND LENNARD LIMITED v. GREAT WESTERN RAILWAY COMPANY. (a)

Negligence—Dock—Accident to barge in lock—Conditions of admission—Exemption of defendants from liability—Whether terms sufficiently clear—Meaning of “dock”—Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27), ss. 2 and 83—West London Extension Railway Act 1859 (22 & 23 Vict. c. cxxxiv.), ss. 4, 50, and 164.

A barge belonging to the respondents, plaintiffs in the action, was, in leaving a dock belonging to the appellants by way of a lock, damaged owing to the negligence of the appellants' servants. Conditions or by-laws had been made of the terms on which the appellants received vessels into the dock, and No. 1 provided that “All barges or vessels while in Chelsea Dock are at the sole risk of owners or persons bringing or causing the same to be brought into the dock,” and the question arose whether that condition exempted the appellants from liability for the negligence.

Held, that the dock having been built on the authority of a special Act of Parliament under which the lock was also constructed, by-laws including condition No. 1 referred to the lock as well as the dock, and that condition exempted the appellants from liability, it being expressed in terms sufficiently clear to exclude negligence, there being no other risks to which it could apply.

Rutter v. Palmer (127 L. T. Rep. 419; (1922) 2 K. B. 87, at p. 92) applied.

Decision of *Avory, J.* reversed.

FURTHER consideration of an action tried before *Avory, J.* and a common jury.

The facts appear fully from the above head-note and from the judgment.

Ernest Charles, K.C. and *Rowland Thomas* for the plaintiffs.

F. P. M. Schiller, K.C. and *Wilfrid Lewis* for the defendants.

Cur. adv. vult.

July 15, 1927.—The following judgment was read by

AVORY, J.—In this case the jury found that the damage to the plaintiffs' barge, resulting from the grounding of the barge in the defendants' lock, when it was leaving the defendants' dock called the Chelsea Dock or Basin, was caused by the negligence of the defendants' servants.

Mr. Schiller, on behalf of the defendants, submits, notwithstanding this finding, that the defendants are entitled to judgment on the ground that condition No. (1) of the terms and conditions on which the defendants receive barges into Chelsea Dock, of which the plaintiffs are to be assumed to have had notice, exempts them from liability for such negligence. The condition is in the words following: “All barges or vessels while in Chelsea Dock are at the sole risk of owners or persons bringing or causing the same to be brought into the dock.”

In support of his submission, Mr. Schiller contends that the word “dock” which is found in this condition includes the lock and that the terms used are sufficient to exclude any liability for damage caused by the negligence of the defendants' servants. Two questions, therefore, arise for determination: (1) Whether the terms of the clause are sufficiently clear and unambiguous to exempt the defendants from liability for any such negligence; and (2) whether such exemption extends to a case where damage is caused in the lock by such negligence. If the word “dock” in the clause in question does not include the lock, then *cadit quæstio*.

Upon the first question several cases have been cited bearing upon the owner's risk clause, each of which has fallen to be decided upon the particular words used. In *Reynolds v. Boston Deep Sea Fishing and Ice Company* (38 Times L. Rep. 429), a case somewhat analogous in the facts to the present case, the words which were held to be sufficient to exempt, were: “No liability whatever shall attach to the company for any accident or damage done to or by any vessel either in taking her to the slip or when on it or when launching from it.”

These words are obviously more specific and comprehensive than those in the present case. Applying the test laid down by Scrutton, L.J. in the case of *Rutter v. Palmer* (127 L. T. Rep. 419, at p. 421; (1922) 2 K. B. 87, at p. 92), I think in the present case there were possible risks other than that of negligence to be provided

(a) Reported by T. R. F. BUTLER and GEOFFREY P. LANGWORTHY, Esqrs., Barristers-at-Law.

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against by the defendants, and that, in any event, the words used are not adequate to exempt the defendants from liability for the negligence of their servants.

Upon the second question, I have been referred to the statutes, Harbours, Docks, and Piers Clauses Act 1847, ss. 2 and 83, where the word "dock" is defined in sect. 2 to include "the works connected therewith"; and the West London Extension Railway Act 1859, ss. 4, 50, and 164. Although I do not doubt that for some purposes, such as the jurisdiction of the dockmaster, the word "dock" may include the lock, it appears to me that the terms and conditions, including No. 1, upon which the defendants rely, apply only to the dock as distinguished from the lock. In any view I think that condition No. 1 does not clearly and unambiguously apply to the lock as distinguished from the dock so as to exempt the defendants from liability.

For these reasons I come to the conclusion that the plaintiffs are entitled to judgment for the agreed amount of damages.

The defendants appealed.

Schiller, K.C. and Wilfrid Lewis for the appellants.

Charles, K.C. and Rowland Thomas for the respondents.

LORD HANWORTH, M.R.—This is an appeal from a decision of Avory, J., given on the 15th July last. The action was brought by Messrs. Forbes, Abbott, and Lennard Limited against the Great Western Railway Company. The plaintiffs were the owners of a barge and the Great Western Railway have become, under the amalgamation system of railways, the owners of a dock at Chelsea, a dock which was built by the West London Extension Railway, and which has now passed into the hands of the present defendants. On the 5th Feb. 1926, the barge was taken to the dock for the purpose of loading a cargo of coal which had reached the side of the basin of the dock. The dock abuts on the river Thames at Chelsea, and the entrance into the dock basin is through a lock. The river is, of course, tidal, as we all know, at that point, and the tide falls a considerable distance, the result is that the approach to and the exit from the dock through the lock has to be made at a point when the tide serves so that the water in the river can reach the same height as the water in the lock. The vessel entered the basin of the dock through the lock, and was in charge of a man named Finch, who was the plaintiffs' lighterman. The barge loaded a cargo of coal, and was ready to proceed on her outward journey back into the river again. The tide on the morning of the 8th Feb. was high at something like 9.30, and at a point after that, something like an hour afterwards, the barge was ready to pass out through the lock, but owing to the falling tide it was a matter of a small amount of time as to whether it would be possible to get the barge through the lock and into the

river at a time when the water in the river afforded sufficient tideway for the barge. Now the vessels entering the basin have to conform to the requirements and directions of the defendants' dockmaster. The dock is a small one, and we understand that there is one man who acts for a certain number of hours, and he is replaced by another; but substantially the dock is in charge of one person, and at the material times the man who is in charge of the dock was a man named Titcomb. What happened was this: The barge went into the lock, and when the water had been let out from the lock, so as to lower the water to the level of the river, it was found that there was not sufficient water to enable the barge to get out clear into the tideway, and she stranded upon the sill of the dock, and that by stranding she received stresses and strains which injured her. Ultimately she was floated again when the tide rose, and was beached at the side of the river, and then it was found that she was making water through the leaks, which leaks had sprung, and ultimately it became necessary to expend a sum round about 170*l.* or 180*l.* on her. The action is now brought by the owners of the barge against the Great Western Railway Company alleging that it was owing to the negligence of the defendants that the barge received the injuries for which the expense had to be incurred. The action has been twice tried. On the first occasion the jury were unable to agree as to their verdict. On the second occasion, before Avory, J., the jury found in favour of the plaintiffs. There was then a further point to be discussed, a point of law, whether even if there had been negligence on the part of the defendants, they were liable owing to the terms and conditions to which I must refer later on, upon which she had entered the dock. Avory, J. held that those terms and conditions did not prevent the liability of the defendants, and gave judgment for the plaintiffs for the amount which had been agreed upon between the parties. It is from that judgment that the appeal is taken.

On behalf of the defendants two points were made. It is said that there was no evidence of any negligence on the part of the defendants, and that, therefore, there was no evidence on which the jury could reasonably come to the conclusion that the defendants had been negligent; and, secondly, the point is taken, that even if they were negligent, owing to an express term and condition binding upon the plaintiffs, the defendants are excused from that liability for negligence.

I will deal first, as it was put first before us on behalf of the appellants, with the question of negligence. The negligence charged is this: that the defendants through their servant Titcomb failed to exercise a proper control over the barge, that the barge, and the lighterman in charge of it, were bound to conform to the conditions of the defendants' servant, and that the defendants' servant allowed the barge to attempt to pass out from the dock basin through the lock into the river at a time when

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there was not a sufficiency of water to enable her safely to do so; that Titcomb in control of the lock and the dock ought to have warned, and did not warn, Finch, the lighterman, that it was unsafe for the barge to attempt the passage from the basin into the river. Now we have made a careful examination of the evidence. It appears to me that there was evidence of negligence. I do not myself attach much importance to the precise measurement of water, or the precise measurement of the amount of water which the barge drew. Finch, the lighterman, had on several occasions been into the dock, and he knew the means of access and of departure, and he was fully familiar with the conduct and management of the barge. We are told that she was loaded at the stern more heavily than she was at the bow, and therefore that she drew more water at the stern. However that may be, I think the true position is that the lighterman did look to Titcomb for assistance and advice as to whether he could safely make the exit from the basin. A few passages may be quoted from the evidence. Titcomb was, at a slightly earlier point of time engaged in passing a barge from the river into the dock basin. When that operation was over the lock was free to take the outgoing barge, and at that time he said to Finch: Did Finch intend to leave the basin, and Finch said he did. I need not refer to all the passages in which the evidence is to be found, but I will refer to a few of them. Finch certainly said that Titcomb was in charge, and he must take his instructions, on which I think that Finch was probably right. Then he was asked: "In order to find out whether there was enough water you either go and look yourself or you ask the dockmaster if you have any doubt about it?" (A.) Yes, if there is any doubt about it." Then he, later, said: You never ask the dockmaster whether there is enough water, it is for him to tell you that, and he can say you can go out, or you cannot go out. Now, taking Titcomb's evidence, for I put aside the evidence relating to certain information which was embodied in correspondence which ultimately took place between the plaintiffs and the defendants, I come to the passages which are in the evidence of Titcomb, and he says this: Did you speak to him at all or did he speak to you? (A.) Yes. When he brought the barge down—that is in the proximity of the lock—"I asked him if he was going out. He said he wanted to get out, but he wanted to go to the telephone to order a tug to tow him down." Finch did go to the telephone, and did order a tug, and, having ordered a tug, it was, of course, important that he should keep the appointment with the tug which was to meet him outside in the river.

When Finch got back from his telephoning to the tug, Titcomb says: "I asked Finch: 'Are you going out?' I said: 'If you are you will have to cut about; you have only 5ft. 6in. water to play with.'" Now I reject the actual measurements, but, at any rate, it

is clear Titcomb said to him: "You will have to cut about," and the meaning of that is that Titcomb was conscious that the time limit available for the passage of the barge out into the river was short. "Why did you say to Finch," Titcomb was asked, "you have 5ft. 6in. to play with?"

(A.) "Because I had not taken the measurement. I had always taken that hole." There was a hole by which the measurement of the water was approximately estimated as 5ft. 6in. Now it appears to me that upon that evidence Titcomb did act in relation to the passage of the barge from the river. He admitted at another point in his evidence that he could prevent a barge going out if he thought it dangerous for it to go out, and that if the water had got to a point which demanded his intervention he would intervene to stop a barge going out. Equally he had another duty to perform, and that was to see that by reason of the falling of the water and emptying of the lock the water in the basin was not reduced below an adequate level. Upon the whole evidence submitted to them the jury found a verdict in favour of the plaintiffs. That verdict, I think, must be taken to negative any contributory negligence on the part of the plaintiffs. That point was clearly and sufficiently put before them by the learned judge, and they must be taken to have found that at a time when Titcomb was in responsible charge of the dock basin he did not effectively fulfil his duty in that relation because he could have intervened to stop the barge going out if he was of opinion that too much risk was involved.

It was said that the defendants did not owe any duty at all to the plaintiffs, that Titcomb's duty was to see to the maintenance of the water in the basin, and that he was not responsible to the owners of the barge *Amy* for the conduct of that barge, but, having regard to the evidence which Titcomb gave himself, it appears to be admitted by him that at a certain point he had a duty to prevent a barge taking a risk that he could have exercised his authority to prevent any risk being incurred. It becomes, therefore, a question of degree at what point he ought to intervene and how far he ought to intervene, and it is a question of fact for the jury. It does not appear to me that the case can be put as one in which the invitee was upon the premises, and that the only duty of the defendants was in respect of a possible or so-called trap within the meaning of *Indermaur v. Dames* (14 L. T. Rep. 484; L. Rep. 1 C. B. 274; affirmed 16 L. T. Rep. 293; L. Rep. 2 C. P. 311). When that case is referred to it must be remembered that the point that had to be considered there was what was the duty of the occupier with reference to persons resorting to the premises in the course of his business. In the judgment of Willes, J. (14 L. T. Rep. 484; L. Rep. 1 C. P. 274, at p. 287) he says this: "The authorities respecting guests and other bare licensees and those respecting servants

and others who consent to incur a risk being therefore inapplicable, we are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation, express or implied." They found in that case that there was a duty which had not been fulfilled of warning the invitee of a trap. Here it appears to me that the defendants did owe a duty inasmuch as they had the power and exercised the power of control over vessels that came into this dock, that that control must be prudently and wisely exercised in the interests of the owners of the barge coming into the dock, that that was admitted by Titcomb, and the verdict of the jury must be taken. On the question of fact and degree they found that sufficient care had not been exercised by Titcomb in discharging the responsibility which lay upon him. For these reasons I come to the conclusion that there was evidence to go to the jury, and, that being so, we cannot disturb the verdict on the question of negligence.

Now I come to what is a more difficult question and one which needed careful consideration. The learned judge had this point argued separately before him, but I doubt if he had the advantage of as full a discussion as we have had upon the point. It appears that this dock was built under the authority of an Act of Parliament, the West London Extension Railway Act 1859 (22 & 23 Vict. c. 134). That Act incorporated the Harbour, Docks, and Piers Clauses Act of 1847 (10 & 11 Vict. c. 27). It was under that Act that power was given to make by-laws. Now the Act of 1847 says this in sect. 2: "The expression herein 'dock or pier' shall mean the harbour dock or pier and the works connected therewith by special Act authorised to be constructed." There is no question that the basin and the lock were constructed under this special Act of 1859, and therefore where one reads the words "harbour, dock or pier" one has to recognise that those words embrace all the works connected therewith under the special Act. Therefore it is not possible to separate the lock from the dock. The lock is as much part of the works authorised to be constructed, and the lock is no more than the gate or approach to the dock. By sect. 83 the authority is authorised to make by-laws for regulating the use of the harbour, the dock, or the pier, and for regulating the admission of vessels into or near the harbour, the dock, or the pier and their removal out of and from the same, and for the good order and government of such vessels while in the harbour, dock, or pier. Under the power so included in the private Act certain by-laws have been made for the Chelsea Dock, and by the first by-law vessels are to enter the Chelsea Dock under the direction of the superintendent of the West London Extension Railway Company or his assistant. Although the word "dock" is chiefly used, yet there are places where the lock is particularised. I do not, however, think that the separation in

certain places of the lock in particular from the dock prevents the by-laws applying as they were intended to apply to the whole system, comprising both the lock and the dock. In addition to that there are certain terms and conditions which are published and set up in places conspicuous to those who are using the dock, and they begin in this way: "Chelsea Docks. Terms and Conditions. The West London Extension Railway Company do hereby give public notice that the following are the terms and conditions on which they receive barges or vessels into the Chelsea Dock: (1) All barges or vessels while in Chelsea Dock are at the sole risk of owner or person bringing or causing the same to be brought into the dock." These terms and conditions in more than one place have a reference to the company's by-laws, and, for the reasons which I have given, I think that the by-laws in terms, as well as implicitly, cover both the dock and the lock, and I think that in reading these terms and conditions which are to fit in and to be read alongside of the company's by-laws, it is not possible, having regard to the interpretation clause which I have read, to say that these conditions apply only to the dock and not to the lock. I therefore am against the point that was made by Mr. Charles on behalf of the plaintiffs that these conditions, even taking them at their full interpretation, do not apply to the lock, and that inasmuch as the injury to the barge was caused in the lock, this condition has no application.

I come, therefore, to consider whether or not this first condition does give immunity to the defendants in respect to the accident and the misfortune which happened to the barge in the lock of the Chelsea Dock. Its words are wide. "All barges while in the Chelsea Dock are at the sole risk of owner or person bringing or causing the same to be brought into the dock." Taking the case, as I do, that negligence has been found against the defendants, does that condition serve to exclude the defendants from liability for the negligence of their servants? Now the rules applicable to that I think are stated, and very fairly stated, by Scrutton, L.J., in the case of *Rutter v. Palmer* (127 L. T. Rep. 419; (1922) 2 K. B. 87, at p. 92): "In construing an exemption clause certain general rules may be applied; first, the defendant is not exempted from liability for the negligence of his servants unless adequate words are used; secondly, the liability of the defendant apart from the exempting words must be ascertained; then the particular clause in question must be considered." Now I adopt indeed as I think I am bound to do, those three rules in considering this case. Take the first: "The defendant is not exempted from liability for the negligence of his servants unless adequate words are used."

An illustration of what that means can be found in the case of *Price and Co. v. Union Lighterage Company* (9 Asp. Mar. Law Cas. 398; 89 L. T. Rep. 731; (1904) 1 K. B. 412), where the words were: "Exempt

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from liability for any loss of or damage to goods which can be covered by insurance." It was there held that the exemption being in general terms and not expressly relating to negligence, the barge owner was not exempt from liability for loss or damage caused by the negligence of his servants. The words of exemption were so wide and certainly not precise. They could be amply satisfied without including negligence, and it was held, therefore, that there was not an exemption from negligence. But in the present case we have got words which are wide enough to include negligence. In a case that was decided by Greer, J. (as he then was) (*Reynolds v. Boston Deep Sea Fishing and Ice Company Limited*, 38 Times L. Rep. 22) negligence on the part of the defendants was held to be established by the learned judge, but he held that the clause protected them, the clause in that case being that "All persons using the slipway must do so at their own risk, and no liability whatever shall attach to the company for any accident or damage done to or by any vessel either in taking her to the slip or when on it, or when launching from it." It is true there that the words "no liability whatever," were wide and embracing words, but we have got here the words: "All barges are at the sole risk of owner."

Taking now the second rule: "The liability of the defendant, apart from the exempting words, must be ascertained." With the assistance of Mr. Charles we have endeavoured to find what is the liability that could have been intended to be covered apart from negligence. It was suggested that it might have been intended to refer to pilferage from the cargo. I am not sure that those words would cover cargo at all. If it is a question of pilferage, I do not think that, apart from negligence, the defendants would be responsible for theft taking place from the cargo while a barge was in the basin of the defendant's dock. There are observations in *Shaw v. Great Western Railway Company* (70 L. T. Rep. 218; (1894) 1 Q. B. 373) which appear to point in that direction.

After careful examination of the possibilities of liability apart from negligence, it appears that it is difficult to suggest any, and I have come to the conclusion that the intention of those words must be to cover what was the much more probable event than any other, and that would be the negligence of the servants of the defendants, and in considering the second rule, "the liability of the defendants apart from the exempting words, must be ascertained," it would seem that the words would be practically otiose unless negligence was covered. Then if the only liability of the party claiming the exemption is a liability for negligence, as to me it seems to be, the clause will more readily operate to exempt him.

Bearing in mind, therefore, that the central liability, the substantial liability, of the defendants was from negligence, it appears to me that the purpose of this condition 1 was to cover negligence, and asking myself the question, "Are the words wide enough to do

so?" it appears to me that these words: "All barges are at the sole risk of owner or person bringing or causing the same to be brought into the dock" are apt to exclude negligence.

In looking at the clause itself, I think it is important to bear in mind that with some particularity the sole risk is imposed upon the owner and upon persons bringing or causing the same to be brought into the dock. It is at that point that the greatest danger might arise, namely, in the course of ingress or egress from the basin through the lock, and those words being introduced seem to point in particular to the place and time at which the greatest possibility of injury might occur. For these reasons it appears to me that condition No. 1 does in terms sufficiently clearly expressed exclude negligence, and thus that, although the negligence was found, as the jury were entitled to do after the direction of the learned judge, against the defendants, the defendants have established their immunity from that cause of action by the emphasis that they lay on the condition under which by the terms of the contract the barge was allowed to enter and pass out of the defendants' dock. For these reasons it appears to me that the judgment entered for the plaintiffs must be set aside. The appeal will, therefore, be allowed with costs and judgment will be entered in the action for the defendants with costs.

ATKIN, L.J.—I agree. This is a case in which the plaintiffs, the owners of a barge, brought their action against the defendants who are the owners of the Chelsea Dock or basin, for damage caused to the barge by reason of the negligence of the defendants' servant, and it is said that the defendants' servant was negligent in directing or allowing the plaintiffs' barge to proceed out of the basin, through the lock, into the river Thames at a time when there was insufficient water over the sill of the lock to enable the barge to get into the river, and, as the result, the barge grounded in the lock and was strained and received the damage complained of. The jury found their verdict for the plaintiffs on the issue as to negligence, and the learned judge, on consideration, entered judgment for the plaintiffs. It was suggested that there was no evidence of negligence because there was firstly, no duty owed by the defendants' servants to the plaintiffs, or, in the alternative there was no breach of duty; and, secondly, it was said that in any case the defendants had protected themselves by the terms of the contract on which the plaintiffs had sent the barge into the basin for the purpose of receiving a cargo of coal. I propose, in the first instance, to deal with the second point, because that appears to me to dispose of the plaintiffs' claim. The condition of the contract which is relied on is contained in certain terms and conditions which appear to have been published, at any rate at the dock, in such circumstances that it is admitted in the present case

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they formed part of the contractual terms between the plaintiffs and the defendants, and, therefore, we are not concerned to consider the question which sometimes arises upon a suggested contract of notice of terms. The conditions are printed, and they are headed: "West London Extension Railway"—of which undertaking this dock forms a part—"Chelsea Dock. Terms and conditions. The West London Extension Railway Company"—who have now been succeeded by the Great Western Railway Company—"do hereby give public notice that the following are the terms and conditions on which they receive barges or vessels into the Chelsea Dock: (1) All barges or vessels, while in Chelsea Dock, are at the sole risk of owners or persons bringing or causing the same to be brought into the dock." Now it being admitted, therefore, that the contract was to be at the sole risk of the owners, two points were raised by Mr. Charles for the plaintiffs. It was said, first of all, that that contract did not exclude the defendants' liability for the negligence of their servants, for it was said that such an exemption from negligence must be in clear and unambiguous terms, and here the terms were not of that description; and, secondly, it was said that in any case the terms and conditions only applied to the vessel while in Chelsea Dock, and at this time the vessel was not in Chelsea Dock, but was in the lock, and the lock was not part of the dock for the purpose of this condition. I propose to deal with those two points, and I propose to deal first with the question of the construction of the contract, because that appears to be the more convenient course. It is quite clear that if a contracting party who has undertaken liabilities in respect of a chattel desires to relieve himself from the liability of his servants in dealing with that chattel, he must use reasonably clear and unambiguous language in order to do so.

That, I think, is a general rule of construction of such contracts, and one is assisted in the construction and determining whether a clause is clear and unambiguous by considering what are the liabilities of the contracting party apart from such exemption. There are many cases of carriers where a liability is imposed on the carrier in addition to and apart from any question of negligence. In fact, as we know, subject to certain well-known exemptions, the common carrier is made to be an insurer of the goods. Therefore, any questions which relate to carriage by land and carriage by sea, where the carrier is either a common carrier, or, as is said in cases of carriage by sea, is not a common carrier, but incurs the liabilities of a common carrier, you have the case of a contracting party subject to large liabilities which are quite independent of any question of negligence on his part, and in those cases if he seeks to limit his liability it has been held that inasmuch as there is a large class of liability which may well be covered by exemption from liability in general terms there may be an ambiguity which enables the court to

say that the contractor has not quite clearly indicated that he intends his exemption to extend to negligence as well as other liabilities. That is the class of case which is illustrated by the case to which my Lord has referred of *Price and Co. v. Union Lighterage Company* (9 Asp. Mar. Law Cas. 398; 89 L. T. Rep. 731; (1904) 1 K. B. 412). That was a case of carriage by water, where the exemption was from any risk covered by insurance, and it was held that inasmuch as you could give quite reasonable effect to all those words, treating it as liability to other negligence, there was not a clear exemption of liability from negligence. There are cases of carriage by sea where it is quite plain that the liability was intended to cover everything and where you have used the words, "any risk whatever," the courts have paid attention to the very large scope of the language used and have held that that is plain and means all it says. But then there are other cases where you have not the original liability of the insurers and where the liability is in substance confined to a liability for the negligence of the contracting party's servants, such as the case of an ordinary bailee, and in those cases it has been held that the words, "at sole risk" or "owner's risk," and so forth, must receive their ordinary meaning. In substance there is no substantial liability that the contracting party seeks to relieve himself from except the liability of negligence, and that was the case that was referred to by my Lord of *Rutter v. Palmer* (127 L. T. Rep. 419; (1922) 2 K. B. 87), which was the case of a garage keeper, who said that cars driven by the garage proprietor's servants were driven at the owner's risk. Now it appears to me that that is precisely this case. I am quite unable to distinguish the liability of the railway company, the owners of the dock in this case, from the liability of the garage keeper in *Rutter v. Palmer*. In substance, there would be no liabilities imposed upon the dock owner in this case except liability for the negligence of his servants. It is true that there were two or three forms of liability which were suggested; one was the liability in *Indermaur v. Dames*. It was said with truth the dock company invited the owners of barges to come and send their barges to use the premises, and therefore they were under an obligation to take care, which is defined in *Indermaur v. Dames* (16 L. T. Rep. 293; L. Rep. 2 C. P. 311), as an obligation to take reasonable care, to see that the owners of the barges are not injured by unusual damage known to the dock company and not known by the plaintiffs, and to see that if there is such a danger, that they are warned. That appears to me to be in fact a liability for negligence in terms, in the way it is stated, and I think the action in such a case is brought upon an allegation of a failure by the defendant to perform the duty which is imposed upon him by the law to the extent to which it is laid down in that case. The other liability it was suggested they were liable to was a

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liability for the wilful acts and defaults of their servants by way of theft or pilferage or wilful damage done to the barge. Like my Lord, I should like to defer the question as to how far this condition refers to cargo or affects the owner at all. But apart from that it appears to me the plaintiffs are in a dilemma.

Ordinarily speaking, the defendants would not be liable for wilful damage done by their servants, and therefore that is not a liability—which it is necessary to relieve against, but if they are liable for the wilful damage caused by their servants, and if that is the kind of peril or risk that this clause was intended to relieve them from, it seems to me very difficult to suppose that the railway company intended to limit their liability to that and did not intend to cover the liability from negligence. At any rate, it was a question, it appears to me, very similar in scope, and one which it is very difficult to suppose would have caused the defendant company to put in a condition like the one referred to. Now the other liability that was suggested was the liability of the defendants in respect of the warranty which has been held in the well-known case of *The Moorcock* (60 L. T. Rep. 654; 14 Prob. Div. 64) to attach to a contract between parties in a case where a dock owner invites the shipowner to send his ship into a dock. That is a warranty that the dock owners have taken reasonable steps to see that the berth offered to the boat is safe and to see that it is safe, and if it is not safe that they will give notice of the fact to the shipowner. That appears to me again to be precisely similar in practice, though it is expressed in terms of warranty, to a liability for the negligence of their servants, a duty to take care, and, if care is not taken, to warn; but however that may be, it is precisely similar to the liability which is sought to be imposed in this case, which is put upon the very ground that the defendants by their servants invited or directed the plaintiffs' servant to put his barge in the lock in such conditions that being in the lock and proceeding to use the lock it would necessarily place itself on a sill where it might ground and be likely to suffer damage. That being so, I find no reason at all for coming to the conclusion that the words of this contract are not quite plain and unambiguous. It appears to me on their reasonable intendment they plainly exempt the railway company from liability for the negligence of their servants. In substance that is the sole liability to which they were exposed, and I cannot give any sufficient meaning to the words unless I give them the effect which is contended for by the defendants. I think, therefore, that the defendants are protected by the contract between the parties as far as the construction of the contract is concerned.

The only other question that arises is whether it is right to say these conditions were applied to a ship or were intended to apply to a ship while she was in the lock, and in order to decide

that question one must no doubt look at the conditions as a whole. It seems to me unnecessary to read them all, but I am satisfied that on the proper construction of the contract the lock was intended to be treated as part of the dock, as in fact it is. It is quite plain that under the statutory terms that relate to the undertaking the lock is part of the dock. In some cases where you are distinguishing between the basin and a lock in common parlance a man might very often distinguish between the dock and the lock, but when you are dealing with terms of contract it seems to me quite plain that the lock is for all purposes part of the dock.

It is quite plain that the railway company would desire to make the conditions of the contract between them come into existence from the moment when the barge passed from the highway, the river, into the private property of the undertakers, namely, the dock, and when one has come to the conclusion that the terms of the contract were intended to protect the undertakers from the negligence of their servants it seems to me to follow irresistibly that the one time when they would normally desire to protect themselves would be in the lock when the negligence of their servants would be much more likely to have any effect on the ship than when in fact she was lying in the basin. I see no reason in the terms of the contract at all for limiting the words to the basin of the dock as opposed to the whole of the entrance into the dock, which includes the lock, and therefore I think that the contract terms apply to this particular injury, and that the defendants have protected themselves from liability. That being so, it is of course in one sense unnecessary to deal with the question as to the verdict of the jury, and the question whether there was evidence upon which the jury might find that the defendants' servant was in fact guilty of negligence, but as that was argued before us and there has been a verdict about it and it may affect the question of costs, I merely desire to say that for my part I am satisfied that the verdict must stand. It is unnecessary to go into details of the whole matter now, but it appears to me that there was ample evidence, if the jury disbelieved the lock-keeper and did believe the lighterman, upon which they could find that there was negligence on the part of the lock-keeper, and I think whether they found it or whether it is a matter of law, in the circumstances which the jury I think must have found to exist, there was a duty upon the lock-keeper to warn the lighterman, if in fact there was insufficient water for him to pass out of the lock, or indeed if there was a risk of his not being able to pass out of the lock without injury to his craft. Upon that matter I see no reason for interfering with the verdict of the jury, but for the reasons I have given, it appears to me that as the defendants succeed upon the question of contract the judgment for the plaintiffs must be set aside and judgment must be entered for the defendants.

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LAWRENCE, L.J.—I agree, and would only add a very few words of my own to the judgments delivered by my Lords.

The substantial question raised by the appeal turns on the true meaning and effect of the first of the conditions on which the railway company receive barges into Chelsea Dock. Two points were made by Mr. Charles on this condition. The first point was that the expression "Chelsea Dock" did not include the site of the lock which forms its entrance, and the second was that the risk of the barge owner did not cover damages caused by the negligence of the dock owners' servants. Now on the first point I think there cannot be any reasonable doubt that the *prima facie* meaning of the expression "Chelsea Dock" in a document such as I have been construing would cover the site of the lock. My only doubt on first reading the whole of the conditions and by-laws was whether a distinction had not been drawn in those conditions and by-laws between the inner basin and the lock through which it was entered, and that it might have been said that they formed their own dictionary and distinguished between the lock and the dock. On hearing Mr. Schiller's explanation and on a closer examination of the conditions and by-laws, my doubts have been entirely resolved. I find nothing inconsistent in reading the word "dock" throughout the conditions and by-laws in its natural and comprehensive meaning as including the site of the lock. Several of the conditions, such as No. 8, for instance, would appear to make it absurd to exclude the site of the lock from the word "dock." In my judgment the first point fails. Then as to the second point, it is a well-settled rule that in a condition such as this it must be made clear that it is to exempt the dock-owner from liability to damage caused by the negligence of his servants, and if it could reasonably be referred to any other liability than the liability of such a nature it ought to be construed as confined to that liability. Now had Mr. Charles been able to satisfy me that there was any other substantial risk run by the dock-owners than liability caused by the negligence of their servants, I think he would have succeeded in bringing his case within the principles to which I have referred. The only two kinds of damage other than that which I have mentioned which he could suggest was, first, damage caused by the wilful acts of the company's servants, as to which I will say no more, that having been covered by the judgments of my Lords, and secondly, the damage for which the railway company would be liable on a question of breach of warranty on the principle of the case of *The Moorcock* (6 Asp. Mar. Law Cas. 357, 373; 60 L. T. Rep. 654; 14 Prob. Div. 64). I agree with Mr. Schiller's contention that the warranty there referred to is in substance a warranty to use all reasonable care to prevent danger to those who are using the docks. Therefore a breach of that warranty would substantially only be caused by the negligence of the dock-

owners' servants. Consequently the case of liability for breach of warranty stands on precisely the same footing as the other liability for the negligence of the company's servants. Under these circumstances there is substantially no other liability than the liability for damage caused by the negligence of the dock owners' servants. The first condition, therefore, in my opinion, must necessarily cover all liabilities otherwise it would be meaningless and useless. I agree that this appeal succeeds and that there ought to be judgment as suggested by the Master of the Rolls.

Appeal allowed.

Solicitor for the appellants, A. G. Hubbard.

Solicitors for the respondents, Keene, Marsland, Bryden, and Besant.

House of Lords.

Oct. 25, 27, 28, 31, and Dec. 19, 1927.

(Before Lords HALDANE, DUNEDIN, SHAW, PHILLIMORE, and BLANESBURGH).

CANADIAN PACIFIC RAILWAY COMPANY v. KELVIN SHIPPING COMPANY LIMITED. (a)

ON APPEAL FROM THE SECOND DIVISION OF THE COURT OF SESSION IN SCOTLAND.

Collision — Damages — Subsequent negligence — Novus actus interveniens.

As the result of a collision between the appellants' steamship M. and the respondents' steamship B. V. in the River Clyde, the latter vessel was so seriously damaged that it was resolved to beach her on the north side of the river in what was described as position 1. She subsequently slipped off the bank, and drifted to position 2 along the fairway of the river, where she was made fast by moorings under the supervision of the Clyde Navigation Authorities. As the result of the action of the tide she slipped into position 3 across the fairway, which increased the difficulty and cost of salvage. The owners of the M., whilst admitting initial liability for the collision and for damage truly consequent thereon, alleged that the damages claimed were to a large extent due to the subsequent negligence on the part of the respondents or of those for whom they were responsible.

Held (per Lords Haldane, Shaw and Blanesburgh; Lords Dunedin and Phillimore dissenting), that there was no breach in the chain of causation initiated by the collision, and no novus actus interveniens which was the direct cause of the final damage. The burden of showing that the chain of causation started by the initial injury had been broken lay on the appellants. In order to discharge that burden they must prove that the breach in the chain was due to unwarrantable action, and not merely

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

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CANADIAN PACIFIC RAILWAY CO. v. KELVIN SHIPPING CO. LIM.

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to action on an erroneous opinion by people who had bona fide made a mistake while trying to do their best, which was all that was known to have happened in the present case, not only as regards position 1, but also as regards the subsequent positions described as 2 and 3 respectively.

Decision of the Second Division of the Court of Session affirmed.

APPEAL from an interlocutor of the Second Division of the Court of Session in Scotland (the Lord Justice-Clerk, Lords Ormisdale, Hunter, and Anderson) reversing the decision of the Lord Ordinary (Lord Murray).

The Kelvin Shipping Company Limited, owners of the steamship *Baron Vernon*, brought an action against the Canadian Pacific Railway Company, owners of the steamship *Metagama*, for the loss and damage which they had sustained in consequence of a collision between the two steamships in the River Clyde on the 25th May 1925.

The Canadian Pacific Railway Company, the present appellants, admitted sole liability for the collision, but subsequently disputed part of the respondents' claim of damages in respect that they alleged that it was not the direct and natural consequence of the collision, but of subsequent negligence of those on board the *Baron Vernon*. The Lord Ordinary sustained the appellants' contention as to the subsequent negligence, but the Second Division of the Court of Session reversed his decision and found the respondents entitled to substantially the whole of their claim.

The facts are fully set out in their Lordships' judgments.

The Canadian Pacific Railway Company appealed.

Condie Sandeman, K.C., Langton, K.C., Normand, K.C., and C. W. G. Guest for the appellants.

Carmont, K.C., James Stevenson and A. W. Grant for the respondents.

The House took time for consideration.

LORD HALDANE.—I have had the advantage of reading the judgment of my noble and learned friend Viscount Duncedin. With his statement of the facts in the appeal, down to that of the result of the reclaiming note to the Second Division, I am in full agreement, and with his statement of the law which follows, so far as the principle is concerned. The question is whether, after the original fault which started matters, there has been a *novus actus interveniens* which was the direct cause of the final damage. Here I am also in agreement with him. I think, further, that the question of whether there was failure to use the engines of the *Baron Vernon* when she was on the north bank, in the first position, is purely one of fact.

But I do not agree that it has been proved that there was such a *novus actus* assuming the form of negligence on the part of those in charge of the *Baron Vernon* in not using the

engines. Negligence was not established in the other particulars alleged against those in charge. Apart from the question of not using the engines there were three other allegations of negligence made against those in charge of the *Baron Vernon*, when in the first position on the north bank. It was alleged at the trial that they should have obtained the assistance of tugs; next, that the steamer should have had her moorings out; and, thirdly, that she should have filled her aft ballast tanks. If, contended the appellants, these precautions had been taken, the steamer would have remained in position number one, and could have been easily and inexpensively salvaged. But on these three allegations the Lord Ordinary, after hearing the evidence, negatived them, and found the facts in favour of the respondents. It is only in the averment of negligence in not using the engines that he decided against the respondents, and the learned counsel for the appellants are stated in the judgment of the Lord Justice-Clerk to have abstained from challenging the judgment against them on the other grounds referred to.

I therefore turn at once to the crucial question in the case, was there fault in those responsible for the ship in reference to the use of her engines when she was on the north bank? Now this is a question of evidence, and in weighing the evidence in order to draw the proper inferences there are certain principles which have to be kept steadily in view. When a collision takes place by the fault of the defending ship in an action for damages, the damage is recoverable if it is the natural and reasonable result of the negligent act, and it will assume this character if it can be shown to be such a consequence as in the ordinary course of things would flow from the situation which the offending ship had created. Further, what those in charge of the injured ship do to save it may be mistaken, but if they do whatever they do reasonably, although unsuccessfully, their mistaken judgment may be a natural consequence for which the offending ship is responsible, just as much as is any physical occurrence. Reasonable human conduct is part of the ordinary course of things, which extends to the reasonable conduct of those who have sustained the damage and who are seeking to save further loss. These propositions were laid down and applied by Lindley, L.J. and his colleagues in the Court of Appeal in *The City of Lincoln* (6 Asp. Mar. Law Cas. 475; 62 L. T. Rep. 49; 15 Prob. Div. 15). They are in accordance with what was said in 1857 by Dr. Lushington in *The Pensher* (Swab. 211). It follows that the burden lies on the negligent ship to show by clear evidence that the subsequent damage arose from negligence or great want of skill on the part of those on board the vessel damaged. It is their duty to do all they can to minimise that damage, but they do not fail in this duty if they only commit an error of judgment in deciding on the best course in difficult circumstances. In the case *The City of Lincoln* (sup.) the steering compass, charts, log, and log

glass of the damaged barque had been lost in the collision. The master made for a port, but owing to the loss of his instruments he was unable to calculate with accuracy the distance. He blundered, and his ship grounded and was lost. None the less his ship was held entitled to recover. In *The London* (12 Asp. Mar. Law Cas. 405; 109 L. T. Rep. 960; (1914) P. 72), the rule laid down was that if the negligent act is the primary and substantial cause of the damage sustained by the plaintiff, the defendants will be responsible for the whole loss, even although it may have been increased by the introduction of the wrongful conduct of a third person as an outcome of the original negligent act.

The burden of showing that the chain of causation started by the initial injury has been broken lies on the defenders. In order to discharge this burden they must prove that the breach in the chain was due to unwarrantable action, and not merely to action on an erroneous opinion by people who have *bonâ fide* made a mistake while trying to do their best, which is all that is shown to have happened in the present case. This seems to me to be the standard in the light of which we must examine the evidence of what occurred in the position on the north bank.

The *Baron Vernon* was struck by the other steamer, the *Metagama*, on the port bow, and was cut down to below her water-line. She filled rapidly forward, and went down heavily by her head. Her pilot decided to beach her. The south bank, towards which the bow had been turned by the collision, he could not reach because of the bow having touched bottom. He accordingly put the engines astern, and beached the vessel stern first on the north bank, where she assumed what has been called in the case position 1. At this time, about 8 p.m., it was high water. Now in order to determine whether the *Baron Vernon* could have maintained this position on the north bank, it is almost essential to know in detail how the steamer was really lying. Unfortunately to this question no answer sufficiently precise can be given. The Lord Justice-Clerk points out in his judgment that the exact situation on the bank has been matter of inference only, and that an approximate answer at best is all that can be given. The stern was up the bank. The Lord Ordinary says in his judgment that her position cannot be fixed with any precision. She took the bank not at right angles but with her stern angled up river some 20 to 30 degrees. He thinks that only about one-third of the length of the steamer was beached. The north bank consists of sand and clay, with some mud as the navigable channel is approached. The north bank is also of a considerably steeper gradient than the south bank. It is of a gradient, in the neighbourhood of position 1, on the average of one in eighteen, but it is not uniformly like this, and the Lord Ordinary thought that the average gradient formed no real guide. But even if the gradient had been known it does

not appear to me to have formed a real test. For how the vessel would be lying depends not only on mere average but on the actual condition of the bank. If there was a hump in the bank, and the keel was lying on it, this would alter the actual gradient of the keel, and take away the basis of inference as to the angle of the ship with the water of the river and as to whether the propellers at the end of the stern were in or out of the water.

The first question on which the appellants have to discharge the burden of proof which lies on them, is whether the respondents were in fault in failing to secure the steamer in position 1. Was there reason to think that this could be more readily effected from a position on the north bank than from one on the south side of the river? I find no evidence which satisfies me that the prudent course was not to take the steamer, if possible, across to where the bank was softer and presumably safer. If this was so it was not negligence to keep the steamer only for a short time on the north bank. In the hurry and confusion which followed the collision the respondents endeavoured to keep her there, but whether it was negligence which resulted in damage to let her slip across the river, I very much doubt.

Whether this be so or not, it seems to me that it has not been proved that the respondent steamer was in a position such that by using her engines she could have been maintained in it. When the collision took place it was about high water. About forty minutes later, when the tide had begun to fall, the steamer slipped off the north bank and crossed the river until her stern was caught by and remained fast on the slope of the southern bank.

Whether to keep the engines running after the vessel had been beached stern first on the north bank would have been a safe course is doubtful. As was pointed out by the judges in the Second Division, with a vessel lying on a sloping bank the vibration of the engines might possibly have tended to produce an opposite result to that desired, inasmuch as it might have shaken the vessel out of the position in which she was. What was done was that a minute or two after 8.15 the pilot Addison rang off the engines. He says that it had been reported to him that there was no water for the propeller to bite. Addison says that he went aft and that the tilt of the ship confirmed the report which had been given to him. His evidence on this point was given by him in cross-examination. The second officer was not called by anyone to say whether there was water or not. If Addison's evidence was true there was no necessity to call him, and I think that for the reasons given by the Lord Justice-Clerk there is not any reason to doubt Addison's evidence, or to suggest that in what he said he made any admission of negligence in judgment about the engines.

Whether the propeller was awash or was on the ground is, of course, a material point. There is but little evidence on the subject. Addison, the pilot, thought that the tilt of the

vessel, which he observed when he went aft, showed that the report which he had heard that there was no water which it could bite was true. He therefore rang off the engines. It is pointed out that the second officer, who, he says, made the report to him, was not called. It is inferred for the appellants that Addison's evidence as to this report must have been false, because Hill, the captain, stated that the second officer was on the bridge with him. For the reasons given by the Lord Justice-Clerk, I cannot accept this inference. The second officer may have left the bridge momentarily, and spoken to Addison. The point about there being water for the propeller was one which was raised apparently casually during the cross-examination by the respondents of Anderson, the master of a tug called the *Flying Cormorant*, which was passing by. He hailed the damaged ship in her northern position 1. Anderson says that his services were abruptly refused, and he certainly was rather a zealous witness for the appellants. He declares that he saw the propeller and that it was in the water. I doubt, having regard to the position of his tug in the river and the moment at which he observed, whether he could either see as distinctly as he suggests or at the only time that is material. The pilot, Addison, and the captain, Hill, thought quite differently on the point, and I think that there is at least as good reason to rely on their judgment. What the second officer might have said had he been called we do not know, but the statement of the pilot that he had reported to him was not objected to, and the pilot proceeded to give his personal observation of the angle of the stern as a reason for taking the same view and ringing off the engines. The propeller had a wide sweep and might have been destroyed by the bank before it did any good. Even if Anderson's evidence can be relied on he is apparently speaking of what he saw when the *Baron Vernon* was still in motion, and it is not clear whether he is speaking of what happened when she had come to rest on the bank. The burden of proof being on the appellants, I am unable to hold that on this point they have discharged it.

It is with regret that I find myself at issue with my noble and learned friend Lord Dunedin on this question. It is one of fact. But I cannot hold with him that it was proved that the engines never raced even for a short time. Neither the log books nor the engineer of the steamer in his evidence gave any information about this point. It does not appear that at the trial the appellants thought fit to cross-examine about it. The inference I draw is that the respondent thought that the vessel was safely grounded, and that it seemed for some reason undesirable to create the risk which they considered an attempt to set the engines going might occasion. The position of those in charge of this steamer was indeed a difficult one. Of her bower anchors one had been lost in the collision and the other was under water. The windlass was wrecked. All

that was available was a small kedge anchor which was obviously insufficient. The best chance was apparently to remain still. I cannot see in the facts as proved by the appellants any break in the chain of causation initiated by the collision, or any *novus actus interveniens*.

The conclusion at which I have arrived is based on the principle which requires the appellants in a case such as this to discharge the burden of proof, and also on a survey of the evidence. If that conclusion is right as regards position 1, I think that it is *à fortiori* right as regards positions 2 and 3, I am therefore of opinion that the interlocutor of the Second Division was right, and that the appeal ought to be dismissed with costs.

Lord DUNEDIN.—I propose, first of all, to narrate those circumstances of the case as to which there is no contention.

On Friday, the 25th May 1923, the *Baron Vernon*, the owners of which are the respondents in this case, was proceeding up the Clyde on the proper—i.e., the south—side of the channel at a place, roughly speaking, some fourteen miles below Glasgow. She was met by the steamship *Metagama*, whose owners are the appellants in this case, going down the river. The *Metagama* hit the pursuers' vessel at about 8.5 p.m. on the port bow and made a large hole in her. For this collision it is admitted that the *Metagama* was in fault. As soon as the *Metagama* had backed away from the collision the *Baron Vernon* began to sink forward. She was laden with iron ore and esparto grass. After the collision, the bow of the *Baron Vernon* headed towards the south side of the river. The pilot in charge at once gave orders to go ahead, his idea being to beach the boat on the south side, but the stem had so far sunk that he found, on approaching the bank, that she buried her nose in the bank and he could get no further forward. He accordingly, changed his tactics and, putting his engines full astern, he backed across the river to the north bank. There he successfully ran her stern first on to the north bank; she remained with her bow athwart the river but practically out of the navigable channel. The movements of the vessel may be taken from the record of the log, the accuracy of which has not been questioned:

8.5 Struck on port bow by S.S. "Metagama," vessel started to settle down ford.,—8.6 Stop, Full ahead—8.7 Full astern and beached stern on North Bank—8.12 stop—8.17 Rang off engines.

This had all happened at just about full flood tide. The tide then began to ebb, and just at 9.0, as shown by the log, she slipped off the bank back into the water. The engines were not used, but she drifted across the river to the south bank. She there struck stem on to the bank, but she pivoted round her stem and assumed a position on the bank up and down the river.

A tug appeared at about 10.30. The tug assisted her to put a kedge anchor out from the

stern and held on in order to keep her in position. The tug which did so was the *Flying Elf*, which was afterwards replaced by another tug, the *Flying Buzzard*. On the Saturday morning at 6.10 a.m. the assistant harbourmaster arrived with other anchors, and eventually other heavier anchors were also brought. In the meantime, the *Flying Elf* had been replaced by the *Flying Buzzard*, a more powerful screw tug, which kept her stern down the river. Another powerful tug, the *Flying Serpent*, arrived about 1.50 p.m., but after the harbourmaster had arrived and the anchors were put in place, the master of the *Flying Serpent* was told that he was not wanted and went away. The theory of the mooring had been that the stern was the only part likely to get out into the river, and the anchors were all disposed so as to prevent the stern moving outwards; it was assumed that she was fast by the head.

On Saturday she began to get the esparto grass out and on Sunday to get the iron ore out; but at 6.30 on Sunday morning she dragged her anchors, the stem swung out to the river and she assumed an athwart the river position. After that she sank deeper and deeper into the mud and eventually had to be raised at a very great cost to the Clyde Trustees, who wished to keep the navigable channel clear which, in her then position, she partially fouled.

The present action was raised by the owners of the *Baron Vernon* against the owners of the *Metagama*. At first the *Metagama* denied fault and raised a counter-action, but before trial the *Metagama* admitted fault for the collision. In the meantime the Clyde Trustees had raised action and obtained decree against the *Baron Vernon* for the cost of salving the ship, which was so large—as in a question with the *Metagama*—as to make the *Baron Vernon* a total loss. Fault being admitted, it followed of necessity that the *Baron Vernon* must recover for the expense of repair and for loss of freight. The Lord Ordinary held that it was the fault of the pursuers that the vessel had not been maintained in its position on the north bank, and that if it had been so maintained the salvage could have been effected at a cost of 5000*l.* odd and he gave a decree for 21,500*l.* On reclaiming note the Second Division recalled that interlocutor, holding that the *Metagama* was liable for all that subsequently happened. They held that the vessel was thus a total loss and gave decree for 45,896*l.* 10*s.* 10*d.* with interest from different periods on said sum.

I shall now say a few words on the law of the case, as to which I believe there is no substantial difference of opinion. The *Metagama*, having been in fault for the collision, is liable for the damage occasioned thereby, and if the ship with which she collided sinks subsequently to the collision, she is, if no more is to be said, liable for that sinking. That is what Dr. Lushington said in the case of *The Mellona* (3 W. Rob. 7) and *The Pensher* (*sup.*). But it is always the duty of the person who is damaged to do his best to minimise his loss. This is really the same thing as

to say that if he might reasonably have avoided any part of the damage he has suffered, to that extent the damage is not such as arises directly from the act complained of. In many cases the question is stated as to whether after the original fault which started matters there has been a *novus actus interveniens* which was the direct cause of the final damage. *Novus actus interveniens* may be the act of a third party, so that in this case I think the best way of stating the proposition is, Was the pursuer guilty of such negligence after the collision as to make that negligence the direct cause of the final damage?

The learned Dean of Faculty, for the appellants, strongly urged the proposition that if a person owes a duty to another and is negligent in the performance of that duty, then it is for him to show—the onus is on him to show—that the result of such negligence had no effect on the ultimate loss, and he cited the cases of *Davis v. Garrett* (6 Bing. 716) and *Turnbull v. Cruickshank and Fairweather* (7 F. 791). I have no fault to find with his proposition, but I do not think those cases necessarily apply, for in *Davis's* case (*sup.*) deviation was undoubted negligence and in *Turnbull's* case the failure to pay the fees for keeping up the patent was undoubted negligence. Now, here the negligence alleged is the failure to use the engines to maintain the vessel's position on the north bank. Whether this failure to use the engines was negligence is a question of fact. Under the whole circumstances, it is, indeed, what is usually termed a jury question, and it is, therefore, not very surprising that there should be difference of opinion on the matter. If that failure was in the circumstances negligence, then the cases cited apply, but if it is not, then the basis of those cases fails.

The whole point, therefore, in my view, on which the case turns, is, Was it negligence of the persons in charge of the *Baron Vernon* not to use the engines to keep the vessel on the north bank?

So far, I believe, in what I have said I will have the adhesion of all your Lordships; but I now come to more contentious matter. I think it very necessary to state quite precisely what my view of the facts is, for the facts must be precisely settled before the law can be applied. I take the view which the Lord Ordinary, who tried the case and saw the witnesses, took, that there was real negligence. The reason for it, I think, is apparent. The pilot and master, having run the ship aground, thought she was all safe; they never took into account that the turn of the tide was imminent, and that at that time there would always be a chance of her slipping off again if she was not maintained where she was. That they thought she was safe, I think, is made very clear by the fact that they made no effort to secure a tug if one was about, and that they rang off the engines, which was equivalent to saying, in so many words, there is no chance of employing the engines again. Indeed, the master said quite plainly, 41 E, "I did not think she

would slip off." They gave no real reason for not employing the engines. In cross-examination, when it was put to them why they did not—and by "them" I mean the two persons actually in charge, namely, the pilot and the master—they made suggestions which were partly ludicrous and partly after-thoughts. The pilot said that the last report he had was that the screw was in the air. This report was supposed to have been made by the second officer, who was not examined and who was not proved to have been on the bridge; but the perfectly fatal point against this is that the engines never raced, as they must have done the moment the screw was in the air, and the engineer's log and the engineer's testimony give no countenance to any idea of racing. I do not wonder that, in these circumstances, the Lord Ordinary did not believe the pilot on this point. It was also suggested that the propeller might have been smashed. There is, in my view, no ground for that supposition. A witness, who was the master of a tug and who saw the collision and who naturally stood by to see what would happen, swore distinctly that he saw the screw after the vessel was backed on to the north bank and that its boss was awash. It is not without significance that the bow being down forward, this is just the position the vessel assumed when she got to the south side, as testified by the master of the *Flying Elf*, the first tug that arrived after she touched the southern shore. But the master's real view comes out most plainly when asked, 41 D, "Why did you not give the engines a chance?" He answered, "There was no necessity." To my mind, it is quite clearly proved that after she came into position on the north bank there was enough water for the blades of the screw to work in and that they were never given the chance of working. There is the usual contradiction between the experts on one side and the other as to what might have happened if the engines had been worked. In such cases one is driven to use common sense to the best of one's ability. I have come to the conclusion, with the Lord Ordinary, that very little would have been needed to keep her where she was for the one critical but short period when the tide turned, that that little could have been easily given by using the engines, and that the non-working of the engines was negligence. I am not insensible to the view that a mere error of judgment in choosing between two courses ought not to be counted negligence, but an error of judgment is one thing, supine inaction another, and the latter is what, in my view, ruled on this occasion. If, by the negligence of the pursuers, the ship left its safe position, then all subsequent damage is attributable not to the original fault but to that subsequent negligence.

After the vessel assumed her position on the south bank the pursuers did what they could to keep her there, using a tug and then getting anchors to which to moor her. No doubt here a mistake of judgment was made. The

mooring was such as secured that the stern should not drift outwards, but there was no provision against the stern swinging inwards, which came to the same thing. Here, however, I think the defenders (though in the view I have taken as to position No. 1 this is immaterial) cannot be held to blame, because they consulted the best authority they could, namely, the harbourmaster, and he gave the opinion that the ship was securely moored. I think this comes directly within what was said by Lord Collins in *Clippens Oil Company* (1907, S. C. (H. L.), on p. 14), when justly correcting a remark which I had made in the Court of Session, he said: "I think the wrongdoer is not entitled to criticise the course honestly taken by the injured person on the advice of his experts, even though it should appear in the light of after events that another course might have saved loss."

On the whole I would allow the appeal and restore the judgment of the Lord Ordinary.

LORD SHAW.—After a full consideration of this case I am of opinion that the judgment of the Second Division of the Court of Session is correct and that the appeal should be dismissed.

The general narrative as to the movements of this ship is clearly given in the opinion of my noble and learned friend who has preceded me. I think with him, and with possibly all your Lordships, that no negligence has been established against the *Baron Vernon* in regard to the events which occurred after that vessel, in her wounded condition, slipped off the north bank of the Clyde. In her subsequent proceedings those in charge of her acted upon advice which, concurring with their own, proved that there was a case of erroneous judgment but not of negligence.

The difference which arises on the Bench concerns the single remaining case of what is called position No. 1, that is to say, what was done or not done after the *Baron Vernon*, rammed to the water-line on her port bow, made the attempt, which only partially succeeded, to ground on the north bank of the river. The strength of her engines only carried her so far ashore and up the bank; with the turn of the tide she, after forty minutes, slipped into the water again. That this effort to ground her even in that position was a praiseworthy effort no one doubts. Had it succeeded, the damages would have been limited to somewhere about 5000*l*. When the action, however, was instituted, the *Metagama* set up a case the main elements of which had really nothing to do with the point now before this House. The appellants in defence maintained that the *Metagama* was not to blame; that defence has been abandoned and blame is now admitted.

It was only nineteen months thereafter, namely, in March 1925, that the appellants first suggested that the loss sustained was not directly due to the collision but was occasioned by the improper handling of the *Baron Vernon*

after that event. A series of allegations were made including the important one that the *Baron Vernon* should have summoned a tug to assist her in keeping in position on the north bank. All of these averments have now been given up except one, namely, that in position No. 1 the engines of the *Baron Vernon* should have been kept going. This allegation and afterthought have been much amplified in argument and amount now undoubtedly to a charge of negligence against the *Baron Vernon*.

As upon this matter there is difference not only in the courts below but in your Lordships' House, I propose, first, to state as briefly as possible how the facts appear to me to stand, and, in the second place, to apply the law which appears appropriate to these facts.

The vessel had on board an experienced pilot and an experienced master. The situation was one of urgency and emergency. I do not think it is correct to say that either the captain or the pilot were panic-stricken; but I have no manner of doubt that their most anxious desire, during the short period of forty minutes, was to do everything that could reasonably and properly be done to save the vessel and to prevent a further or a total loss.

As, notwithstanding the numerous accusations made against the master, all of which have been disproved or abandoned, this one still remains, it has to be carefully considered.

It is first said that after the *Baron Vernon* was beached on the north bank, her engines should have been kept going, and it is further said that it is proved that if these engines had been kept going, the vessel would have kept her position, and further damage avoided.

This requires a consideration of the position both of the ship and of the propeller. It is fairly clear that the ship lay aslant on the north bank to the extent of about one-third of her length sternwards, and that her forefoot, owing to the inrush of water caused by the collision at her port bow, was also touching ground. So far as the backing sternwards to the north bank was concerned, it had been wonderfully successful. The stern was undoubtedly rammed to the bank, the stern post was broken, and it appeared to be made clear beyond question that she could go no further in that direction, and that it would have been quite foolish for either master or pilot to suppose that she could.

What, however, was the position of the propeller? It was said to have been reported by the second officer that the propeller was in the air. I think this is an overstatement, and a fair result, I think, of even the pilot's evidence appears when he is asked:

Question.—“Why did you stop the engines?” and he gives the answer: “Because it was reported to me that the propeller was doing no good not getting a grip of the water.” He further explains: “I went to the stern myself, and I saw the stern was so far out that I could see the propeller was no use.”

A witness, Anderson, on board a tug, and viewing from the river the state of matters on

the bank, thinks that the boss of the propeller was awash, that two blades only were in the water, and two blades were in the air. It lies upon those who are responsible for the then condition of the ship—that is to say, a ship cut to the water line, and sinking, and deprived of all her fore anchors, and left only with a kedge anchor which, in the circumstances, was absolutely useless—it lies upon them to establish affirmatively that the keeping of the propeller going would, in all reasonable probability, have saved this ship. The onus upon them, in this particular, is a heavy onus.

In the language of Lord Sumner in *The Paludina* (ante., p. 117, at p. 120; 135 L. T. Rep. 707, at p. 710; (1927) A. C., p. 27), “The hand of the original wrongdoer was still heavy on his ship, and his own navigation was not the sole human agency determining her fortunes.”

I have addressed myself with anxiety and care to the question whether it was blame-worthy not to keep the engines going. I am distinctly of opinion that it was not. It appears to me to be quite a mistake to suggest that because this ship had two blades on her propeller going instead of four, therefore it must be mathematically correct to state that there still remained to her half of her propelling power. It is not so by any means. There remains a certain element of power, but it is unquestionably much less than a half and is quite small and fragmentary. Nevertheless, it may be asked: Why was not even this fragmentary power utilised to neutralise the enormous action of gravity which would operate to sink her, dragging her forward? On the very statement of it, this would appear to me to suggest a hopeless and merely desperate venture. The truth was not merely that it was hopeless in the negative sense, but I think to be the case in a positive sense, it was worse than hopeless. It would have precipitated instead of retarding the subsequent mischance. I am not speaking without book in this matter, and I do not depend, although one might, I think, legitimately do so, merely on the strong view of both the pilot and the captain, who were on the spot. I do not think their evidence can be lightly discarded. They were naturally and properly anxious to do the very best they could, and in the urgent position of affairs they consulted together—Captain Hill's evidence being:

Question: When she fetched up, did the pilot say: “That will do, we can do no more, and ring her stop?” But at the time, did you say anything about “We ought to stop the engines, in case they smash the propeller on the ground?”

Answer: Yes, I said to the pilot, “Better stop now. You will smash her up if you go on as you are going.”

The evidence of the captain is not completely satisfactory, but the pilot and he were certainly of the definite opinion, prompted by what they saw and knew at the time, that to keep her engines going was a useless and improper proceeding.

When, however, the harbourmaster—the most widely experienced and highly responsible person charged with duty under the Clyde Navigation Trustees—when he is asked on the subject in a careful cross-examination for the defenders, he gives a most emphatic denial of even the possibility of preventing the saving of the vessel by keeping the engines going. The question is: “Would there have been any difficulty in holding her so long as her propellers were covered by water and with the use of her engines?” and the answer he gives is “Impossible.” In answer to further questions he concludes the matter emphatically by saying: “I am saying now that, no matter what anybody else says, my opinion is that she could not hang there, she could not do it.” Smaile goes the length to say that the ship’s chances of remaining, even with the running engines, would have been very doubtful; but one of the most important witnesses in the case, a man with great experience, Captain Wilson, has, in cross-examination by the defenders stated thus his view in favour of not disturbing the vessel. He says that he would have let the vessel lie, and—

Question: To prevent her being washed out by the outgoing tide, would you not have kept your engines going astern?

Answer: No, I would not.

Question: Why not, until you got her anchored?

Answer: Because by keeping her engines going astern, she would have been unable to go even astern—she would be bound to swing.

Question: I take it from him that her stem was deeply in the mud and her stern was aground?

Answer: Yes. Well, I will say she was in a safe position.

That is to say, here is this highly skilled witness who agrees, in his judgment (these facts being put to him by the defenders) that the captain and the pilot thought exactly what he himself would have thought—that she was lying safe. That being so, the question is pursued by the cross-examining counsel:

Question: Would you not have taken the precaution to keep your engines running?

Answer: No, I would not have moved my engines.

Question: Suppose you had kept your engines running, would not that have tended to keep the ship where she was?

Answer: No, you would have been washing away the soil from under her.

Captain Richards on the suggestion being put to him that the engines kept running astern would have held the vessel from the bank, says: “I do not think so. I cannot follow that at all,” and he further adds: “If they worked the propeller with the engines, it would naturally make a hole, and the vessel would probably sink further into it—that is, the extreme stern of the vessel, or, at least, that is where she was holding the ground.”

There are other opinions, as, for instance, those of Metcalfe and Munro, and both of these witnesses favour the idea of tugs. That

idea is now given up and Munro has this broad question put to him by the Crown:

Question: Would the propriety of this or that step to be taken not depend a good deal upon your precise knowledge of the vessel as she had taken the ground, and what portions of her are aground or are water-borne?

Answer: Yes. I think that when they got the ship on the north bank the pilot was very pleased with the position she was in—that was a very good position.

Question: Would the propriety of taking this or that step depend on the precise knowledge of the people on the ship?

Answer: Yes.

If, after perusing all this evidence I am asked my opinion, I should say without much hesitation that I think to keep the engines going there was only not a duty but would have been a most dangerous proceeding. Matters had reached a stage when the propeller of this vessel, with a broken stern port, and in quiet shallow water, had one chance left to her and one only, and that was to lie still. The screw was an instrument whose propulsive power was, in the circumstances, reduced to a minimum, but whose disturbing power was increased to a maximum. Whether she would have smashed up part of the ship or not—a view of one witness—is not certain; but that the rotation of the blades would have caused a disturbance of the water, and of the sand and silt in and about that very portion of the ship of which it was highly important that she should retain a grip, is, I think, established.

In these circumstances, I put to myself the question: What would have been said, the ship having slipped off into deep water, if the fact had been that the engines had been put or kept going? Then indeed the defenders would have had a substantive case, and would no doubt have made the most of it. They would have said, “Your ship was safe. At least the law of chances was greatly in its favour. She was gripping the land, and she lost her grip. Why did you disturb both land and water? Why did you do that?” Here would have been definite and positive proof, it would have been maintained, of a *novus actus interveniens*, and of active contributory negligence. It is right to put this point, because in the narrow issue which is before the House as to whether or no, not a mere error of judgment has been committed but actual negligence, it is right to look at the considerations which affect the matter from both sides. So viewing it, and quite apart from all questions as to the heavy onus of proof resting on the defenders, I do not find it to be in any way established, affirmatively, that there was negligence in the navigation or handling of this vessel.

As to the law, the judgment of Lord Chelmsford in the case of *The Flying Fish* (Brown. and Lush. 436) still remains of outstanding authority. He confirms the opinion of Doctor Lushington as to how such a case stands when a master of the vessel has been put into a position such as the master of the *Baron*

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Vernon was on this occasion. "It is quite true," observes Lord Chelmsford, "as the learned judge (Doctor Lushington) has said, that 'if there was a reasonable doubt on the part of the master, where the measure proposed, or any other measure, would have been successful, he was justified in declining to run the risk, and would not be guilty of nautical ignorance of gross negligence.'" And Lord Chelmsford himself puts the general question in this form at p. 443: "Taking the whole of the evidence on both sides into consideration, can it be said that the conduct of the captain of the *Willem Eduard*, after he had run his vessel on shore in consequence of the collision, did not exhibit a want of nautical skill and a gross neglect of duty?"

It is quite possible to excise the word "gross" as going beyond the necessities of the proposition, but when that is done there remains a large ground in law, as I think there is in reason, for a court of law refraining from blame, in cases of urgency and emergency, when a variety of courses may occur to the mind of those in charge. This is especially so where the interest of such persons is all in favour of saving the vessel, if that is humanly possible. I am of opinion that the Second Division came to a sound conclusion in declining to attribute such blame. Whether there was error in judgment—a point upon which I have great doubt—it is not necessary to determine, but that there was culpable, or anything sufficiently approaching negligence, on the part of the pilot or the captain, I disbelieve.

In these circumstances, I am for dismissing the appeal with costs.

LORD PHILLIMORE.—The details of this case have been so adequately stated by the noble Lord, Viscount Dunedin, that it is unnecessary that I should repeat them. I may, however, state in outline the nature of the question which is submitted to us.

About 8 p.m. on Friday, the 25th May 1923, the steamship *Baron Vernon*, owned by the pursuers, came into collision in the River Clyde with the steamship *Metagama*, belonging to the defenders. This collision was due to the bad navigation of those on board the *Metagama*, so that the owners of the latter vessel are liable for the damage occasioned by the collision.

On the morning of Sunday, the 27th, after various happenings, the *Baron Vernon* finally sank in a position and in a part of the river which rendered her a total loss, and which further occasioned great expense, incurred in the first instance by the River Clyde Trustees in raising and removing the wreck.

The question before your Lordships' House is whether the owners of the *Metagama* are liable for this total loss, as the Court of Session has decided, or whether they are only liable for what happened up to a certain stage in the history of the transaction as the Lord Ordinary decided.

The *Baron Vernon* coming up the river was struck on her port bow in the way of No. 1 hold and was cut down below the waterline. Her anchors were cut away or rendered useless, and she had some other forward damage. Her pilot and master rightly determining that the thing to do was to beach her, tried to turn her head towards the south or nearer bank; but she had sunk forward so far that her stem scraped the bottom and prevented forward movement. They then quite properly worked her engines astern, so as to back her on to the north shore, and this they succeeded in doing. Almost the only dispute as to the incidents of the story concerns the amount of this backing, the witnesses for the *Baron Vernon* making her each a spot further out of the channel than those called on behalf of the *Metagama*.

It was just before the top of the tide, and therefore the most favourable moment for beaching her; and she lay there apparently at rest for approximately forty minutes when she slid off from this position No. 1 out into deep river towards the other side. She was again brought up by her stem catching on the ground, and as it was now ebb tide she swung with her stern down the river in a fore-and-aft position. This was called position No. 2. She rode safely in position No. 2 during the rest of the ebb and was kept in position during the next flood with the assistance of a small tug and anchors which were in the course of being got out. This would be on the Saturday. By the time the flood tide made on Sunday, she had an anchor out ahead, an anchor astern, and two anchors on her starboard quarter specially placed to prevent her swinging her stern out into the river as the flood tide made. She did not have a tug.

Unfortunately the flood tide, when it gathered strength, brought away the stern anchor, and those on the starboard quarter being intended to keep her from swinging out, were of no use for keeping her from swinging in, but rather by their weight and pull would encourage a swinging in, and she did swing in.

Then an unexpected circumstance occurred. Though held by her sunken stem enough to make her pivot on it and swing, she was not so tightly held but what the stem could be moved and the coming in of the stern into the bank wedged the stem out, so that she got into a position athwart the river with a considerable portion of her length in deep water.

From this position it was found impossible to rescue her, and she became a total loss. This is position No. 3.

That a collision of this kind, occurring in the river in a summer month when there was no gale, with all the appliances of the Port of Glasgow at hand, should have resulted in a total loss, is very surprising. To use the language of Mr. Hogarth (one of the pursuers), "one could hardly conceive that the vessel would become a total loss at our own doors as it were," and it appears to me that it could not have happened unless "someone had blundered."

The defenders say that she ought not to have been allowed to move from No. 1 to No. 2 or again from No. 2 to No. 3, and, anyhow, should not have been allowed to get from No. 1 to No. 3.

The account in the log book runs as follows :

8.3. Full astern.—8.5. Struck on port bow by S.S. "Metagama," vessel started to settle down ford.—8.6. Stop, Full ahead.—8.7. Full astern and beached stern on North Bank—8.12. stop—8.17. Rang off Engines ; proceeded to run kedge anchor from stern.

9.0. Ship slid into mid-channel.

The idea of carrying out the kedge anchor was a meritorious one, though not likely to be of much avail as the anchor was so light ; and, moreover, there was not time to carry it out before the ship slipped.

The complaint of the defenders is that the engines were stopped and rung off instead of being worked astern so as to keep her on the bank. Thereupon three questions arise : (1) Ought the pilot and master to have known that there was a danger of the vessel sliding off the banks ? (2) could they have prevented it by working the engines astern ? (3) if so, was there any reason why they should not do so ?

1. That they ought to have known, can hardly be questioned. The pursuers called a number of scientific gentlemen, most of whom said it was so certain, that it would have happened even though the engines had been worked astern ; and the master expressed himself to the same effect. If, as the pursuers suggest, the contour of the north side at this particular spot was exceptionally steep or irregular, so as to make sliding or slipping more easy, this was a matter which ought to come within the local knowledge of the pilot.

Here I may repeat that the only dispute as to historical fact is upon the question of the extent to which she ran up on the north bank—the pursuers putting her further on the bank and more out of deep water than the defenders.

2. On the second question there is much dispute. The experts called by the pursuers generally express their opinion that no action of the engineers could have saved the ship from slipping. One of them, Mr. Smaile, will not go further than saying "that it is very doubtful whether the engines would have held her ;" but he thought that if she had survived the first tide, the chance was that she would have survived the second. On the other hand, the tugmaster who was present and who might by towing, have had the same effect as the ship would have had by using her engines was of opinion that he could have held her by towing.

No point can be made of the tug not being employed because owing to ignorance of the evidence he was going to give, no question was put to the master of the *Baron Vernon* to give him an opportunity of explaining why he did not use the tug. But counsel for the defenders was entitled to use the analogy of the tug's potential action as showing what the engines could do.

When I come to the third question, I shall discuss whether there was any reason why the *Baron Vernon* should not have worked her engines astern. If there was no reason against their being so worked, the working seems so obvious and easy a precaution that your Lordships, I opine, would be chary of admitting the excuse that the precaution after all might have been useless. I feel certain that in affairs of everyday life, if someone owed to one of your Lordships a duty to take steps to provide against an accident, and a step was omitted which even possibly could have avoided the accident, you would not be very patient of the excuse that the accident would have happened whether or no.

3. I come, therefore, to the third point. Was there any reason against working the engines astern ? Was it an occasion of choice between two courses or of taking action to which some objection might be offered ? It appears to me that it was nothing of the sort. There was a plain omission of an obvious precaution.

True it is that after the event (nearly three years after it) when they come to be examined, the pilot and the captain not at all unnaturally begin to think that there must have been some reason for their omission to use the engines. The pilot suggests that the propeller was churning in the air, and that he had a report from the second officer that the engines were racing, but the captain has no recollection of anything of the kind, and he and the pilot were on the bridge as was the second officer ; and if the second officer went aft to see, he had to come back to the bridge to make some report, and the captain would have heard it. It was a vital matter. None of the log books suggest racing.

As to the captain, the Lord Ordinary rather invited him to find a different excuse, and for a moment, he yielded to the temptation, but in the end he withdrew the suggestion, and it remains that his real evidence is : "Well, when she fetched up dead, the pilot said, 'That will do, we can do no more,' and rang her to stop." The captain had previously said that "the pilot rang her engines off. I did not suggest that."

Now, I return for a moment to the log book. "8.7. Full astern and beached stern on N. bank. 8.12. Stop. 8.17. Rang off engines." Or, as expressed in the engineer's log book : "Full astern 8.7. Stop 8.12. Finished with engines 8.17 p.m." These are the contemporary records, and I venture to insist upon the ringing off. It is not so much that the working astern is stopped for a brief period so as to enable those in control of the navigation to judge whether she was far enough up on the bank ; or to judge whether with some of the tail of the flood tide she could be edged up a little further ; or to judge whether with the first motion of the ebb she began to be uneasy.

Five minutes are given to stopping from 8.12 to 8.17. And then they put it out of their power to do anything. The engines are rung

off, or as the engineer says they have "finished with the engines." Why? Because they were convinced that the vessel was hard and fast, and it did not occur to them that she would slide or slip off. If, therefore, it should have occurred to them, and if there is probable ground for assuming that working the engines astern would have saved it then as there was no reason why the engines should not have been worked, the slipping off the bank is due to the neglect of that precaution.

I must not, however, omit the excuse which is offered by some of the learned judges in the Court of Session. The Lord Justice-Clerk thinks that the fact that the crew were panic-stricken is the reason why the captain should not have thought of putting the engines astern. Lord Ormisdale thinks that the fact that the crew were deadly panic-stricken has some bearing on this point, and Lord Anderson thinks that the fact "that the crew were to some extent panic-stricken" was the reason why the captain and pilot should not "make up their minds what was best to be done or not done for the salvage of the ship."

I conceive that these observations bear very hardly upon the captain and the pilot. The captain, it is true, had given as a reason why the kedge anchor was not carried out earlier, that the crew had been deadly panic-stricken, but to suggest that this temporary alarm on the part of the crew would extend to the principal officers on the bridge at a time when the vessel was no longer sinking and was at any rate in their view hard and fast on the ground, and that the panic which had extended to them was so great as to prevent their giving a simple order to the engine room, is a reflection on their manhood which I am sure they would resent.

As to the engineer, he was so little panic-stricken that after the engines were finished with, he did not even come on deck to see what the state of things was, but remained comfortably down below.

It was Lord Anderson, I think, who accepted or suggested the idea that the action of the propeller might wash away the bank. If that were so—which, with all respect to the learned Lord, I take leave to doubt—it would only have made a dock for the ship into which she would have settled.

For these reasons, I am of opinion that it was the fault of those in charge of the *Baron Vernon* that the vessel slipped from position No. 1 where she would have been safe, into position No. 2.

In the case of *The City of Lincoln* (sup.), a sailing ship suffered such damage by a collision that it was necessary to make for a port of safety, while the collision had deprived the master of his proper instruments of navigation, and the Court of Appeal held that the striking of the vessel on a shoal might be deemed to be due to the loss of his instruments and to be the consequence of the collision.

On the other hand, we have *The Flying Fish* (sup.), a case not unlike the present. There, as here, the ship got ashore in consequence of the

collision, but the fault lay in not getting her off, not, as in this case, in not keeping her on. In that case the Privy Council, reversing Dr. Lushington, held that the loss which followed was not to be attributed to the collision. The Privy Council thought that he had been wrong in requiring the defendants to prove "gross nautical ignorance or gross negligence," and concluded that there had been an omission to take a plain means of saving the ship.

The judgment is, I think, valuable in giving a warning against stating these cases with an assumption that subsequent damage is *prima facie* the result of the collision—in other words, that *post hoc* is *propter hoc*.

If *The City of Lincoln* (sup.) be accepted as good law, you have in it the high-water mark, as you have in *The Flying Fish* (sup.) and in *The Paludina* (sup.) the low-water mark of the doctrine of consequential damage.

Whether the burden of proving that the subsequent damage followed upon the collision lay upon the pursuers, or whether it was for the defenders to disprove the consequence—which seems to me rather a question of degree than of law—I cannot assent to the view of the Lord Justice-Clerk that it was for the defenders to prove their case "beyond all reasonable doubt." And I was glad to hear from counsel for the defenders that they did not put their case so high. The proof, if it had to be given by the defenders, was proof of the same kind as that accepted for ordinary matters in a court of justice.

Neither can I agree with the Lord Justice-Clerk that "the *Baron Vernon* was . . . relegated to a choice of remedies." In my humble judgment, there was no choice to make, and none was made. A duty which was reasonably plain was omitted to be discharged.

As I agree with the Lord Ordinary in his finding that it was due to the negligence of those on board the *Baron Vernon* that she moved from position No. 1 to position No. 2, so I agree with him that on the whole there was not negligence in the *Baron Vernon* getting from No. 2 to No. 3, and that this movement may be deemed the natural consequence of her being in No. 2.

It is true that this particular movement might have been prevented if there had been a heavier anchor out astern, or if a tug had been employed to tow astern during the strongest part of the flood tide. It is also true that it does not seem to have occurred to anyone that if the *Baron Vernon* sheered inward she would move her bows or wedge her stem outward, as, unfortunately, she did. But at this time the harbourmaster and his deputy were on the spot; and though they were not in charge of the ship, nor did the captain cease to be in charge, as the Lord Justice-Clerk seems to have thought, and though they gave no orders but only advice, still, I think that on the question of the direction in which the anchors should be laid, and the number of anchors, they might have given orders, and their advice, therefore, came with

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great weight. There was present also another adviser of nautical experience, Captain Burns, and all three gentlemen concurred in what was being done and in not requiring anything more.

True it is that they had nothing to say as to the propriety of having a tug, and this may be said not to concern them. But it is a point that no one of them recommended the employment of a tug; and, more important still, no one of them anticipated that any mischief would result from her stern swinging in. I think that the movement to No. 3 may be taken as the natural consequence of her getting into position No. 2.

It has been suggested on behalf of the pursuers that if your Lordships take this view as to the transition from No. 2 to No. 3 then they are then entitled to say that they can recover in full notwithstanding that there may have been negligence on the part of their people in allowing the ship to move from No. 1 to No. 2.

This is founded upon the statement made by one of the witnesses for the defenders to the effect that No. 2 was in itself a good position, the exact words being that from "the point of view of the salvor the position was an extraordinarily favourable one, in my opinion." But to read this passage divorced from the context would be to misinterpret the evidence of the witness. In a sense No. 2 was a good position. It was outside, though only just outside, the dredged deep water channel; and, as the ship lay parallel with the bank, the obstacle to such navigation as might travel outside the deep water channel was reduced to the narrowest possible point, and the opposition to the tide with its consequent operation of scouring and silting was reduced to the lowest point.

It may be remarked in passing that it was a very dangerous position if the bulkhead were to give way. The real objection to it, however, is that, as the event showed, the position would not be preserved (I would rather say "would not" than "could not"), and would therefore end in the fatal position No. 3. In this matter the pursuers seem to me in a dilemma. Either the transition from No. 2 to No. 3 could reasonably have been prevented—in which case their people were responsible for that transition—or it could not have been prevented and is the natural consequence of the ship getting into position No. 2, and this being so, the responsibility falls on those who allowed the ship to get from No. 1 to No. 2.

It was suggested that if the *Baron Vernon* had been placed by those in charge of her in position No. 2 immediately after the collision and had then undergone the same misfortunes which she afterwards underwent, those in charge of her would not have been held guilty of negligence in so placing her, and her owners might have recovered for a total loss.

This might have been so, because an error in judgment in a moment of sudden danger produced by a fault of the *Metagama* would

not constitute negligence in those in charge of the *Baron Vernon*, as was decided in *The Bywell Castle* (4 Asp. Mar. Law Cas. 207; 41 L. T. 747; 4 Prob. Div., p. 219) and many similar cases by sea and land. In those circumstances there might have been no cause of complaint against those in charge of the *Baron Vernon*. They could not well help what happened. The complaint here is that when the ship was in a position of safety, she was allowed by their supineness to slip out of it.

I cannot put the matter better than by borrowing some of the homely words of an old ditty: "Had this ship remained upon the ground; she would not have been drowned."

I am in favour of recalling the interlocutor of the Court of Session and restoring that of the Lord Ordinary, with the variation in respect of interest and costs which was accepted as the outcome of the discussion at your Lordships' Bar.

LORD BLANESBURGH.—After a review of the unfortunate progress of the *Baron Vernon* from the moment when she found herself at rest in position 2 until she finally sank when in position 3, one is tempted to ask why it was that she ever sank at all. From a little after 9 o'clock on the Friday evening until 6.30 on the following Sunday morning she remained anchored in position 2, fourteen miles below Glasgow, in the placid waters of the Clyde, undisturbed by wind or weather, not really seriously damaged by the collision, with steam on her engines and with all the salvage appliances of the river in the shape of tugs, anchors, pumps and tackle available for her service. And notwithstanding this, at the end of it all she sank in the mud. Lord Phillimore has drawn attention to the statement of one of her owners to whom it seemed hardly conceivable that the vessel would become a total loss at their doors as it were. The final disaster is indeed one which calls for some explanation. Did the respondents in charge of the vessel and in duty bound to minimise the injury due, in its origin, to the collision, really do their best in the circumstances? The question is very insistent. Nor does it become less so when the nature of position 2 is recalled. It is described in unqualified terms of approval by Captain Metcalfe, a witness for the appellants. In his opinion from the point of view of salvage the *Baron Vernon*, when so placed, was in the most favourable position she could possibly be in, for the reason, which he gives, that she was lying up and down the tide, well out of the river traffic, and situated so that all salvage operations could be most conveniently carried out upon her. Nor does Captain Metcalfe stand alone here. His view is shared by Captain Munro, another witness for the appellants, who further indicates with reference to position 1 and position 2 that while there was no finality in either of them, the two positions were alike in that they were both admirably adapted as bases from which, if need be, by means of anchors, proper moorings and the assistance,

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if necessary, of her own steam, the *Baron Vernon* might ultimately be placed in the most advantageous position available for salving with no further damage to herself. I read the evidence of both witnesses as amounting to this, that on the evening of the collision there was to all appearances so little to choose between positions 1 and 2 in the above respects that had both of them been open to the master and pilot when the *Baron Vernon* was driven from her position on the south bank, either might without impropriety have been chosen.

All of your Lordships are of the opinion, which I also share, that while in their subsequent proceedings when she was in position 2, those in charge of the *Baron Vernon*, by acting on mistaken advice, may have brought about a disaster that with greater forethought was avoidable, their conduct for all that did not in the circumstances amount to negligence. The appellants accordingly gain nothing from the strong opinions on this subject held and expressed by their witnesses, and notably by the two to whom I have already referred. I find, however, implied in their evidence something which is very important in connection with another branch of the case, namely, that had it occurred to anyone that such a course was desirable, no reason is disclosed why at either high tide on the Saturday the *Baron Vernon* could not under her own steam have been again brought, as she had been on the previous night, to what I may call a position 1 on the north bank and have been there beached and protected by ropes, tugs and anchors by that time available. In other words, the loss of position 1 on the previous night was not final or irrevocable. It could have been recovered later had the attempt seemed to anyone to be worth while. It did not so seem, and no one is even now blamed for that view. And for the reason that position 2 seemed to all, and rightly, to be a position not of necessity but of choice.

Accordingly the serious question between the parties really is whether the respondents are to be held in fault for the alleged omissions, neglects and errors of seamanship committed when the *Baron Vernon* was in that position and not before. These were the true causes of the final sinking, and it is unfortunate for the appellants that responsibility for them, as acts of negligence, is not, for the reason already given by your Lordships, imputable to the respondents. As I see it, the truth is that the loss of position 1 has in the development of the case been invested with an importance to which it had no claim. As I think, the taking up of that position by the *Baron Vernon*, and its loss, had in the result no influence on the chain of causation either in fact or in law. It was not until the 18th March 1925—nearly two years after the collision—that position 1 was set up as being specially favourable, and even then the amendment which introduced that statement went on to describe position 2 as a position from which the *Baron Vernon* could have been expeditiously salvaged—all in accord

with the evidence of the appellants' witnesses to whom I have referred.

But while this view of the case would justify my adherence in its result to the judgment of the Second Division, I am conscious that it is a view which has commended itself to myself only. It behoves me therefore to express my opinion upon the question discussed by all your Lordships—the question, namely, whether the failure by the respondents to use the engines of the *Baron Vernon* while she remained in position 1 amounted to negligence to which are attributable, and not to the collision, all the consequences which followed.

This aspect of the case has been so fully dealt with by your Lordships who have preceded me that I can express my own conclusion upon it very briefly. I observe, at the outset, that the fundamental difference here between the Lord Ordinary and the learned judges of the Second Division is a legal one. In the opinion of the Lord Ordinary it was necessary only for the appellants, on this point, to make out a *prima facie* case of negligence against the respondents. That done, it lay upon the respondents to establish that the use of the engines not only might but would or must have been of no avail. If this is correct in point of law then it cannot, I think, be disputed, that, assuming a *prima facie* case of negligence to have been made, the respondents did not succeed in proving what was required of them. On the other hand, the view of the Second Division on this point is well expressed in the judgment of the Lord Justice-Clerk, where he says that the onus was on the appellants to prove affirmatively that precautions—e.g., the use of the engines—should have been taken which were neglected and that these precautions, if taken, would probably have been effective. If this proposition be correct in point of law, then the Lord Ordinary, as I read his judgment, would not dissent from the view that the appellants had not succeeded in affirmatively establishing what was thereby required of them.

For myself, taking the well-known case of *Davis v. Garrett (sup.)* and later authorities which have followed it as guides, I would prefer to state the true rule in a form which lies, perhaps, between these opposing views. These authorities, I think, show that it is not sufficient for the appellants in a case like the present merely to show, as the Lord Ordinary seems to have thought, that the negligence and the injury that might flow from it did exist. It was necessary for them—and here I choose a form of words somewhat more definite than that employed by the Lord Justice-Clerk—in addition to show that the injury would in ordinary course flow from the negligence. If less is shown the act of negligence must be regarded as otiose—as inoperative to cause or contribute to the subsequent injury.

This is for me a critical matter. I am in agreement, if I may say so, with Lord Dunedin in the view which he has expressed with reference to the evidence on this point of the master and the pilot of the *Baron Vernon*. The case

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of the respondents is, I think, prejudiced by that evidence. But, nevertheless, the appellants have not, in my judgment, succeeded in showing that if her engines had been kept going there was more than a remote possibility, a mere chance, that the *Baron Vernon* might thereby have been prevented from slipping. With the further help of tugs, yes : but without a tug, no.

Here the appellants suffer, and I think rightly suffer, for their delay in raising this question, a delay which has indefinitely aggravated the difficulty of ascertaining with any precision the exact position of the *Baron Vernon* at the time and the details of the other factors which affect the result. On the whole case, therefore I am of opinion with the noble Lord on the Woolsack that this particular charge in relation to position 1 has failed, as have all the others. Accordingly I also am for dismissing the appeal.

Appeal dismissed.

Solicitors for the appellants, *William A. Crump and Son*, agents for *Maclay, Murray, and Spens*, Writers, Glasgow, and *J. and J. Ross*, W.S., Edinburgh.

Solicitors for the respondents, *Botterell and Roche*, agents for *Fyfe, Maclean, and Co.*, Glasgow, and *Beveridge, Sutherland, and Smith*, W.S., Edinburgh.

Nov. 14, 15, 17, 18, and Dec. 19, 1927.

(Before Lords HALDANE, DUNEDIN, SHAW, PHILLIMORE, and BLANESBURGH).

THE MOSTYN. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Docks — Damage to dock works — Action by owner of docks — No negligence — Liability of owners of vessel — “Answerable . . . for any damage done by such vessel . . . to the harbour, dock, or pier, or the quays or works connected therewith” — Harbours, Docks, and Piers Clauses Act 1847 (10 Vict. c. 27), s. 74.

The appellants were the owners of the docks at Swansea under special Acts incorporating (inter alia) sect. 74 of the *Harbours, Docks, and Piers Clauses Act 1847*, by which it is provided as follows : “The owner of every vessel . . . shall be answerable to the undertakers for any damage done by such vessel . . . or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith, and the master or person having the charge of such vessel . . . through whose wilful act or negligence any such damage is done shall also be liable to make good the same. . . .” The respondents’ steam vessel *M.*, in entering the appellants’ docks, dragged her anchor, and in

consequence the anchor became engaged with an electrical cable laid at the bottom of the dock entrance, doing damage to the electrical works on shore with which the cable was connected. There was no negligence on the part of those in charge of the vessel, nor on the part of any other person.

Held, per Lords Haldane, Shaw, and Blanesburgh (Lords Dunedin and Phillimore dissenting), that the owners of the M. were liable under sect. 74 of the Harbours, Docks, and Piers Clauses Act 1847 for the damage done to the electrical cables, although they were not guilty of negligence. That section applied when the damage complained of, whether occasioned by negligence or not, had been brought about by a vessel which was at the time under the direction or control of the owner or his agents.

River Wear Commissioners v. Adamson and others (3 Asp. Mar. Law Cas. 521 ; 37 L. T. Rep. 543 ; 2 App. Cas. 743) explained and distinguished.

Decision of the Court of Appeal (17 Asp. Mar. Law Cas. 97 ; 135 L. T. Rep. 693 ; (1927) P. 25) reversed.

APPEAL from the decision of the Court of Appeal (Bankes, Atkin, and Sargant, L.JJ.) (reported 17 Asp. Mar. Law Cas. 97 ; 135 L. T. Rep. 693 ; (1927) P. 25).

The appellants, the plaintiffs in the action, the Great Western Railway Company, the owners of the King’s Dock at Swansea, sued the respondents, the owners of the steamship *Mostyn*, to recover an agreed sum of 226l. 4s. 6d. by way of damages for injuries to certain electrical cables laid in the King’s Dock entry, caused by the *Mostyn*. The plaintiffs founded their action in the first instance upon allegations of negligence, but by an amendment made after the pleadings upon the case so framed had been closed they alleged that “the damage complained of was damage done by the *Mostyn* to a harbour, dock, pier, or works connected therewith, and the defendants were answerable, therefore, to the plaintiffs as undertakers of the said harbour, dock, pier, or works by reason of sect. 74 of the *Harbours, Docks, and Piers Clauses Act 1847*, as amended by sect. 15 of the *Pilotage Act 1913*.” The facts were shortly these : In a masonry chaseway at the bottom of the communication passage which leads from the King’s Dock Lock to the adjoining Prince of Wales’ Dock electric cables were laid for lighting purposes and the supply of power. The casualty occurred on the night of the 26th Oct. 1923, and was the sequel of an accident which caused the *Mostyn* to be suddenly held up at the entrance of the passage in question. Entry to the passage was controlled by the plaintiffs’ officers. Another steamship, the *River Dee*, was ordered on, and while she was making her transit the *Mostyn* was ordered to proceed. Through some breakdown which was not explained, the *River Dee* stopped and blocked the way, at a time when the *Mostyn* was 300ft. or less from the entrance. To bring up the *Mostyn* it was necessary to put

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

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her engines astern and drop her port anchor. When the way ahead was again clear engine action with helm action was required to square the vessel's head for the passage. As soon as she had been brought to the correct heading engine action ahead was ordered, and an order was also given to heave up her anchor. The advance of the *Mostyn* to the passage-way and the bringing of her anchors awash would in ordinary course have taken place concurrently. On the floor of the dock outside the passage-way there lay, however, a cable, the property of the Postmaster-General, said to have been laid by his authority, the exact situation of which at the time in question was not definitely ascertained. As to its presence no notice was given and there were no indications apparent to those using the docks. The anchor of the *Mostyn* fouled, or was fouled by, this last-mentioned cable, and by reason of such fouling was held down as the *Mostyn* advanced into the passage, with the effect that by the combined operation of the ship's winch and of the fouled cable the anchor's fluke dragged upon the cables lying in the chase-way under water on the floor of the passage and carried away the cable in question from its attachments in the plaintiffs' distributing chamber on shore.

The Court of Appeal (Bankes, Atkin, and Sargant, L.JJ.), affirming the decision of Lord Merrivale, P., held that the appellants were not entitled to recover damages under sect. 74 of the Harbours, Docks, and Piers Clauses Act 1847 upon the authority of the *River Wear Commissioners v. Adamson and others* (1877, 3 Asp. Mar. Law Cas. 521; 37 L. T. Rep. 543; 2 App. Cas. 743). By Bankes, L.J., upon the ground that *River Wear Commissioners v. Adamson and others* (*sup.*) was a decision that the statute did not apply to this case having regard to the fact that the court was unable to find any negligence on the part of those in charge of the vessel. By Atkin, L.J., upon the ground that the *ratio decidendi* of *River Wear Commissioners v. Adamson and others* (*sup.*) is to be found in the opinions of Lord Cairns and Lord Blackburn to the effect that the damage contemplated by sect. 74 is *injuria cum damno*. By Sargant, L.J., upon the ground that the court was bound by the authority of *River Wear Commissioners v. Adamson and others* (*sup.*), and further that if the Lord Justice had had to express his own view apart from authority, it would have been a view entirely in accordance with the reasoning of Lord Cairns in that case.

The railway company appealed.

Raeburn, K.C. and *Wilfrid Lewis* for the appellants.

Langton, K.C. and *Carpmael* for the respondents.

The House took time for consideration.

LORD HALDANE.—This was an action brought by the appellants against the respondents for damages for the negligence of the latter in so manœuvring the steamship *Mostyn*, that in navigating a concrete-laid channel of com-

munication between the King's Dock at Swansea, belonging to the appellants, and the Prince of Wales' Dock, also belonging to them in common with the channel of communication, the *Mostyn* tore up and injured, to the extent of 226l. 4s. 6d., certain electric cables which crossed the bottom of the concrete-laid channel in a horizontal chase-way, open at the top. The claim is based on an allegation of negligence, resulting in liability at common law, and also on the provisions of sect. 74 of the Harbours, Docks, and Piers Clauses Act 1847, which it is said does not require proof of negligence in order to render it applicable. The courts below have agreed in holding that negligence has not been proved, and the nautical assessors who have been present to advise us are of opinion that there was no negligence shown. I understand that we are unanimously of the same opinion, and I shall leave it to others of your Lordships to state the facts out of which this opinion has arisen. I wish, however, to guard myself from being supposed to concur unreservedly in the whole of the observations made by the President, Lord Merrivale, who tried the case, and also in all of the reasons given in the Court of Appeal, which affirmed his conclusion. In a case of this kind, tried after a prolonged interval and dealing with circumstances which have been difficult for the witnesses to observe accurately, it generally results that details of what has been said by witnesses are open to criticism. There has been a good deal of such criticism in the course of the argument for the appellants, and some of it was not without foundation. But reading the evidence as a whole, I have come to the clear conclusion that negligent navigation has not been established. In cases like this, judges and counsel alike are apt to fasten on details, rather than on the whole to which they belong. The details are sometimes of a kind on which it is not possible to form a reliable judgment. If they are not individually vital, the true method seems to me to be to study the evidence as a whole, and to recognise that its individual details cannot be exhaustively estimated. Reading the whole of the evidence in this microscopic fashion is safer than the mere piecing together of microscopic estimates of particular incidents, which are misleading, apart from their context. The distinction between the two methods is to-day familiar in scientific investigation, which recognises that the microscopic procedure is the only one which can afford a picture that is at all adequate of what has been experienced.

With this observation, I pass to the very serious question of law which is raised by the second branch of the appellants' argument, on the assumption that actual negligence has not been proved.

Sect. 74 of the Harbours, Docks, and Piers Clauses Act 1847, provides that "the owner of every vessel or float of timber shall be answerable to the undertakers" (the persons authorised to construct the dock) "for any damage done

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by such vessel or float of timber, or by any person employed about the same, to the harbour, dock or pier, or to the quays or works connected therewith, and the master or person having the charge of such vessel or float of timber through whose wilful act or negligence any such damage is done shall also be liable to make good the same; and the undertaker may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same. Provided always that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot whom such owner or master is bound by law to employ and put his vessel in charge of."

By sect. 76 a remedy over is given to the owner who has had to make satisfaction for any such damage wilfully or negligently done by the master or person in charge, or, if the owner has had to pay any penalty or costs, by reason of any act or omission of any other person, the person who actually did such damage or committed the offence is to indemnify the owner.

The question which we have to answer is whether, in a case in which neither negligence nor any other act of an unlawful nature has been established against the owners of the *Mostyn* or those in charge of her, sect. 74 makes the owners answerable for the damage done in this case to the dock.

I assume that the master and those in charge were not answerable for any wilful act or negligence, inasmuch as none has been proved against them. But in the case of the owner the section does not in terms require any wrongful act to be established as the condition of liability. The words, taken by themselves, are unambiguous. The owner is to be liable for any damage done to the undertaking. If the language of this section can legitimately be construed by us who sit here without regard to authority, I should find difficulty in saying that the appellants were not entitled to claim that it applied. It has been said that to take this view is to attribute to Parliament an intention which is hardly conceivable, the intention of making people liable for damage where they have been in no way to blame. But I am unable to attach much weight to this consideration where the words are clear. What the motives of Parliament were we do not know and cannot inquire. It may be that it desired to encourage undertakers of this class by providing insurance at the cost of owners who are in no way to blame. There are instances of such a principle in modern statutes, such as the Workmen's Compensation Acts, and it may be that it was something analogous that was in the mind of the Legislature. I do not know and I feel myself precluded from even trying to inquire, or from speculating.

But we cannot proceed here on this simple view. It has been established by a decision which is binding on us by this House, that the

language must be interpreted as subject to some qualification which is implicit in the words, and the question which alone we are free and bound to examine, is what this qualification is, and how far it extends. In the case of *River Wear Commissioners v. Adamson and others* (35 L. T. Rep. 118 and 37 L. T. Rep. 543; 1 Q. B. Div. 546 and 2 App. Cas. 743) the question related to a vessel which had been driven on shore by a storm in endeavouring to make the port of Sunderland. The crew had been taken off with difficulty, and there was no control of the ship. Being a complete wreck she was driven by the winds and the waves against a pier belonging to the harbour, and damaged it. An action was brought by the commissioners against the owners, and damages had been awarded at the trial against them. It was held by the Court of Appeal that the action would not lie. Jessel, M.R. was of opinion that the general words of the section did not cover a case where the event causing damage occurred by the act of God or the Sovereign's enemies. It would have been equally difficult to hold that there was liability if the damage had been caused by the action of the undertakers themselves. The proviso exempting the owner of the vessel where there was compulsory pilotage showed that the words were not to be interpreted without restriction. As the result he held that the words were to be construed by the analogy of the common-law principle that where a duty is imposed by a merely generally expressed rule, that rule is not to be interpreted as covering such causes as the act of God.

Kelly, C.B. thought that the rule of construction was that no one can be made liable, excepting by express contract, for injury occasioned by the act of God, and that this rule applied to the general words of the Act of Parliament before them. But he went further on this language itself, for the section goes on to refer to the master, a person having the charge of such vessel "afloat," and says that if he is negligent he shall "also" be liable. This, and the exemption in case of compulsory pilotage, seemed to Kelly, C.B. to show that the word "also" imported only the superadding to the negligent act of the person in actual charge, a liability of the same kind imposed on the owner.

Mellish, L.J. agreed. He considered that the statute did mean to extend the liability of the owner beyond that at common law, because apart from such an intention it was difficult to see the object of the section. But he held that it contemplated only a case where the running against the pier was caused "through the act of man," and reading the language as a whole the Lord Justice said (35 L. T. Rep., at p. 120; 1 Q. B. Div., at p. 554) "it looks as though the Legislature considered that, somehow or other, through the act of man damage might be done to the pier, and then, in order to get the owner of the pier out of the difficulty of having to prove that it was owing to some particular person's negligence, and that that

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person was the servant of the owner, they say the owner shall be liable." The court was therefore justified in construing the general words, in accordance with the general rule of construction, excluding the act of God.

Denman, J. agreed that the section exempted the act of God. The words were strong, but they did not, in his view, include a case where the liability was not caused by the owner or his servants, but by the act of God. The words imposing liability on the person in charge confirmed this view, although there might be cases coming within them where the owner would be liable when no person was in charge, but someone ought to have been. But here the act of God was the sole cause.

Pollock, B. concurred, though he said that his reasons were not the same as those of the other members of the court. He did not know whether damage done by a float of timber arising from a cause not provided against by human providence would in itself be enough for exemption. He was not sure that this could be said to be the act of God. But here the vessel was extraneous to the dock authority, and had become derelict. It was only by the force of the elements that she was driven against the pier, and that was not an event against which the statutes provided.

On these somewhat varying grounds the Court of Appeal reversed the judgment and decided against the commissioners. It is important to know what was really laid down in this judgment, which was affirmed by the House of Lords. I think only that there having been no human agency as the cause, and the real cause having been the act of God, the case was not covered by the section. The learned judges were at least agreed on this, that when the cause was not human agency but a *vis major* beyond human control, it did not come within the words.

In the case before us there was no negligence, but, on the hypothesis which I am making, there was no breach of duty at all. It is therefore important to see whether the grounds of the decision in this House in *River Wear Commissioners v. Adamson and others* (*ubi sup.*) laid down for us any different principle which was held to take the case outside of the words of the statute. This is not easy to determine, for there was divergence of opinion.

Taking first Lord Cairns's view, I think that he held that it was to go too far to follow the Court of Appeal in saying that, where even a *vis major* had been the operative cause, the case was one which would have been outside the language used in the section. He found it, however (37 L. T. Rep., at p. 545; 2 App. Cas., at p. 751), "difficult to suppose that by means of ordinary and routine clauses inserted in private or local Acts, the Legislature, although it might well provide a ready and simple procedure for recovering damages where a right to damages existed by common law, could intend to create a new right and a new liability to damages unknown to the common

law." By common law the owner was not liable merely because he was the owner, unless it were shown that those navigating the ship were his servants. All the section does, according to Lord Cairns, is to take the owner and declare him to be the person who may be sued for the damage done. Under the subsequent words he may recover over against the master or crew for any act of omission. The clause was therefore in substance a clause of procedure only, dealing with the mode in which a right of action already existing is to be asserted, and does not create any new right of action for damages. Although he did not concur in the reasoning of the judges of the Court of Appeal, he therefore thought that their conclusion was right, and that the appeal should be dismissed.

The massive legal intelligence, even of Lord Cairns, does not seem to me to have wholly disposed of the question before us. He was dealing with a case in which human agency had been superseded. Here we are dealing with one in which there was human agency, although there was no breach of duty. I think that he meant to go further, and to suggest that even if there was human agency there would be no liability created provided that there was no breach of duty at common law. But that question was not before him, and what he suggests was not necessary for the decision of the *Adamson* case (*sup.*). It is therefore important to see whether his suggestion was concurred in by the other noble and learned Lords who took part in the decision. The very power of rhetoric which Lord Cairns commanded when stating his conclusions about matters of legal principle, makes it the more desirable to see that we are following the substance rather than the form of his propositions. Even if we accept his view that the section is one creating a new procedure, that of suing the owner while giving him a right to recover over, I am quite unable to see how this leaves the existing substantive law intact and relates to procedure alone. The owner could not be sued under that law unless he had violated some duty. If he can be sued at all, even with a right to recover over, it must be because some new substantive liability has been imposed on him by the statute. I think, therefore, that it follows that the common law has been altered, and that a new right of action has been created depending on the alteration. This is much more than mere procedure. Did his colleagues who heard the appeal with him accept his view as I interpret it? I think they did not.

I have studied their opinions. Lord Hatherley and Lord Gordon seem to me to have been impressed, as I own that I myself have been impressed, by the difficulty of reading the words of the Act as not altering the common law by including at least the case of an owner who personally or through his servants was navigating the ship when the damage was caused. Lord Hatherley was a very careful judge. I think that his disposition here was to

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hold that the words of the Act were so free from ambiguity that they covered cases in which there was no human agency, though he did not say so in terms. He was content to express his general agreement with the view of Mellish, L.J. that the statute only applied where human agency had intervened, and that it was because it was absent in the *Adamson* case, that he concurred in the judgment of the Court of Appeal. I doubt whether Lord Hatherley himself was ready to accept even this restriction of its scope, but he thought it at least a possible one, and if true it was enough to take the circumstances in the case before him, where there was no human agency, outside the language of the Act. That Lord Hatherley did not in terms dissent from the general result reached by the majority I cannot regard as an important circumstance in ascertaining his opinion. Lord Gordon expressly dissented. At the conclusion of an elaborate judgment he expressed the opinion that the statute ought not to be construed as if it contained any exemption from liability where it occurred even from the act of God. The words appeared to him to be express and unambiguous, and being so, he thought that they ought to be read according to their ordinary construction.

There remain to be considered the opinions of Lord O'Hagan and Lord Blackburn, with a view to ascertaining whether these noble and learned Lords concurred in the view which had been expressed by Lord Cairns, L.C., that no new right of action at all was created, whether or not human agency was present.

Upon scrutiny of the words used by Lord O'Hagan, I have come to the clear conclusion that he did not concur in the dictum of the Lord Chancellor, so far as it went beyond the facts of the case before him, that the statute created no new right of action, but was confined in its scope to procedure only. The language, Lord O'Hagan thought, was *primâ facie* sufficient to cover all cases, including those in which human agency came in. But he was of opinion that, reading the whole of the section, and particularly the reference to "such" vessel in the words declaring the liability of the master or person having charge of it, an intention was expressed to confine the liability of the owner to vessels "in charge of a master or someone else." On this point he expressed his concurrence with Mellish, L.J. The owner is therefore placed in a worse position than he would have been at common law, but not so bad as that in which he would have been had he been made liable when no one had charge on his behalf. The proviso as to the compulsory pilot seemed to Lord O'Hagan to confirm this conclusion. In his view the statute did, as Lord Cairns had said, simply introduce new procedure to the advantage of the dockowner, but it did not enlarge the liability beyond the limits he had indicated. On the question whether the act of God was excepted it was therefore unnecessary for himself to express an opinion, for it did not

arise. In *Dennis v. Tovell* (2 Asp. Mar. Law Cas. 402; 27 L. T. Rep. 482; L. Rep. 8 Q. B. 10) the vessel was perhaps not derelict and the owner might properly be held liable.

In Lord Blackburn's opinion a statute was an instrument in writing, to be construed on the same principles as other such instruments. He thought that, on every construction of the statute which he had heard suggested, the Legislature had intended to impose on the owner of the ship a liability occasioned by persons for whom he would not have been liable at common law. But he did not think that the Legislature could have meant to shift the burden of a misfortune befalling the owner of the pier from its owner, who at common law would bear it, to the owner of a ship wholly free from blame and involved, without fault of his, in a common misfortune. Lord Blackburn was of opinion that the purpose of the Legislature was to give the owners of the pier more protection than they had. With a view to this it had enacted that the remedy was to be that the owner, who was generally really liable (for the acts of his agents) though it was difficult and expensive to prove it, should be liable without proof either that there was negligence, or that the person guilty of neglect was the owner's servant, or of proving how the mischief happened, and that this is expressed by saying that the owner shall be "answerable for any damage done by the vessel, or by any person employed about the same" to the harbour. Lord Blackburn goes on (37 L. T. Rep., at p. 551; 2 App. Cas., at p. 769): "As to the cases in which the fault was not that of some person not able to make compensation, for whom the shipowner was not at common law responsible, it may have been thought that the cases would occur so seldom, or when they occurred would probably be of such small amount, that the shifting of the loss from the owner of the property to the owner of the ship was not too high a price to pay for the saving of litigation and expense. The cases of a common misfortune, befalling both ship and pier, without fault of either, seem not to have been thought of. At all events, no exemption or proviso to take these cases out of the general enactment is given in express words." He comes to the conclusion that this was the scheme of the Legislature; the mischief being the expense of litigation; the remedy that the owner should be liable without proof of how the accident occurred. He dissented from his own judgment in *Dennis v. Tovell* (*ubi sup.*), but with great doubt and hesitation. He expressed himself as adverse to the view taken in the court below that where a statute is made which might have expressed but has not expressed, an exception of the act of God, the courts should introduce it. He observed that Mellish, L.J. and Lord Cairns had thought that the words might be construed so as to make the owner of the ship answerable only for damages occasioned by the act of man; damages for which someone is answerable at common law. But he could not see anything

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in the words to justify what was, in the opinion of some of the judges in the Court of Appeal and, he thought, of Lord O'Hagan, that the language was confined to cases in which someone was in actual charge of the ship. Even if it were so this would not, in his view, help the owner in the case before him, for he was in possession of the ship until it was driven on the bank, after which the tide floated it in. The owner was still owner when this ship struck the pier, and it was no mere "congeries of planks," nor was it, in his opinion, a derelict. He had great doubt and hesitation in affirming the judgment of the Court of Appeal, but he would not dissent from the proposal to do so. It was conceivable, as Mellish, L.J. had thought, that the words referring to "damage done by the ship" might have the restricted sense of *injuria cum damno*.

When the expressions used by Lord Blackburn are considered, I cannot find in them concurrence with the dictum of Lord Cairns that no new right of action was created, even where human agency came in, and that the wide words at the beginning of the section were intended to introduce nothing more than what Lord Cairns had spoken of as a new form of procedure, which would indeed assist the dock-owner to pursue a new kind of remedy, but conferred on him no fresh substantive right. On this point the opinions delivered appear to me to leave us under the duty of deciding, unfettered by authority, whether when the vessel which caused the damage was under the control of the owner's agents, he is liable notwithstanding that there was no breach of the duty not to be negligent on their and his part. I do not think that *River Wear Commissioners v. Adamson and others* (*sup.*) settles the point of non-liability where the vessel was in charge, at the time of the accident, of the owners' agents. It seems to me that the words of the statute are too clear to admit of this conclusion, and that the decision of this House in the earlier case is not in truth any authority for it. We do not know enough of the facts in *Dennis v. Tovell* (*sup.*) to enable us to say whether that case was one of a derelict or whether anyone remained in charge of the vessel. If there was no human agency then what I have said does not apply in that case. I comment on the decision in *River Wear Commissioners v. Adamson and others* (*sup.*) on the assumption that, notwithstanding what was said by Lord Blackburn, there was no such human agency. For if there was, that in my view brings the case within the uncontrolled words, and would render it analogous to the present case. But on the facts set out in the report I think that the vessel must be taken to have become out of human control.

We appear to me to be bound by the authority of *River Wear Commissioners v. Adamson and others* (*sup.*) to hold that the section in question is not to be read literally, but as applying when the damage complained of has been brought about by a vessel under the direction of the owner or his agents, whether

negligent or not. The decision further exempts the owner when the vessel is not under such control but is, for instance, derelict. When there are facts to which it applies it effects an alteration in the common law which imposes a new liability to be sued on the owner, and to that extent changes not merely procedure but also substantive law.

If these things are true I think that on the facts established in the present case we must find the owners liable, reverse the judgments of the court below in their favour, and give judgment for the appellant railway company for damages, the agreed amount of which is 226*l.* 4*s.* 6*d.* The appellants are entitled to the general costs here and below, excepting the costs on the issue of negligence, on which they have failed. These costs they must pay to the respondents.

LORD DUNEDIN.—I have had the advantage of reading Lord Phillimore's judgment. He has dealt exhaustively with the question of whether there was negligence on the part of those in command of the *Mostyn*, and has come to the conclusion there was none. I agree with his statement and his reasons. I wish, however, to add one remark because I think the opinions of the learned judges of the Court of Appeal, who also found there was no negligence, might be misinterpreted.

There are passages in those judgments which would seem to favour the view that, though the captain knew it would be a negligent thing to do to enter the passage-way with the anchor down, yet, inasmuch as his command to heave up the anchor was given at a time which would ordinarily have sufficed to take it off the ground before the passage-way was reached, and he was only thwarted by the unexpected and unsuspected interference by the Post Office cable, he is thereby excused. That is not my view. If he had been unhampered in his movements, knew that he had an anchor down, and knew that it would be wrong to enter the passage with it down, I think it would be for him to see that he got it up before he entered the passage, and that he could not excuse himself by saying, "I began to heave at such a time as would ordinarily have sufficed." But on the facts here he was not unhampered. His anchor was down without negligence. He was compelled to move on because of the position of the ship and the gale, and, therefore, the position of affairs as I have just put it, did not arise.

I now come to the point on the statute. The opinions of the noble Lords who decided *River Wear Commissioners v. Adamson and others* (*sup.*) have been analysed again and again. I do not propose to analyse them again, because I do not think I could add anything helpful to what has been said by Lord Herschell, L.C., in the case of *Arrow Shipping Company Limited v. Tyne Improvement Commissioners; The Crystal* (7 Asp. Mar. Law Cas. 513; 71 L. T. Rep. 346; (1894) A. C. 508), and by the learned judges of the Court of Appeal in this case.

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At the same time, I do not agree with the method of treatment which those learned judges took in dealing with *River Wear Commissioners v. Adamson and others (sup.)*. I think it quite necessary to say this because there is, in truth, no difference in the position of the Court of Appeal in this matter, and that of your Lordships in this House. *River Wear Commissioners v. Adamson and others (sup.)* is binding equally on both tribunals. Now, when any tribunal is bound by the judgment of another court, either superior or co-ordinate, it is, of course, bound by the judgment itself. And if from the opinions delivered it is clear—as is the case in most instances—as to what the *ratio decidendi* was which led to the judgment, then that *ratio decidendi* is also binding. But if it is not clear, then I do not think it is part of the tribunal's duty to spell out with great difficulty a *ratio decidendi* in order to be bound by it. That is what the Court of Appeal has done here. With great hesitation they have added the opinion of Lord Hatherley to that of Lord Cairns and then, with still greater difficulty, that of Lord Blackburn, and so have secured what they think was a majority in favour of Lord Cairns's very clear view. I do not think that the respect which they hold and have expressed for the judgments of your Lordships' House compelled them to go through this difficult and most unsatisfactory performance. As I have said, our own position is just the same as theirs, and I say unhesitatingly that I agree with Lord Herschell that you cannot extract from the judgments in *River Wear Commissioners v. Adamson and others (sup.)* such a *ratio decidendi* as is binding. That, however, is far from wiping *River Wear Commissioners v. Adamson and others (sup.)* off the slate. It remains for two purposes. First, for the judgment itself, and, second, for the opinions of the noble Lords, which are entitled to the greatest respect. Now, the judgment is binding. What, therefore, I think is our duty on this occasion is to consider the statute for ourselves in the light of the opinions, diverging as they are, and to give an interpretation; but that interpretation must necessarily be one which would not, if it was applied to the facts of *River Wear Commissioners v. Adamson and others (sup.)*, lead to a different result. In other words, Lord Gordon's view is not open to us. Then, Lord Gordon's view being gone, there are, in my opinion, just three different *rationes decidendi* on which the result can rest.

There is, first, Sir George Jessel's view, namely that the words of sect. 74, absolute in their terms, must be held as having added to them an exception in the case of an act of God, or, in other words, that the exception of an act of God to a duty or liability cast on a person by the common law is equally true of a duty or liability cast on him by an Act of Parliament. I think that that view was in terms disapproved by their Lordships in this House, and I entirely agree with them.

I had prepared my opinion so far, but I am bound to add a word or two in view of what is going to be said by my noble friend Lord Blanesburgh. He has taken the view which, although the case of *Wear v. Adamson* has been again and again considered, I do not think has before been taken, that Sir George Jessel's opinion rests particularly on the pilotage exception. I am not at one with my noble and learned friend about that. I think Sir George Jessel's view was this: No doubt he took the pilotage exception, but he took it in this way. He said in effect: "Here you must revert to the general doctrine of law that there is an exception to a duty at common law of the act of God, and if you do that you find the pilotage exception exactly fits." But I do not think it matters whether I am right about that or not because whatever Sir George Jessel said there is no question that Kelly, C.B. and Denman, J. put the matter quite clearly that there was the same exception to an Act of Parliament as there is to a duty cast by common law, and that view was undoubtedly disapproved by this House. Lord Cairns, first of all, deals with it, and after taking the other view of what Sir George Jessel had said, and then adding the view of the Chief Baron and Denman, J., he says (37 L. T. Rep., at p. 545; 2 App. Cas., at p. 750): "In my opinion these expressions are broader than is warranted by any authorities of which I am aware. If a duty is cast upon an individual by common law, the act of God will excuse him from the performance of that duty. No man is compelled to do that which is impossible. It is a duty of a carrier to deliver safely the goods entrusted to his care, but if in carrying them with proper care they are destroyed by lightning or swept away by a flood, he is excused, because the safe delivery has by the act of God become impossible. If, however, a man contracts that he will be liable for the damage occasioned by a particular state of circumstances, or if an Act of Parliament declares that a man shall be liable for the damage occasioned by a particular state of circumstances, I know of no reason why a man should not be liable for the damage occasioned by that state of circumstances, whether the state of circumstances is brought about by the act of man or by the act of God." Lord Blackburn is just as explicit (37 L. T. Rep., at p. 552; 2 App. Cas., at p. 771), where he says, speaking of the old case of *Paradine v. Jane* (Alleyne 26): "The really important part of the decision is that where a contract is made which does not either expressly or impliedly except the act of God, the courts could not introduce that exception by intendment of law; and that makes strongly against the supposition that in construing a statute where the Legislature might have expressed, but did not express, such an exception, the court should introduce it." With those opinions I humbly concur, and I have made this digression because I think it would be very unfortunate that there should be any doubt left that that doctrine

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has been contemned by the House. My noble friend also says that he would have been content to decide the case upon *Fletcher v. Rylands* and *Nichols v. Marsland*. With great deference to him I think that analogy is quite a false one.

This leaves the other two views. (1) The view of Lord Cairns that damage in the section must be read as confined to actionable damage, and (2) the view suggested by Mellish, L.J. and favoured by some of the noble Lords that the action which led to the damage must be action attributable to human agency but, that being found, that the words of the section remain absolute. It becomes necessary—for I can see no other alternative—to choose between these two views.

On very anxious consideration of what is obviously a difficult and obscure question, I have come to be of opinion that the view of Lord Cairns is the preferable view. I am moved by two considerations. First, I think it is easier to interpret a word used, *i.e.*, damage, in a certain sense rather than to read into the section words which are not there, but which are to be gathered from a general view of the section as a whole. Second, I think that the compulsory pilot exception fits Lord Cairns's view better than it fits the other. It is obvious that the reflected light which this clause gives as to interpretation of the preceding part in an Act of 1847 cannot be affected by a change of the law in the Act of 1913. Now, the position of the clause to Lord Cairns's view may be found in his own words (37 L. T. Rep., at p. 546; 2 App. Cas., at p. 752): "This makes the part of the section relating to the employment of a pilot intelligible and consistent with the rest of the enactment. If a licensed pilot is in charge, the owner is not discharged from a possible liability, but everything is left as it would be at common law. If a pilot was in charge of a ship and the owner was at the same time the master navigating the ship, and did an act which caused damage, he would be liable at common law, and the Act leaves him so; but, in the same case, if, while the pilot was in charge and the owner was navigating the ship, the ship became unmanageable by tempest, the owner would not be liable."

On the other view, the effect of the clause is very one-sided and illogical. The vessel is in fault or is not in fault while the pilot is in charge, then the owner is not liable. But the vessel is in charge of a person for whom the owner is not responsible, *e.g.*, a repairer in dock, and the owner at once becomes responsible, fault or no fault.

In the result, therefore, though I must needs admit the matter is difficult when so many distinguished persons have differed, I end by agreeing with Lord Cairns that damage must be actionable damage, and that, therefore, in the present case the owner is not liable. It follows that the appeal should be dismissed.

Although I am not in agreement with the majority of your Lordships, who prefer what

I have called Mellish, L.J.'s view, I am glad that there will at least be a clear rule for future cases, namely, that the action which led to the damage must be action attributable to human agency, but, that being found, that the words of the section remain absolute.

Lord SHAW.—My noble and learned friend on the Woolsack has in his judgment narrated the circumstances in which damage was done by the anchor of the steamship *Mostyn* to certain electrical cables lying in the bottom of a waterway or communication passage extending between the King's Dock and the Prince of Wales' Dock, Swansea. These works were part of the undertaking of the Swansea Harbour, vested by statute in the appellants. When the misadventure occurred, the vessel had been in no way abandoned: her officers and crew were all on board.

This House agrees that the damage was done without negligence on the part of either owner or master or their representatives, in respect of which the common law would attach liability for damage. I entirely assent to that view of the facts.

The appellants, however, raise the further question whether, notwithstanding negligence not being established, the shipowners are, under the provisions of sect. 74 of the Harbour, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27) liable to them, the dockowners, for the damage done by the ship to the dock.

That section is in the following terms:

The owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith, and the master or person having the charge of such vessel or float of timber through whose wilful act or negligence any such damage is done shall also be liable to make good the same; and the undertaker may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same: Provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of.

While upon the construction of the words of the statute itself I feel free to confess that I would not personally have found difficulty, yet it has long been plain that most serious difficulty does arise in consequence of the judicial opinions expressed in the House of Lords in the *River Wear Commissioners v. Adamson* and others (*sup.*). The solution of that difficulty is of wide importance.

Prior to that case, the section, when under consideration in courts of law, had been construed according to what was held to be the plain and comprehensive tenor of its language used in the Act, and the shipowner was made, according to that language and subject to the pilotage exception, answerable for all damage

done by the vessel to the harbour or its connected works and that in any circumstances. A powerful Court of Queen's Bench, consisting of Cockburn, C.J., Blackburn, J., and Quain, J. decided the case of *Dennis v. Tovell* (27 L. T. Rep. 482-483; L. Rep. 8 Q. B. 10), and in delivering the leading judgment Blackburn, J. used these words: "The Legislature has put the owner in the same position as a man who keeps a dangerous animal, who must do so at his peril, and be answerable for any injury such animal may do. It enacts simply that the owner shall be liable for whatever damage the vessel may occasion. It appears to me that the Legislature has clearly said so, whether it intended it or not."

This judgment was expressly followed in the case of *The Merle*, decided in the Court of Admiralty in 1874 (2 Asp. Mar. Law Cas. 402; 31 L. T. Rep. 447) by Sir R. Phillimore.

If this law was not completely overturned by the House of Lords in *River Wear Commissioners v. Adamson and others* (*sup.*), it must be conceded that it was severely shaken thereby. So long as that House of Lords judgment stands, the doctrine that the shipowners are liable to the dockowners for all damage to the works caused by the ship, in all circumstances and in whatsoever manner, can no longer be maintained.

Nearly every judge who has spoken upon the subject, not only in *Adamson's* case, but in the various cases thereafter in which *Adamson's* case has been referred to, has admitted that, while the restriction of liability enforced by this House has, of course, to be deferred to, yet the imposition of unrestricted and comprehensive liability appears, nevertheless, to be in entire accord with the plain and express words of the statute. This is not a remarkable, but it is a notable fact.

There seems, indeed, no reason to doubt that the learned judges of the Court of Appeal in the present case would not have reached any restricted view of the statutory words had it not been for the case of the *River Wear Commissioners v. Adamson and others*. All the learned judges make that pretty plainly appear from the opinions which they have delivered. With regard to the case of *River Wear Commissioners v. Adamson and others* (*sup.*) itself, they also indicate the great difficulty which they have either in reconciling that decision with the statute, or in understanding its scope, or discovering, if any, its *ratio decidendi*. In *Arrow Shipping Company Limited v. Tyne Improvement Commissioners*; *The Crystal* (*sup.*) this House, and especially Lord Herschell, plainly found themselves in the same plight. It is the same plight also in which I find myself in this appeal.

The difficulty in regard to *River Wear Commissioners v. Adamson and others* (*sup.*) pointedly arises upon the words used by the noble and learned Lord then on the Woolsack, Lord Cairns. It is, nevertheless, our task to escape, if possible, from the "bewilderment" (to use a not inappropriate expression of

Scrutton, L.J.) caused by the variety of opinions delivered in this House. My own humble efforts have resulted as follows:

It is beyond all things important in considering the *Adamson* case (*sup.*), to bear in mind its very special circumstances. These are concisely given in the Lord Chancellor's own words commencing his judgment (37 L. T. Rep., at p. 545; 2 App. Cas., 749): "On the 17th Dec. 1872 the steamship *Natalian* was attempting, under stress of weather, to enter the Sunderland Docks, belonging to the appellants; while it was still in the open sea, about forty to fifty yards from the pier, it struck the ground, canted with its head to the south, and drifted, bodily, ashore. The crew had been rescued from the ship by means of the rocket apparatus. The tide was low at the time; and as the tide rose the flood and the storm drifted the ship against the pier and caused damage."

As I read the argument for the shipowners, their main reliance was upon this fact—that the ship was no more than a helpless log; that all aboard her had been rescued by the rocket apparatus, and that she had been abandoned and was derelict. Sir John Holker, for the owners, put that in the forefront of his argument (2 App. Cas., at p. 747): "There may be nothing unreasonable," says he, "in holding the owner of a ship liable for ordinary damage caused in an ordinary way, but the Legislature never could have intended to make him liable for damage occurring when the ship was no better than a helpless log upon the water, when the master and crew were with difficulty saved from death, and the owner had not any means whatever of exercising any means of control over the vessel."

In the course of the appellant's argument, the Lord Chancellor, upon *Dennis v. Tovell* (*sup.*) being cited, interjected the observation: "The facts there were not the same." It is to be observed accordingly that the one point which was before this House on that occasion was whether such an extremely special case, namely, that of a completely derelict ship, was within the words of the statute. That is to say, whether the owners could have a liability imposed upon them in the case of a ship abandoned, and beyond all human control, and left to the mercy of the elements.

It would be unnecessary to dwell upon this but for the fact that a careful scrutiny of the judgments delivered seems, to my mind, to point conclusively to this, that every one of the judges overcomes the misgiving with which manifestly he viewed a pretty apparent infraction of the comprehensive application of the statute, by the explanation of this singularity of fact, and his conception as to the element of hardship which thus entered the case.

The two main elements of fact were simply: (1) a derelict ship, all means or chance of possible control over which by human agency had disappeared; (2) damage to a pier by a ship in that state. It was to a case resting on those special facts that the decision of *River*

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Wear Commissioners v. Adamson and others (sup.) applied.

So far as the judgment of the Lord Chancellor was concerned, it is clear that the grounds taken by the learned judges of the Court of Appeal were grounds in which he did not concur. "I do not concur," said he, "in the reasoning of the learned judges of the Court of Appeal"; the noble Lord reached the conclusion which they had reached on a different ground—a ground which has given rise to much disturbance of the legal mind for two generations.

It may be noted in passing that while the noble Lord stated that if a duty was cast upon an individual by common law, the act of God would excuse him from its performance, yet it was a different case where a man, by contract, accepted the liability, and he further put a statutory liability on precisely the same ground as that of contract, saying (37 L. T. Rep., at p. 545; 2 App. Cas., at p. 750): "There is nothing impossible in that which, on such a hypothesis he has contracted to do, or which he is, by the statute, ordered to do, namely, to be liable for the damage."

Having thus sheared away all reasons for questioning the competency of the statute—to impose effectively a comprehensive liability, his Lordship then states the common law obligation resting upon negligence, by which common law obligation owners of vessels and those representing them, were bound, and he then adds the crucial words (37 L. T. Rep., at p. 545; 2 App. Cas., at p. 751): "In my opinion, it was to meet this state of the law that this section (sect. 74) was introduced. It proceeds, as it seems to me, upon the assumption that damage has been done of the kind for which compensation can be recovered at common law against some person; that is to say, damage occasioned by negligence or wilful misconduct, and not by the act of God." Later he adds: "The clause appears to me to be a clause of procedure only, dealing with the mode in which a right of action for damages already existing shall be asserted, and not creating a right of action for damages where no right of action for damages against anyone existed before."

I am of opinion that the question is whether the decision of this House rested upon the special and peculiar circumstances of the case or whether it rested upon a general doctrine of which the first of those sentences is the expression. If the former, the case does not bind this House, or any court, by a general principle; if the latter, it binds all courts and this House, the statute must be read in accordance with the doctrine so announced, and that doctrine is part of the law of the land until the Legislature be moved to interfere.

The situation accordingly is: Shipowners, as such, are by statute liable to dockowners for "any damage done by such a vessel . . . to the harbour, dock or pier." Whereas by the doctrine of Earl Cairns in *River Wear Commissioners v. Adamson and others* (sup.)

they are not so liable unless the damage was occasioned by negligence: the statute, in short, does not increase the common-law liability.

As I view the case, the doctrine so expressed, constituting this important exception from express statutory liability, neither was necessary for, nor did it truly underlie, the decision in *River Wear Commissioners v. Adamson and others* (sup.).

It is a doctrine, I may be allowed to say, very different from that which as lawyers we have been brought up to believe, holding as we do with Blackstone I, 89, "where the common law and a statute differ, the common law gives place to the statute." It is, accordingly most necessary to consider whether the doctrine so expressed by the Lord Chancellor as to this statute received the assent of this House at large. I am of opinion that it did not.

Before I consider the utterances of the other noble Lords, I may observe that the judgment of Mellish, L.J. in the Court of Appeal, which was received with great deference by other noble Lords who addressed the House, itself contained a very striking repudiation of any such doctrine. Said Mellish, L.J. (35 L. T. Rep., at p. 120; 1 Q. B. Div. 553): "I think, looking at the language of the section, it clearly was the intention of the Legislature to extend the liability of the owners of vessels, in favour of the owners of piers and harbours, beyond the liability which is imposed on them by common law; because, if that is not the intention, it is not easy to see the object of the section at all."

I do not find in any of the other judgments in the House of Lords a repudiation of that view, and yet it is an undoubted repudiation of the view of Lord Cairns, L.C. I proceed to the judgment of Lord Hatherley. He says (37 L. T. Rep., at p. 546; 2 App. Cas., at p. 752): "I cannot concur in the views expressed in the Court of Appeal by some of the learned judges, on the one hand that the damage which was done in this particular case having been caused by what is commonly said to be an accident, but is called in the language technically used in law courts as an act of God, namely a storm, the owner of the vessel would be excused by the section of the Act of Parliament, however construed, from the consequences of that mischief."

That appears to me to be a complete contradiction of the view of Lord Cairns, and a denial of the doctrine laid down by him. "The act of God would excuse the owner under the section," says Lord Cairns. "The act of God would not excuse him," says Lord Hatherley. Lord Hatherley goes further into a separate point in the case, namely, whether there is excuse even in the special circumstances of the vessel having been derelict or abandoned, and he appears to incline to the view that the owners were liable even in the special circumstances of a derelict ship. That, however, is apart from the general doctrine of Lord Cairns to which I have alluded. Lord

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Hatherley's judgment, along with the judgment of Mellish, L.J., to which I have alluded, appears to be, in substance, in direct conflict with the doctrine now being investigated.

Lord O'Hagan bases his judgment entirely upon the peculiar circumstances. He says (37 L. T. Rep., at p. 547 ; 2 App. Cas., at p. 788) : " It does seem hard that the respondent, having had his ship so injured by the winds and waves on the high seas that its crew, to save their lives, abandoned it, and it was derelict, and was forced by the storm against this pier, should not only have lost its value, 10,000*l.*, save in so far as it was insured, but, in addition, nearly 3000*l.* for mischief done admittedly without fault of his and by the act of God. We must take care that a hard case shall not make a bad law ; but we must also take care that we do not attribute to Parliament the intention of injustice so very flagrant, without coercive necessity." And he adds : " I have come to the conclusion, although not without serious hesitation and misgiving, that there is no such necessity, and that, well considered, the statute is not applicable in the peculiar circumstances before us."

One would have great difficulty as to Lord O'Hagan's judgment : but that it is an affirmation of the general doctrine laid down by Lord Cairns, L.C. can hardly be suggested in view of his own words, where he recurs to the general point in this way : " You may have noted that my reasoning has not been precisely that of the Court of Appeal, and that I have not based it altogether upon the legal doctrine as to the act of God." Then the opinion winds up in this way : " The only case cited as touching the present one (*Dennis v. Tovell, sup.*) has no application to it."

The House will be pleased to know the reason why. That reason is this : " There the vessel was not derelict, and the owner may have properly been held liable. Here, on the other hand, in the words of Pollock, B., ' out on the high seas she met with certain risks and injuries which compelled her crew to leave her, and she became derelict.' And, in my judgment, this ship should be dealt with as if it had been abandoned at the Antipodes, and had been ploughing the ocean, without a crew, for years before it was driven against the pier at Sunderland."

Lord O'Hagan's affirmation gives no ground for an assertion that he attached the weight of his authority to the general doctrine under discussion of the liability of owners only in case of negligence. It only established and it does establish that in his judgment the owners of the *Natalian* were not liable in the circumstances because she was a derelict ship.

In the result, at the point we have reached, I hold that the general doctrine has not only not been adopted by the two learned Lords last referred to, but has been in substance either dis-affirmed, or shown to be in no way the ground of the judgment to which they themselves ultimately inclined.

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The opinion of Lord Blackburn contains much valuable matter, as one would have expected, but it is extremely difficult to extract from it any affirmation of what I might call the Cairns doctrine. It does contain a complete disclaimer of the idea that the statute was not to add, as Lord Cairns's words seem to imply, anything to common law liability. Lord Blackburn (37 L. T. Rep., at p. 551 ; 2 App. Cas., at p. 786), said : " Reading the words of the enactment, and bearing then in mind what was the state of the law at the time when it was passed, it seems to me that the object of the Legislature was to give the owners of harbours, docks, and piers more protection than they had."

The remedy, his Lordship added, against the trouble of fixing particular persons with liability was : " That the owner who was generally really liable (although it was difficult and expensive to prove it), should be liable without proof either that there was negligence, or that the person guilty of neglect was the owner's servant, or proving how the mischief happened, and this is expressed by saying that the owners shall be ' answerable for any damage done by the vessel, or by any person employed about the same,' to the harbour."

I cannot read that as in any sense confirming the view that this statute was to be interpreted upon the footing that the shipowners escaped all liability except liability that grounded upon negligence. On the contrary, it seems to me to affirm the proposition that a further and separate liability was imposed by statute, and that it was imposed on the owners *quod* owners. To use the language of a Roman lawyer, the liability imposed is not a liability *ex delicto*, nor is it a liability *quasi ex delicto* ; but it is expressly a liability *ex dominio*. It is laid upon the owner as owner, and it humbly appears to me that this view is in entire accord with the dicta just cited from Lord Blackburn, and is in entire discord with the idea that he concurred in the general doctrine which Lord Cairns had laid down.

I am further of the opinion that Lord Blackburn misconstrued the true import of the judgment of Mellish, L.J., a topic upon which I understand my noble and learned friend who is to follow me will deliver a fuller opinion.

The final opinion in *River Wear Commissioners v. Adamson and others (sup.)* was delivered by Lord Gordon. That learned Lord, after a full survey of the legislative circumstances preceding the Act of 1847, and of that statute itself, dissents from the judgment of the House.

In the result, I am humbly of opinion that the liability of owners for damages done by their vessels to piers and harbours was not limited to damages caused by negligence, and that the dictum of Lord Cairns to that effect was not a part either of the text or of the ratio of the judgment of this House. I do not conceal from your Lordships that I have seldom known a case which has produced so much judicial uneasiness. The most able judgments of the

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Court of Appeal in this case disclose that. All of these judgments are valuable, and I am not sure that the analysis made by Atkin, L.J. differs very much from the results which I have independently come to. I think the Court of Appeal, however, erred in treating the dictum of one judge of the greatest eminence as the judgment of this House, and, therefore, as necessarily having an effect so general as to include the present case.

It may be asked,—if the general doctrine of non-liability except in cases of negligence, was not decided in *River Wear Commissioners v. Adamson and others* (sup.) what was decided? To that I reply that *River Wear Commissioners v. Adamson and others* (sup.) was a conspicuous instance of a derelict ship from which all human agency had been withdrawn, and it was on that footing, and upon that speciality, and to that extent alone, that the judgment in *River Wear Commissioners v. Adamson and others* (sup.) can be applied. I do not say whether or not that can be characterised as a *ratio decidendi*, and I desire to utter no disrespectful word on that subject, but I must in duty declare that this statute seems to me still to abide in its full and comprehensive application of liability to owners, but that the sole exception, plus the statutory exception of pilotage, is the derelict or abandoned ship case. Respect must be had alike (1) to the statute in its express and general effect and (2) to the decision of this House of an implied and particular exception.

Such an exception ought not to be extended or expanded. This House and courts of law should resist that. As to *River Wear Commissioners and others v. Adamson*, I would only add that if it were construed in the broad sense which with so much misgiving it appears to have been taken to mean, it would seem to me to form a curious intrusion of the judiciary into the province of the Legislature: for I cannot doubt that it was the Legislature, and the Legislature alone (the plain and clear words of the statute being before us) upon whom lay the duty of cutting into those words by an exception equivalent to a *pro tanto* but a large repeal. The case recalls much older times when the judiciary attempted that. It is recorded that “when counsel in a case in 1305 argued for a certain construction of the statute of the Westminster Second of 1285, he was cut short by the Chief Justice with the remark: ‘Do not gloss the statute; we understand it better than you, for we made it.’”

In these times apparently the statute is to be eviscerated by conceptions not of the judges who made the law, but their conception of what was the true and correct line of policy which must be supposed to have impliedly conditioned the words of those who made the statute. I humbly think this to be both legally and constitutionally unsound, even though it be put forward under the guise of construction. Parliament can and does change its own mind, and it will not under the constitution allow that the judiciary should change its mind for it.

In my opinion, we best adhere to both legal and constitutional principle when we affirm the statute, and decline to accept—unless it be where there is the clearest judicial decision to that effect—a vital and fundamental alternative which should deeply cut into the comprehensive words plainly employed by the Legislature. I agree with Lord Haldane and in the motion which he is to propose to the House.

Lord PHILLIMORE (read by Lord Dunedin).—About 10.30 p.m. on the 26th Oct. 1923, the steamship *Mostyn* was inside the docks of Swansea, and about to proceed from the King's Dock to the Prince of Wales' Dock. She was light in water ballast with a high side out of the water, not assisted by a tug but with a dock pilot on board to help the captain, and with an anchor clear and ready to let go as required by one of the by-laws of the harbour. The wind was blowing a gale from about S.W.

In these circumstances it was observed that a small steamship, which was preceding the *Mostyn*, had suddenly stopped, it is supposed because of some breakdown of her machinery. But at the trial nothing was proved with regard to the cause.

The approach to the dock being thus blocked, the *Mostyn* put her engines astern to take off her way and dropped her anchor to assist in checking herself and to keep herself straight, as otherwise her quarter would have been caught by the wind, and she would have been brought diagonally athwart the entrance. It is not disputed that these were proper and necessary manoeuvres. By them the ship was brought up; and then her engines were stopped.

After a short while, the leading steamship was able to move on and out of the way, and the *Mostyn* proceeded to get her anchor in, and at the same time to steam ahead. She had not paid out much chain. The fifteen-fathom shackle had not reached the windlass. The depth of the water was 30ft., and there would be several feet from the hawse to the water's edge, so that there would not be much chain dragging on the ground. Now it happens that in these docks just in front of the communication passage leading from the King's Dock to the Prince of Wales' Dock, there is an electric cable belonging to the Postmaster-General lying along the bottom, which at that part is ordinary gravel or sand; and that in the communication passage some little way in where the bottom is cemented there is a bundle of about ten electric cables, which belong to the dock owners and which carry light and power about the docks. They lie in a chaseway and are uncovered, but are not higher than the bottom of the dock.

Shortly after the vessel moved and as the chain was still being got in, all the lights all over the dock went out, and the dockmaster in charge, realising that the anchor of the *Mostyn* must have fouled some of these cables, ordered her to go astern and let her anchor down. This she did and tied up against

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the quay wall in the King's Dock for the night.

Next day the divers went down and found two out of the bundle of ten cables underneath the claws of the anchor not absolutely broken, but pulled out of their place and so damaged that the electric current was cut off. They also noticed that a third cable had been drawn out of its place, though it was no longer under the anchor. Besides this they found a part of the post office cable which had been absolutely broken lying on top of the anchor near the shackle.

The Postmaster-General made his own claim with regard to the damage done to his cable, as to which there are certain statutory provisions. The cost of repairing the dock cables came to 226*l.* 4*s.* 6*d.*, and it is for this sum that the appellants, the Great Western Railway, as owners of the dock, brought the present suit.

The plaintiffs put their case on two grounds. First, they said that it was bad navigation and negligence on the part of those in charge of the *Mostyn*, to go ahead before they were certain that their anchor was clear of the ground and that it was this going ahead and the dragging of the anchor on the ground that caused the fouling of the dock cables. Secondly, they said that, whether it was negligence or not, they were entitled as dockowners, under the provisions of the Harbours, Docks, and Piers Clauses Act 1847, to have compensation for any damage done to their works by a vessel.

The case was tried before the President, assisted by Trinity Masters. He came to the conclusion that there was no bad navigation, and that upon the authority of the case of *River Wear Commissioners v. Adamson and others (sup.)* the statutory claim could not be maintained, and he therefore dismissed the action.

The case came before the Court of Appeal, assisted by nautical advisers, and the result was the same on both points. The railway company have now appealed to your Lordships' House.

The President was advised by the Trinity Masters that those on board the *Mostyn* could not properly be found guilty of negligence, and he came to the same conclusion. But he appears to have been brought to this conclusion in some measure because he thought that the sequence of events was that the *Mostyn* caught the post-office cable first, catching it apparently when she first let go her anchor, and that this encumbrance afterwards prevented her from getting her anchor off the ground before she began to move forward again and so weighed the anchor down that it made it catch the dock cables as she moved forward.

This conclusion was attacked because it was founded, at any rate in part, on the view that the first officer had seen the post office cable foul of the anchor when the latter was being raised, while he never said this, nor indeed did he say that he sighted the anchor or anything

fouling the anchor at all. He knew that there was something foul of the anchor, but he might very well infer this from the fact that it did not come up in the usual way, or that the chain continued to lead aft.

It remains therefore a matter of uncertainty whether the post-office cable was fouled in the first instance, as the vessel went in, or whether as counsel for the appellants contended, the *Mostyn* when going astern in obedience to the directions of the dockmaster and dragging some of the dock cables with her, then first came into contact with and broke the post office cable.

It would seem to me that though the President's conclusion was partly founded upon a wrong premise, it is quite as likely to be right as the conclusions contended for by the appellants. For reasons, however, which I am about to give, it seems to me unnecessary to decide this point.

The President went on to accept the contention that it was *prima facie* negligence to proceed with the anchor dragging on the bottom, or, in other words, to go ahead till they were certain that the anchor was either up to the hawse, or, at any rate, hanging in the water. But notwithstanding this he exonerated the *Mostyn* because he thought that but for the unexpected incubus the anchor would have been up, and that those in charge of the *Mostyn*, though in some respects negligent, were not responsible for a consequence of their negligence which they could not have foreseen.

I am not quite sure whether this was the view accepted by Bankes and Atkin, L.J.J. in the Court of Appeal. It is one on which I should hesitate to put my judgment. If there was negligence, and that negligence caused damage, I doubt whether it would be a defence to say that the damage was not one naturally to be expected.

I think the matter may be put on a broader ground which is that which was explicitly taken by Sargant, L.J. and, as I gather, by the nautical assessors in the Court of Appeal. In my view those in charge of the *Mostyn* did their best in the circumstances.

They were right, as already said, when they lowered their anchor. When afterwards they had to proceed forward and get their anchor, they were bound to have steerage way as soon as ever the anchor was off the ground. It would be, so to speak, a good fault if they got their way on rather before the anchor ceased to hold. With that gale and in the position in which they were in the communication passage, it was all important that the ship should be kept heading straight. In difficult circumstances they did their best. This, I may add, is the opinion of the nautical assessors who have advised this House, and I therefore conclude that there was no negligence in the navigation of the *Mostyn*.

I have now to consider the claim of the railway company preferred by it as owner of the dock under sect. 74 of the Harbours, Docks, and Piers Clauses Act 1847, and I have to construe

that section in the light of the construction placed upon it by this House in the case which I have already quoted of the *River Wear Commissioners v. Adamson and others* (*sup.*).

The literal language of the section would lead me to accept the construction put upon the words by Lord Gordon, namely, that they make the owner of any ship which comes into collision with and does damage to the works of a dock responsible for such damage, whether the collision be a fault of himself or his servants or no; that, in fact, the shipowner is made an insurer.

But the decision of this House passed in conformity with the opinions of the majority of the noble Lords who sat, forbids me to give so wide an application to the section.

At the opposite end of the line comes the suggestion that the section gives no rights to the dockowner other than those which he possesses at common law and only gives him a power to ensure that those rights shall be fruitful by enabling him to detain the ship till satisfaction is made.

No doubt this by itself would in the year 1847 have been a valuable privilege, because till the Admiralty Court Act 1861, the Admiralty Court would have had no jurisdiction in such a matter, and therefore the ship could not have been arrested. Neither would the Act 9 & 10 Vict. c. 99, s. 41, have helped, because that only gives the power of detention in the case of damage to ships, buoys or beacons and applies only to foreign ships.

It was not till 1854 that the Merchant Shipping Act of that year (17 & 18 Vict. c. 104, s. 27) gave the power which is now reproduced in the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60, s. 688), and even so, the power of detention is only in respect of foreign ships.

Valuable, however, as this privilege of detention was and still is, at any rate for England and Ireland, it is obvious that the section does more than give this privilege. It does confer rights and create liabilities not known to the common law, and this was clearly the view of the House in *River Wear Commissioners v. Adamson and others* (*sup.*). We must find some halfway position between these two extremes, and the question is where the line is to be drawn.

When the *River Wear* case (*sup.*) was before the Court of Appeal, the judges differed in the reasons which they gave for absolving the shipowners from liability. Pollock B. decided the case upon a point of his own connected with the special circumstances of that accident.

Sir George Jessel, M.R., Kelly, C.B., and Denman, J. thought that in every Act of Parliament imposing a duty or a liability, however general and absolute the language might be, it was always to be supposed that there was an exception for accidents occasioned by an act of God or of the King's enemies, and that the misfortune in that particular case could be said to have been due to an act of God. This untheological expression is well understood by lawyers, and I should not myself have said that in the *River Wear* case the misfortune was the

result of an act of God in its accepted legal sense. It was merely an ordinary case of perils of the seas. But, however that may be, this House discarded this reasoning and refused to read into the statute this unexpressed exception.

Kelly, C.B. and Denman, J. also relied upon the fact that at the moment when the vessel made its impact on the pier, there was no one on board, and therefore no one in charge of the vessel; and they thought that the reference in sect. 74 to the liability of the master or person in charge, implied that the owner of the abandoned vessel was not to be made liable for its drift.

But neither did that view commend itself to your Lordships' House. Lord Blackburn pointed out that the ship was not a derelict, and, if in any case a ship by the act of man is brought to such a position that in the ordinary course with tide or wind she will thereafter come into collision with a pier, the fact that she is then left by her master and crew, ought not in reason to affect the question of the owner's liability.

There are two ways of reading the judgment of Mellish, L.J. According to one view the liability would accrue whenever the accident was due to some act of man. According to the other it would only accrue when the accident was due to the negligent act of some man, it does not matter who. This latter is the view of his judgment taken by Lord Blackburn, though apparently not by Lord Cairns.

However this may be, it seems to me that the *ratio decidendi* in this House is to be found in the adoption of the latter view by Lord Cairns, L.C., by Lord Blackburn, and, in very hesitating terms, by Lord Hatherley, and not expressly dissented from by Lord O'Hagan, that the shipowner is intended to be made liable in cases where the damage can be traced to the actionable negligence of some person, or, to put it in other words, to negligent human agency, the idea being that in this case the shipowner should be, as it were, the medium through which the dockowner recovers his damage, that he should directly compensate the dockowner and bear the loss if it is due to the negligence of himself or those for whom he is responsible, but get reimbursement from any ulterior person who is the real cause of the mischief. For instance, if ship A, by its bad navigation, forced ship B into collision with a pier, the owner of ship B would pay the pierowner and look to recover over against the owner of ship A; or if a shipowner has placed his ship in the hands of a ship-repairer, and the ship-repairer or his servants has done damage to a dock, the shipowner would have to pay the dockowner and seek his remedy against the ship-repairer, while at the same time the right of an employer to recover against his own negligent servants is affirmed.

Lord Cairns calls the section a clause of procedure only, and says that it deals with the mode in which a right of action for damages already existing should be asserted and does not create a new right.

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This, speaking with all respect, is a juridical idea of an unusual nature, because a right in A to recover from B is a different right from that of A to recover from C.

But for the purpose of the statute, Lord Cairns treats the right as one in the abstract which exists in A and can be transferred from being one against B to being one against C. Actionable human agency is, therefore, according to these judgments, the test. This view receives confirmation, as he says, from the fact that an exception is made in the case of compulsory pilotage.

I read Lord Herschell, L.C.'s judgment in the case of *Arrow Shipping Company Limited v. Tyne Improvement Commissioners; The Crystal (sup.)* as putting this construction upon the judgment in the *River Wear* case.

The contention of the railway company before your Lordships was that human agency of any kind, though innocent, made a shipowner liable, and if that were so, they would succeed in the present suit. But the result of my study has brought me to the conclusion that this is not what is intended by the judgment of the House in the *River Wear* case. And as the proof given at the trial in the present case does not indicate that there was negligence on the part of anyone, I think the shipowners are entitled to succeed.

If it had appeared that the leading steamship had been negligent, and that the ultimate misfortune was the consequence of that negligence, then I suppose the shipowners would have had to pay, and to look to recover over against the owners of the leading steamship.

LORD BLANESBURGH.—I accept with all your Lordships the view just expressed by Lord Phillimore that the master and dock pilot of the *Mostyn* are to be absolved from any imputation of personal negligence in connection with the navigation of their vessel on this occasion. I reach that conclusion for the reasons given by my noble friend, and I proceed at once to the inquiry whether in view of that finding the statutory liability of the respondents as owners of the *Mostyn* is at an end or whether it still subsists.

The hypotheses of fact upon which this inquiry must proceed are now made clear. It is convenient to collect them. They are first, that at the relevant time the *Mostyn* was not under compulsory pilotage, or, in other words, that the respondents are not entitled to rely on the pilotage exception in sect. 74. Second: that the damage done by the *Mostyn* to the appellants' harbour property resulted from the voluntary act of her master and pilot. But, third, that it was not due to any negligence on the part either of the respondents, the master or pilot, or of any persons on board of or connected with the vessel at the time. I have myself been helped by this statement, for it discloses, as in a flash, the correspondence between the facts of the present case and the words of the section in relation to a state of things to which the section has direct reference.

The correspondence is striking, so striking, indeed, that one is tempted to affirm that had the present dispute been the first to call for judicial determination, it would have seemed that this statutory liability of the respondents was too plain for argument.

The general intent of the section is now, I think, generally accepted. It has been judicially described in varying terms, but with no different result. I take as a specially apt description that of Mellish, L.J. in *Adamson's* case. "I think," he says (35 L. T. Rep., at p. 120; 1 Q. B. Div., at p. 553), "looking at the language of the section, it clearly was the intention of the Legislature to extend the liability of the owners of vessels, in favour of the owners of piers and harbours, beyond the liability which is imposed on them by the common law; because, if that is not the intention, it is not easy to see the object of the section at all." That assertion begs no question as to the precise limits of the extension of liability effected by the section, but it does warn a court of construction against the danger of denying its plain meaning to any expression found there, merely in order to avoid the imposition of a liability upon owners of vessels which had not hitherto been part of the law of the land.

Thus duly warned, I find on referring to the words of the section that the owner of every vessel is thereby made "answerable" to the undertakers for any damage done by such vessel to the harbour . . . or works connected therewith," and if there be any doubt as to the generality of that liability, in relation, at all events, to the presence or absence of negligence, with which alone the House is, in the present case, concerned, that doubt is, I suggest, resolved by the contrast to be found in the words which immediately follow "and the master or person having the charge of such vessel through whose wilful act or negligence any such damage is done shall also be liable to make good the same." The meaning of these latter words is surely quite clear. It is that the master or person having charge of the vessel is by them only made liable if the damage done is attributable to his wilful act or negligence. That such is the case is the view, amongst others, of Lord Cairns, expressed in his judgment in *Adamson's* case (37 L. T. Rep., at p. 545; 2 App. Cas., at p. 731), of Lord Hatherley (37 L. T. Rep., at p. 546; 2 App. Cas., at p. 753), and of Mellish, L.J. (35 L. T. Rep., at p. 120; 1 Q. B. Div., at p. 553). I fortify myself by reference to these authorities only because of the somewhat different signification attributed to the words by Sargant, L.J. here.

It is now possible to arrive at the full effect of the section so far as it applies to a case like the present. It is that the owner of a vessel as such without any qualification in regard to the presence or imputation or otherwise of negligence on his part is made answerable for damage to harbour property done by his vessel: that the master or person having charge of the vessel is also fixed with liability to make

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good the same damage, but in his case only if the damage be due to his wilful act or negligence, and not otherwise. And I would here observe that this contrast in the nature of the liability which by the section is imposed upon the owner on the one hand, and the master, using that term compendiously, on the other, is heightened by the terms of the pilotage exception to which some reference must now be made. That exception, it will be remembered, extends to the "owners" only. It does not touch the "master" clearly, in my suggestion, because the liability of the owner under the section exists apart from any question of fault on his part: while in the case of the master his liability is conditioned on personal negligence not to be excused by the presence of any pilot on board.

And this leads me here to add one further statement as to the section, more general in its application. It is that this statutory liability is confined to two classes of persons and to them only. First, the owner; second, the "master," with, in his case, the qualification just stated. There is nothing on the face of the section to indicate that the owner's liability is in any sense representative. It is, so far as the section is concerned, as final and as personal as is that of the master. The significance of this, together with the fact that his liability presupposes no fault on his part, will emerge later.

And by these statements progress is made in resolving the one further difficulty which, so far as the present case is concerned, seems to be presented by the wording of the section. That is as to the connotation of the word "damage" as there used. The word, I venture to think, is employed to denote physical or material damage or injury to the harbour or works. If there were any doubt as to its signification when used in relation to the owner, there can, I suggest, be none, when in reference to the same "damage" the master is required "to make it good." And not only by this indication is it shown that the word is being used in a material sense and not as a juridical term. Sect. 74 is one of a fasciculus of clauses (69-76) grouped under the heading: "And with respect to the protection of the harbour dock and pier and the vessels therein from fire or other injury be it enacted as follows." And just as that heading refers to "fire or other injury," so it will be found that the penal sections, 69-73, are all directed to the protection and safeguarding of the harbour and shipping against physical injury of one kind or another. Accordingly I cannot myself doubt that this word damage, where it occurs in sect. 74 is used in that sense also.

In the result I can see no escape from the conclusion that, on the plain words of the section, the liability of the respondents thereunder, for the damage here sued for is in the circumstances now disclosed, clearly established.

And at this point I would observe that in the case of liability imposed upon an "owner" by sect. 56 of the Act in words not more express than the words of sect. 74, where also

an unqualified construction is not assisted by such a contrasted provision as is found in sect. 74, a majority of this House in *Arrow Shipping Company Limited v. Tyne Improvement Commissioners*; *The Crystal (sup.)*, held that an owner was thereby made liable without negligence on the part of himself or of his servants for damage for which, apart from such negligence, he was at common law under no liability at all. I use this case only to indicate that if your Lordships do finally attach liability to the respondents in the present case, you will to this extent merely be bringing sect. 74 of this statute into line with sect. 56, as already interpreted in this House.

But, while such a decision would involve no new principle and while it is necessary fully to appreciate, as applied to the facts of the present case, the unambiguous clarity of provisions which must be ignored if the respondents here are to escape liability, I necessarily recognise that the real difficulty which confronts the House now, is to keep within its proper limits, as applicable to the facts here, its own decision in *Adamson's* case. For I agree of course at once, that by the *ratio decidendi* of that case—if it can be discovered—and by the decision itself—whether its *ratio decidendi* can be discovered or not—this House is as much bound as is at least every English court.

There is, however, one circumstance in *Adamson's* case not yet alluded to which may require this House in the present case to regard that decision from a very special point of view. Curiously enough—helpfully enough perhaps one ought to say—three of the noble Lords out of the four who there decided that there was, under sect. 74, no liability on the owner, concurred at the same time in the view that on the true construction of the section an owner, on the facts of the present case, would be and remain liable for the harbour damage. That conclusion is clearly implied in Lord Hatherley's speech in the two middle paragraphs, which I refrain from setting forth only in the interests of economy and space. It is expressly so stated by Lord O'Hagan and by Lord Blackburn.

Lord O'Hagan says (37 L. T. Rep. at p. 548; 2 App. Cas. at p. 760): "The Legislature may have fairly said that greater protection was due to" [the undertakers] "than they derived from the law which had grown up before that commerce and those works had been created, involving the necessity of safeguards theretofore uncalled for and unknown. Accordingly the Legislature made the owner—a person easily and always to be found—'answerable' as owner, and dispensed with the proof of negligence or any other proof, save the fact of injury by the vessel—in all the cases contemplated by the Act."

And amongst these cases, as Lord O'Hagan had previously held, was the case where as here, the vessel was in charge of a master at the time of the damage done. But Lord Blackburn is the most express of all. He says (37 L. T. Rep., at p. 551; 2 App. Cas., at p. 768):

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"My Lords, reading the words of the enactment, and bearing in mind what was the state of the law at the time when it was passed, it seems to me that the object of the Legislature was to give the owners of harbours docks and piers more protection than they had. It seems to have occurred to those who framed the statute, that in most cases where an accident occurs, it is from the fault of those who were managing the ship—and in most cases those are the servants of the owners—but that these were matters which in every case must be proved, and consequently that there was a great deal of litigation incurred before the owner, though he really was liable, could be fixed; and with a view to meet this, the remedy proposed was that the owner, who was generally really liable (though it was difficult and expensive to prove it) should be liable without proof either that there was negligence, or that the person guilty of neglect was the owner's servant, or proving how the mischief happened, and this is expressed by saying that the owners shall be 'answerable for any damage done by the vessel or by any person employed about the same' to the harbour."

When you find that three out of four noble Lords who were at one in exempting from liability the owners in *Adamson's case* (*sup.*), are there equally in agreement in the view that owners in the circumstances of this case would be liable, does it, for present purposes, matter what the *ratio decidendi* of all or any of them was? I greatly doubt. In any case, at the least, these views so expressed strengthen the conclusion at which I would have arrived independently, that Lord Cairns alone in *Adamson's case* (*sup.*) committed himself to what I may call the "procedure" view of the section, the only view of it adequate to protect the respondents here from liability. From which consideration this consequence also follows—that if this House, following Lord Cairns, are minded now affirmatively to treat this section as a section of procedure, thereby exonerating the respondents, it must be prepared also to dissent from the views of the section, as applied to such a case as the present, taken and expressed by a majority of the House in *Adamson's case* (*sup.*) itself. For myself, for reasons already given, I am not prepared to do anything of the kind; and to avoid being under that necessity, I am encouraged to examine with a freedom which otherwise I would have regarded as presumptuous the view that sect. 74 is a procedure section only.

An examination of Lord Cairns's judgment shows that he was led to this conclusion in the expectation and belief that two main results were thereby attained. First the undertakers were relieved of the burden of finding, for the purposes of suit, the real wrongdoer. The owner in every case was the only necessary defendant, and that was a great concession to the undertakers. Secondly, the owner was not seriously embarrassed by the burden so placed upon him, because sect. 76 gave him a right

over against the actual wrongdoer, whoever he might be.

If Lord Cairns had had the opportunity of weighing and considering some of the observations since made upon his judgment, he must, I think, have found that neither of these expectations was realised by the effect he attributed to the section. He must, I think, have seen that so far as the undertakers were concerned the advantage presented to them was almost illusory, and he would have realised that, so far as the owner was concerned, to call the section merely a procedure section was to speak of peace when there was no peace. But in my view, if I may respectfully state it, the main objection to the procedure theory is that it is really denied to a court of construction by the very terms of the section itself.

I will deal with these points in their order. As to the first, Atkin, L.J. has pointed out with striking force how negligence cannot be treated as a thing separate from the person alleged to be guilty of it. May I for myself add how difficult both for plaintiff and defendant and how unprecedented it would be to conduct and frame a suit in which negligence had to be proved against him, but to which the actual wrongdoer need be neither party nor privy. The section on this view of it, while it would apparently sanction a procedure altogether novel, would really be of no advantage to the undertakers.

Now take the position of the owner. Lord Cairns's view was that the statute in every case gave him his right over against the wrongdoer, and this conclusion encouraged him to read the section as he did so far as it related to the owner. But here, if I may most respectfully say so, Lord Cairns overlooked the fact that just as the section itself imposes its statutory liability only upon the owner and, subject to conditions, upon the "master," so by sect. 76 it is, as you would expect, only against the negligent "master" that the owner is given a right of recourse. If the negligence causing the damage was that of anyone else—the hirer, the ship repairer, anyone on board but not in charge—the section on this procedure view of it would leave the owner to bear the burden himself, a consequence not anticipated by Lord Cairns. And is there not to be found in this consideration the strongest argument of all against this procedure view of the section? That section, as an enactment, imposes liability for the benefit of the undertakers on two classes exclusively, viz., owners and masters of vessels. Sect. 76 adjusts the incidence of that liability between these two, and it goes no further in the way of adjustment because there is no other liability to adjust.

But lastly the procedure view of the section is, I very respectfully suggest, not open on the construction of the section itself. The procedure construction gives no weight to the distinction in this matter of negligence drawn by the section between the liability thereby imposed upon the owner and that imposed upon the master. That construction requiring

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also, as it does, personal or imputed negligence on the part of the owner in every case gives the go-by to the limited terms of the pilotage exception already alluded to. Lastly, it does not inquire how the conception of unrestricted representative liability is, on construction, permissible, when by the section itself the statutory liability is confined to the owner and the master exclusively.

For all these reasons, treating this matter as one open to the House to determine, I express the view with the utmost reverence for any opinion of Lord Cairns that this procedure construction of the section is not admissible.

But I may properly be asked whether in saying this I loyally recognise that the House is bound by its own order in *Adamson's* case, and whether I have governed myself accordingly. I am glad to be bound by the decision in *River Wear Commissioners v. Adamson and others* (sup.). Had I then been a member of this House I would have agreed entirely with the view of the majority. Accepting, in the words of Lord Cairns, the position that the injury in that case was one that could not have been prevented by any human instrumentality, but that it was occasioned by a *vis major*, namely, by the act of God in the violence of the tempest, I should have reached the conclusion that the owners were free of liability on two separate grounds, each quite satisfactory to myself. The first would have been that the liability imposed by the section on the owner in relation to his ship was of the *Rylands v. Fletcher* type (19 L. T. Rep. 220; L. Rep. 3 H. L. 330) and was subject, as that liability always is, to the reservation that the damage is not attributable to an act of God, being what Lord Blackburn in *Adamson's* case called a common misfortune. Alternatively I should have arrived at the same conclusion on the ground stated by Sir G. Jessel, M.R., to which, as I read his judgment, no answer has so far as I can find ever been given and which is to me quite satisfactory.

Sir George Jessel, and I refer to him alone, and I except from the reference both Kelly, C.B. and Denman, J., found the key to the section on this point, not as has been so often supposed, but as I venture to think, under a misapprehension of his meaning, in the words of the substantive enactment alone, but in these words, taken in connection with the pilotage exception. Here I entirely agree with Lord Dunedin, if I may respectfully say so, that this House in *Adamson's* case must be taken to have been of opinion that an exception of an act of God could not be read into the words of enactment here standing alone. But Sir George Jessel, unlike Kelly, C.B. and Denman, J., did not find the exception in these words alone; he found it in them taken in connection with the pilotage exception. He pointed out that under that exception where a vessel in charge of a pilot was overwhelmed by tempest there would be no liability either on the owner, by reason of the exception, or on the pilot under the law. In that case, therefore, any damage

done by the vessel to the harbour would have to be borne by the undertakers. Could it in these circumstances be supposed that the Legislature had in the same event by the substantive words of the clause imposed a liability on the owner for the irrelevant reason that there was no pilot on board? The same view might perhaps be expressed thus. As Lord Blackburn said in *Adamson's* case (sup.), the exception of an act of God may be implied in the terms of an instrument imposing the liability; it need not be expressed. Is not such an exception necessarily implied in this section by the presence there of the pilotage exception? The Legislature has exempted the owner from liability when his vessel at the time of doing the harbour damage is in the hands of a pilot to whose appointment he has had to submit by the constraint of temporal authority. Is it to be supposed that the Legislature when giving this exemption was not proceeding upon the footing that under the section apart from the exception the owner was already immune in a case where the navigation of the ship had been taken out of the owner's control, not by a mere pilot imposed upon him by administrative constraint, but by an irresistible and unsearchable Providence nullifying all human effort?

The announcement by some of the noble Lords in *Adamson's* case (sup.) to the effect that the Court of Appeal had been too ready to imply from a liability imposed by statute an exception in favour of an act of God, may preclude me from expressing, as now permissible, the first of the reasons above given. But I do not find that what Sir George Jessel really, as I believe, said has ever been dealt with adversely by anyone in this House, and it seems to me that Lord Blackburn and Lord O'Hagan were in no way opposed to his view, while Mellish, L.J.'s human agency limitation was merely a paraphrase of it stated as a result. I believe, therefore, that I am still entitled to hold and express it.

But if I must, in view of the decision in *Adamson's* case, cherish both of these grounds only for my own private and personal satisfaction, I have still remaining a sufficient justification for the opinion I hold that a decision in favour of the respondents here is quite consistent with the decision in *Adamson's* case. I find that justification in the fact that it was the opinion also of three of the Lords who concurred in the decision in *River Wear Commissioners v. Adamson and others* (sup.), and I am not required to particularise the reasons they gave for that conclusion.

The result, in my view, is that the owner of a vessel has, under this section, been made answerable to the undertakers for the damage referred to in the section, with no obligation on the part of the undertakers to prove more against him than that the damage was done by his vessel and that he was her owner at the time. To such a claim when so far proved only two defences are open to the owner: (a) the pilotage exception; (b) that the damage was

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in fact attributable to the agency of what, in the language of a simpler age, is known to the law as an act of God.

The object of the section being to provide exceptional protection for the undertakers, I do not myself think that the enactment on this view of it imposes on owners of vessels a burden that can fairly be regarded as oppressive.

On the whole case I concur in the motion made by Lord Haldane.

Appeal allowed.

Solicitor for the appellants, A. G. Hubbard.

Solicitors for the respondents, Ingledew, Sons, and Brown, agents for Ingledew, Sons, and Crawford, Swansea.

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 2, 3, 4, and 25, 1927.

(Before SCRUTTON, SARGANT, and GREER, L.JJ.)

GOSSE MILLARD v. CANADIAN GOVERNMENT MERCHANT MARINE LIMITED.

AMERICAN CANNING COMPANY v. SAME. (a)

ON APPEAL FROM THE KING'S BENCH DIVISION.

Bill of lading—Carriage of goods by sea—Cargo of tinplates—Damage—Negligence in navigation of ship—Cargo-carrying ship—Exceptions clause—Liability of carrier—Carriage of Goods by Sea Act 1924 (14 & 15 Geo. 5, c. 22), Schedule, art. III., r. (2), art. IV., r. (2).

By art. III., r. 2, of the Schedule to the Carriage of Goods by Sea Act 1924: "Subject to the provisions of art. IV., the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried." And by art. IV., r. 2: "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (a) Act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship. . . ."

Tinplates were shipped at Swansea in good order and condition on board the defendants' steamship, the C. H., under a bill of lading of which the plaintiffs were the holders to be delivered by the defendants at Vancouver. After the tinplates had been taken on board at Swansea, the steamer went to Liverpool to discharge certain lumber cargo, arriving there on the 8th Feb., and on the following day the lumber cargo was discharged. On

the 10th Feb. the steamer collided with the dock-head while coming out of the dock and was damaged, in consequence of which part of the cargo had to be shifted and the steamer was kept in dock until April when she resumed her voyage, arriving at Vancouver on the 17th May. When the cargo of tinplates was discharged, it was found that a large quantity of the tinplates were rusty, stained and depreciated by contact with fresh water. The learned judge who tried the action found on the evidence that the damage to the tinplates was due to the wetting received from rain at Liverpool due to the default of the ship's officers leaving the hatches open and that the defendants had failed to carry out the obligation imposed on them by art. III., r. 2, of the Schedule to the Carriage of Goods by Sea Act 1924, properly and carefully to load, handle, carry, keep, care for and discharge the goods carried, and gave judgment for the plaintiffs.

Held (by Scrutton and Sargant, L.JJ.; Greer, L.J. dissenting), that on the facts found by Wright, J. at the trial, the damage to the cargo was due to neglect or default of the servants of the carrier in the navigation or in the management of the ship within the meaning of art. IV., r. 2, of the Schedule to the Carriage of Goods by Sea Act 1924, and that the defendants were therefore immune from responsibility for the damage to the cargo.

Decision of Wright, J. (infra; (1927) 2 K. B. 422), reversed by a majority (Greer, L.J. dissenting).

APPEAL from a judgment of Wright, J. (infra; (1927) 2 K. B. 432).

The plaintiffs in these actions, which were heard together, claimed damages from the defendants for alleged breach of duty and (or) contract in the carriage of certain tinplates in the defendants' steamship *Canadian Highlander*. In Feb. 1925 the plaintiffs had ordered from Baldwin's Limited, South Wales, a quantity of tinplates, which were shipped on the above-named steamship at Swansea on the 4th, 5th, and 6th Feb. for Vancouver under a bill of lading dated the 6th Feb. The steamer arrived at Liverpool from Swansea on the 8th Feb. A quantity of other cargo was discharged and on the 10th Feb., when leaving the docks, the vessel collided heavily with the dock-head and was so badly damaged that she was detained at Liverpool for repairs for ten weeks. There was rain on some of the days when the repairs were being done at Liverpool, and the hatchways were sometimes left open. She eventually arrived at her destination, Vancouver, on the 17th May, and it was found that a large quantity of the tinplates were rusty, stained and depreciated by contact with fresh water. The plaintiffs contended that the goods when shipped were in good order and condition; that the defendants loaded and (or) stowed the boxes containing the tinplates so negligently that many of them were broken and their contents exposed; and that the defendants had also been negligent in shifting and re-stowing the boxes in order to carry out the repairs to the steamer

(a) Reported by T. W. MORGAN, Esq., Barrister-at-Law.
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at Liverpool. The defendants denied that they were negligent in any way, and further pleaded that if the tinplates were damaged it was due to inherent vice, or to insufficient packing, because the boxes containing the plates were not tin-lined and were made of unseasoned wood. They further relied on art. IV., r. 2 (a), (c), (d), (i), and (g) of the Carriage of Goods by Sea Act 1924. These rules are set out in the judgments.

Jowitt, K.C. and *G. St. C. Pilcher* for the plaintiffs.

Miller, K.C. and *Sir Robert Aske* for the defendants.

WRIGHT, J. stated the facts, and continued : The damage done to the tinplates was admittedly caused by fresh water. Except for the detention at Liverpool the voyage was of a normal character. The real issue is how the damage was caused. Two theories have been put forward—(1) that it was caused by the inherent defect of the article by the use of unseasoned wood for the packing; (2) that it was due to wetting from external causes, in particular to exposure to rain during the long stay at Liverpool. I have come to the conclusion that rain did get into the hold at Liverpool in sufficient quantities to account for damage of the kind complained of. As regards the *Gosse Millard* shipment, I find as a fact that the damage was due to wetting from rain at Liverpool. The defendants, in ordinary circumstances, exercised great care and skill in dealing with the goods which they carried, but I find that they have in this case failed to carry out the obligation imposed on them by art. III., r. 2, of the Act. If I am wrong in that finding the only alternative conclusion is that the cause of the damage is unexplained. With regard to the claim of the American Canning Company, on the whole of the evidence I have come to the conclusion that the cause of the damage is quite unexplained.

The alternative conclusion at which I have arrived as regards the claim of the plaintiffs, *Gosse Millard*, and the conclusion I have arrived at as regards the claim of the American Canning Company—namely, that the precise cause of the damage cannot be ascertained—makes it necessary for me to determine as a matter of law on whom lies the onus of proof under the Carriage of Goods by Sea Act 1924, which applies to the shipment in question. The bills of lading were issued in accordance with that Act, as, indeed, is made obligatory under sect. 3 of the Act, and they contained an express statement that they were to have effect subject to the rules scheduled to the Act. These rules, which now have statutory force, have radically changed the legal status of sea carriers under bills of lading. According to the previous law, shipowners were generally common carriers or liable to the obligations of common carriers, but were entitled to the utmost freedom of restricting and limiting their liabilities, which they did by elaborate and mostly illegible exceptions and conditions. Under the Act and the rules, which cannot be

varied in favour of the carrier by any bill of lading, their liabilities are precisely determined and so also are their rights and immunities. In particular art. III., r. 2, of the rules is in the following terms: "Subject to the provisions of art. IV., the carrier"—which means the carrier and any person employed by him to do the work—"shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried." The word "discharge" is, I think, used in place of the word "deliver," because the period of responsibility to which the Act and Rules apply (art. 1 (e), ends when they are discharged from the ship. Art. III., r. 3, requires the bill of lading to state (*inter alia*) "the apparent order and condition of the goods," that is, on shipment. The words "properly discharge" in art. III., r. 2, I think, mean deliver from the ship's tackle in the same apparent order and condition as when shipped, unless the carrier can excuse himself under art. IV.

Hence the carrier's failure so to deliver must constitute a *prima facie* breach of his obligations, casting on him the onus to excuse that breach. That this is so, I think, is confirmed by the language of art. IV., r. 1, which deals with unseaworthiness, in respect of which the carrier must prove the exercise of due diligence. Art. IV., r. 2, contains a long list of matters in respect of loss or damage arising or resulting from which the carrier is not to be liable; these excepted causes, contained in pars. (c) to (p) inclusive, except rule 1, are all matters beyond the control of the carrier or his servants, such as sea perils, acts of God, restraint of princes, riots, inherent vice of the goods, &c.; rule 1 relates to deviation to save life and property; (a) deals with neglect in the navigation or management of the ship, which falls, I think, under a category different from the care of the cargo; (b) relates to fire, and, following previous statutory protection, gives a wide exemption. Finally (q) is in these terms: "Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage." I read the second "or" in the above paragraph as meaning "and." In this I agree with the recent decision of MacKinnon, J., in *Brown and Co. v. Harrison* (*ante*, p. 294; 137 L. T. Rep. 549).

The words of the paragraph last cited expressly refer to the carrier as claiming the benefit of the exception, and I think that, by implication, as regards each of the other exceptions, the same onus is on the carrier. He must claim the benefit of the exception, and that is because he has to relieve himself of the *prima facie* breach of contract in not delivering the goods in the same condition as received. I do not think that the terms of art. III. put the preliminary onus on the owner of the goods

to give affirmative evidence that the carrier has been negligent. It is enough if the owner of the goods proves either that the goods have not been delivered or have been delivered damaged. The carrier is a bailee and it is for him to show that he has taken reasonable care of the goods while in his custody—which includes the custody of his servants or agents on his behalf—and to bring himself, if there be loss or damage, within the specified immunities. It is, I think, the general rule applicable in English law to the position of bailees that the bailee is bound to restore the subject of the bailment in the same condition as that in which he received it, and it is for him to explain or offer valid excuse for not having done so. It is for him to prove that reasonable care has been exercised. This was the language of Erle, C.J., in delivering the judgment of the Exchequer Chamber in *Scott v. London and St. Katherine Docks Company* (13 L. T. Rep. 148; 3 H. & C. 596) adopted by the House of Lords in *Dollar v. Greenfield* (*The Times Newspaper*, May 19, 1905).

In *Travers and Sons v. Cooper* (111 L. T. Rep. 1088; (1915) 1 K. B., at p. 88) Buckley, L.J. said: "The defendant as bailee of the goods is responsible for their return to their owner. If he failed to return them it rested upon him to prove that he did take reasonable and proper care of the goods, and that if he had been there he could have done nothing, and that the loss would still have resulted. He has not discharged himself of that onus." Buckley, L.J. also quotes from an unreported case of *Morrison, Pollefen, and Blair v. Walton* (unreported, H. L. May 10, 1909) the words of Lord Halsbury: "It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to show that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested upon him." The principle is also discussed by Atkin, L.J. in *The Ruapehu* (1925, 21 Ll. L. Rep. 310, at p. 315), where he points out that it is wrong to say that the onus does not arise until the bailor has first shown some negligence on the part of the bailee. I think this principle of onus of proof is applicable to the carrier under the Act; indeed, in the general exception of art. IV., rule 2 (g), it is expressly laid down. In the facts of this case if the shipowners claim (as they do in their pleading) the benefit of that exception, in that the damage was due to wet or damp, they can only so claim on the terms of negating fault or privacy.

Finally, I rely on the language of Lord Sumner, used with reference to the Australian Sea Carriage of Goods Act 1904 (now repealed by the Australian Sea Carriage of Goods Act 1924), which sums up principles equally relevant to the Carriage of Goods by Sea Act which I am considering, apart from the question of seaworthiness which is somewhat differently dealt with in the earlier Act. The case is that of *Bradley and Sons v. Federal Steam Naviga-*

tion Company (ante, p. 265, at p. 266), where Lord Sumner said: "The bill of lading, described the goods as 'shipped in apparent good order and condition' and proceeded 'and to be delivered at the ship's anchorage from her deck (where the ship's responsibility shall cease) at the Port of London.' Though the usual words 'in the like good order and condition' do not appear after the word 'delivered,' it was common ground that the ship had to deliver what she received as she had received it, unless relieved by excepted perils. Accordingly, in strict law, on proof being given of the actual good condition of the apples on shipment and of their damaged condition on arrival, the burden of proof passed from the consignees to the shipowners to prove some excepted peril which relieved them from liability, and further, as a condition of being allowed the benefit of that exception, to prove seaworthiness at Hobart, the port of shipment, and to negative negligence or misconduct of the master, officers and crew with regard to the apples during the voyage and the discharge in this country."

On the above grounds, if the true conclusion be that the cause of damage to the tinplates has not been ascertained but is left in doubt, I think that the defendants have not discharged the onus which is upon them to negative negligence of their servants and to prove some excepted peril, and hence must be held liable. Counsel for the defendants further relied on art. IV., r. 2 (a), and contended that if there was neglect on the part of the defendants' servants, it was "in the management of the ship," so that the defendants would be excused. But if the tinplates were damaged through the negligent admission of rain water into the hold at Liverpool, I do not think that that constituted a case of management of the ship. These words refer to matters affecting the ship as a ship (its safety as such), which, however, might incidentally affect the cargo, such as improperly opening sea connections, so as to prejudice the ship's safety while also damaging the cargo. The principle was so stated in *Rowson v. Atlantic Transport Company* (87 L. T. Rep. 717; 89 L. T. Rep. 204; (1903) 1 K. B. 114; (1903) 2 K. B. 666), where it was somewhat subtly applied to the management of refrigerating machinery, but on the ground that its functions were not limited to cooling cargo. I think that in the present case the protection of the tinplate cargo fell under art. III., r. 2, and not art. IV., r. 2 (a). Any other view would in effect nullify the former provision. The result is that there will be judgment for the plaintiffs, with costs.

The defendants appealed only against the decision in favour of Gosse Millard Limited.

Miller, K.C. and Sir Robert Aske for the appellants.

Jowitt, K.C. and Pilcher for the respondents.

The arguments and authorities cited appear in the judgments.

Cur. adv. vult.

Nov. 25, 1927.—The following considered judgments were read :

SCRUTTON, L.J.—This appeal raises an important question under the Carriage of Goods by Sea Act 1924. Fortunately the facts raising it can be shortly stated. A large quantity of tinplates was shipped at Swansea in the defendants' steamship *Canadian Highlander* for carriage to Vancouver. They were shipped in good condition, but they arrived in Vancouver seriously damaged by fresh water, of which, judging by the extent of the damage, a large quantity must have entered the hold in which they were stowed. At the trial two theories were put forward to explain this fresh-water damage. The shipowners alleged that the water came from the unseasoned timber of the boxes in which the tinplates were packed. The judge was not satisfied of this and found that the boxes were "good average normal boxes." The cargo-owners alleged that the fresh water causing the damage was rain entering through the shelter deck and the 'tween deck hatches of hold No. 5, left open by negligence of the ship's officers and their deputies while it was raining. The judge accepted this view and found that, while damage to the stern by collision was being examined, cracks were found in the lines of the tail shaft, which had to be taken out and replaced. This involved the presence of a considerable number of surveyors and workmen in No. 5 hold, where the tinplates were stowed on the square of the hatch, and the constant passing of men and material through the hatches. The judge found that there was default of the ship's officers in leaving the hatches open so that rain entered. In fact, it must have entered in considerable quantities to cause the very extensive damage ; the judge found that enough rain entered during this period of repair—during which also the crew were scaling and painting in No. 5 'tween decks, which they entered through the shelter deck hatch—to account for all the damage found. He also found that it was probable that some rain had entered earlier on a day when lumber was being discharged from the No. 5 'tween decks. On that day the shelter deck hatch was open, and the judge has found that the lower deck hatch was not protected, as it should have been, by any tarpaulin. This appears to be a small matter, the rain entering during the period of repair when the 'tween or lower deck hatch was open, being found sufficient to account for all the damage to the tinplates. No attempt was made on the hearing of the appeal to challenge these findings of fact.

The next question is : "Do these facts bring the damage within any exception protecting the shipowners ?" These exceptions are to be found in the Carriage of Goods by Sea Act 1924, and in the bill of lading, if the bill of lading provisions do not weaken the protection given to the cargo-owners by the Act. Art. III. of the Schedule to the Act describes the obligation of the shipowner to be

"to properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried." This obligation replaces the previous obligation of a common carrier and improves the position of the shipowner. This obligation, moreover, is subject to the provisions of art. IV., which is also introduced by the provision in art. II. and which is headed, "Rights and Immunities." Exception (a) of par. 2 of art. IV. reads as follows : "Act, neglect or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship." While this partially follows the wording of the United States Harter Act of 1893, which reads "shall not be responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel," that wording was derived from earlier English bills of lading. It could not have come from United States bills of lading, for the United States courts took the view that all negligence clauses in contracts of affreightment were void as contrary to public policy, a conclusion which the English courts were not able to adopt. The question, therefore, is whether the facts found by the judge amount to "neglect or default of the servants of the carrier in the management of the ship." Unassisted by authorities I should have felt no doubt that they did. Assuming that the words deal with the management of the ship as a physical entity, and not with the management of the cargo-carrying adventure on which the shipowners and the cargo-owners have agreed to use the ship, what has been managed here is the hatches of No. 5 hold, an essential physical part of the ship. For the purpose of repairing damage to the ship in order that she may resume her voyage, those hatches have been physically dealt with and dealt with so negligently that, during their absence in rainy weather, such quantities of rain have entered the hold as to damage the cargo in the hold. I cannot understand why on the words themselves, without reference to any authorities, this is not negligence in the management of the ship, or a substantial physical part of the ship.

The words to be construed occur in a statutory contract between shipowner and cargo-owner relating to the carriage of goods in a ship. The cargo-owner has no interest in an empty ship or its management. The shipowner undertakes to use due diligence to provide a ship fit for the carriage of goods—including proper propelling and pumping machinery, and where the cargo requires it, proper refrigerating and ventilating appliances—and in such a proper ship properly to carry and deliver a cargo, and he is exempt from liability for negligent management of such a ship by his servants. Why it should be an objection to management of part of the ship coming within the exception that it is being primarily managed for the benefit of the cargo, I do not understand. That is what the ship is to be used for. It is "navigated" to direct the ship, and so carry the cargo safely, to its proper destination. It is as a

physical entity "managed" for the same purpose. Some portion of the management may not preserve the physical ship, but is still carried out to preserve the cargo. I cannot see any difference between negligently leaving partly open a port or sea cock, whereby water enters which is no danger to the ship but damages the cargo, negligently managing the pumping apparatus with the same result, and negligently leaving hatches off, whether to repair the ship or to ventilate the cargo, whereby salt water at sea, or fresh water in rainy weather in port, enters the hold and damages the cargo.

Negligent management of the propelling machinery, which is hardly "navigation," and negligent management of the refrigerating or ventilating or pumping machinery, seem all equally to be management of the ship. Most modern steamers have masts with no yards, but derricks for loading and unloading cargo attached to them. I do not understand why the derricks are not part of the ship. But it is said that the authorities compel me to hold that a part of the ship primarily used for the benefit of the cargo, if negligently managed, does not come within the exception. It might be enough to say that these hatches were primarily taken off to enable the ship to be repaired and prosecute the contract voyage. But the contention is so important that it is well that the authorities, which are supposed to support it, should be considered.

The authorities fall into three classes: (1) The decisions of the English Courts on bills of lading; (2) the decisions on the Harter Act of 1903, either by the American Courts construing their own statute, or by the English courts construing the words of the statute as incorporated in a bill of lading made in the United States; and (3) the decisions on the English Act of 1924.

The original wording of English bills of lading was either "perils of navigation," "negligence in navigation," or "negligence in the course of the voyage." Questions arose under this wording whether negligence in the conduct of the ship while loading or discharging was covered. *Laurie v. Douglas* (13 M. & W. 746), where loss during discharge was held covered as a peril of navigation, may be compared with *The Accomac* (7 Asp. Mar. Law Cas. 153; 63 L. T. Rep. 737; 15 Prob. Div. 208), where the Court of Appeal held negligence in removing a bilge pipe during discharge not to be "navigation," though it might be in the course of the charter-party "voyage." This latter view was also taken by Sir James Hannen in *The Carron Park* (6 Asp. Mar. Law Cas. 543; 63 L. T. Rep. 356; 15 Prob. Div. 203). Probably to meet this difficulty the word "management," was added after "navigation." I have not found, and counsel could not refer us to, any case using the word "management" earlier than *The Ferro* in 1893 (7 Asp. Mar. Law Cas. 309; 68 L. T. Rep. 413; (1893) P. 38), but I think it had been used for some years before. That was a case of bad stowage of cargo by the

stevedores, not involving any movement of parts of the ship. Sir F. Jeune thought that such stowage was not management of the ship, but suggested that removal of the hatches for the purpose of ventilation would be. Barnes, J. agreed that bad stowage was not "management of the ship," words which he did not think "went much, if at all, beyond the word 'navigation.'" Oddly enough, when three years later the same two judges considered the words of the Harter Act—*The Glenochil* (8 Asp. Mar. Law Cas. 218; 73 L. T. Rep. 416; (1896) P. 10)—each slightly altered his view in *The Ferro* (*sup.*). Sir F. Jeune thought that his illustration of removal of the hatches for ventilation was "not a happy one." I do not know why, as I should have thought that, like pumping the bilges, it was a typical case of "management of the ship." The President made the distinction between "want of care of cargo" and "want of care of vessel indirectly affecting the cargo." I do not understand why want of care in dealing with the vessel or part of it should not be management of the vessel, whether it affects the cargo directly or indirectly, so long as a physical part of the vessel is affected or manipulated. Barnes, J. held that "management" certainly added something to "navigation" and applied to the proper handling of the vessel for her own safety and not primarily to the safety of the cargo, though done when the ship was not being navigated. Again, I do not understand why a negligent handling of part of the vessel should not be management of the ship because it is primarily done for the protection of the cargo. Take failure to pump water out of a cargo hold, the water not being sufficient to affect the safety of the ship, but enough to damage the cargo. Why should not this be "management of the ship" in a contract which is concerned with safe carriage of cargo? Anyhow, in *The Glenochil* (*sup.*) negligently running water into a tank to stiffen the ship while discharging, without discovering a broken pipe through which the water ran into the cargo-hold, was held to be "management of the ship." In *The Rodney* (9 Asp. Mar. Law Cas. 39; 82 L. T. Rep. 27; (1900) P. 112) also a Harter Act case, the boatswain, in clearing a drainage pipe, poked a hole in it, whereby water entered a cargo space, and this was held to be "management of the vessel." The President treated the words as covering "keeping the vessel in a proper condition," and Barnes, J. defined them as "improper handling of the ship, as a ship, which affects the safety of the cargo." These definitions seem to me to cover the present case. The ship was being repaired "kept in a proper condition." To effect the repairs part of the ship, the hatch, was being handled, removed, and replaced. This was done so negligently that, through the open hatch, rain entered the hold and damaged the cargo. The definition of Barnes, J. was accepted by Stirling, L.J. in *Rowson v. Atlantic Transport Company* (9 Asp. Mar. Law Cas. 347, 458; 89 L. T. Rep. 204; (1903) 2 K. B. 666), a Harter

Act case, and by Bankes, L.J. and Atkin, L.J. in *Brown and Co. v. Harrison* (*ante*, p. 294; 137 L. T. Rep. 549), a case on the English Act.

Some of the trouble in the case arises from the decision of the Court of Appeal in *Rowson's* case (*sup.*). Nowadays many ships are built with insulated holds, the walls of which are thickly lined with charcoal. This does not refrigerate them, but, like a thermos flask, keep a hot hold hot, and a cold hold cold. Refrigeration is effected by very elaborate pipes and machinery, sometimes built into the hold, sometimes connected with it, but as much a part of the ship as the propelling machinery, the pumping machinery, and the ventilating machinery. Indeed the English Act of 1924 speaks of all these refrigerating holds as "parts of the ship" to be made fit for the carriage of goods. As explained, no hold is refrigerating without elaborate machinery. In *Rowson v. Atlantic Transport Company* (89 L. T. Rep. 204; (1903) 2 K. B. 666) the engineer mismanaged the refrigerating machinery, whereby the cargo was damaged. Kennedy, J. held that this was mismanagement of the ship, of which this machinery was a part. I quite agree with him. The Court of Appeal, while affirming him, had doubts about the matter till they discovered that the refrigerating machinery, which cooled the cargo of butter, also cooled the ship's butter, which was then being carried in another insulated compartment that might be used for either cargo or ship's provisions. Vaughan Williams, L.J., used the phrase "management of the vessel *qua* vessel." I do not see how you can manage the vessel except as a vessel; and in a contract between shipowner and cargo-owner the vessel is a cargo-carrying vessel, and the management of the vessel is the management of a cargo-carrying vessel—not an empty vessel. Some higher tribunal may feel strong enough to treat the words "management of the ship" as management of the cargo-carrying adventure carried on in the ship, which is the purpose of the contracting parties. I should welcome such a decision. This meaning would cover bad stowage, and the management of the crew and stevedores. But, without going so far as this, "management of the ship" must include management of parts of the ship which, incidentally, damages some of the cargo, and if it is necessary that the management should be primarily intended to keep the ship fit, that condition is fulfilled when the management of part of the ship, the hatches, is for the purpose of repairing damage to the ship itself in the course of her contract voyage.

It is difficult to reconcile the decisions of the United States courts with themselves or with the English decisions; and the Harter Act itself differs widely from the English Act. This arises partly from the fact that the United States courts treated all negligence clauses in contracts of affreightment as contrary to public policy, and the Harter Act was therefore an allowance of clauses which were contrary to public policy, and as such were to be restricted;

while the English courts allowed freedom of contract and limited provisions which restricted that freedom. From this point of view sects. 1 and 2 of the Harter Act were treated as the fundamental purpose of the Act, and, as Holmes, J. said in *The Germanic* (196 U. S. 589), removed matters which would otherwise be within the exceptions of sect. 3 from its operation. The English Act, on the other hand, expressly makes the obligations of arts. II. and III. subject to the immunities and exceptions of art. IV. In *The Germanic* (*sup.*) a combined operation of loading coal for ship's use and of discharging cargo was conducted so negligently that the ship lost her trim and capsized. This was held not to be management of the ship. I should have thought that it clearly was such management, just as the provision of ballast would be. The United States courts have held management of the ship not to include: Insufficient covering of the hatches (*The Jeannie*, 236 Fed. Rep. 463), failure to open hatches to ventilate cargo (*The Jean Bart*, 197 Fed. Rep. 1002), failure to close during rough weather hatches which had been opened to ventilate cargo (*Andean Trading Company v. Pacific Steam Navigation Company*, 263 Fed. Rep. 559), negligent management of refrigerating machinery (*The Samland*, 7 Fed. Rep. (2nd series) 155). I should have decided all these cases differently. They have held management of the ship to include: Failure to pump water out of bilges, causing damage to cargo (*The Merida*, 107 Fed. Rep. 146, and other cases: mismanagement of seacocks, whereby cargo is damaged (*American Sugar Refining Company v. Rickinson* (124 Fed. Rep. 188); failure to cover ventilators, or sounding pipes, or to close portholes (*The Hudson*, 172 Fed. Rep. 1005; *The Newport News*, 199 Fed. Rep. 968; *The Carisbrook*, 247 Fed. Rep. 583; *The Silvia*, 171 U. S. Rep. 462). I refer to an excellent summary and discussion of the American cases in the third edition of Mr. Robert Temperley's work on the English Act, pp. 46–61.

I appreciate the desirability of getting uniformity of decision in maritime cases, as pointed out by Atkin, L.J. in *Brown and Co. v. Harrison* (*ante*, p. 294, at p. 302; 137 L. T. Rep. 549), though the cogency of these remarks is somewhat weakened by the learned Lord Justice's view in the same judgment, with which I agree, that negligence in managing machinery built into the ship for the purpose of protecting the cargo is probably management of the ship. The United States courts had decided the other way. But on this question of harmony of decisions, I have always thought that the words of Lord Esher (then Sir Baliol Brett, M.R.) in *Svendsen v. Wallace* of great value. He says (50 L. T. Rep. 799; 13 Q. B. Div., at p. 72): "It was urged that even if the proposition is stated in terms larger than have hitherto been recognised in English law, yet it ought now to be adopted in order to bring the principle of English law on the subject into consonance with the laws of

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all other countries. But to this I cannot agree. It is useless to inquire whether the law is, as stated, the same in all European countries. For if it is, yet no English court has any mission to adapt the law of England to the laws of other countries; it has authority only to declare what the law of England is. And even if we could do what is suggested, I should doubt the expediency of making the law of the greatest commercial and maritime country in the world bend to the law of other countries where commercial operations are far less extensive, and where commercial adventure is far more timid. As to the cognate law of America, it has been declared over and over again that the English and American courts have diverged upon this particular head of law, the law of general average. The question, therefore, must be, What is the law of England in this matter? For reasons which it is unnecessary to indicate, the United States of America have not been, except in some exceptional periods, a ship-owning country, and they have approached shipping matters from the point of view of the cargo-owner. I cannot think that their decisions, while treated with great respect, should necessarily control the shipping decisions of the courts of the greatest shipowning country in the world.

There is only one relevant decision in the English courts. In *Brown and Co. v. Harrison* (sup.), this court decided that thefts by stevedores in Mexico, which the officers apparently could not stop, were not defaults in the management of the ship. The court accepted Barnes, J.'s definition in *The Rodney* (9 Asp. Mar. Law Cas. 39; 82 L. T. Rep. 27; (1900) P. 112), but confined the exception to management of the ship, and declined to include in it management of the business of the ship, a management solely relating to the goods. This decision prevents us from holding (1) That "management of the ship" in a contract between shipowner and cargo-owner about carriage of goods in the ship covers management of the cargo-carrying adventure; but does not, as I understand it, prevent a decision; (2) that where part of the ship is managed, even primarily, for the purpose of protecting the cargo, still more; (3) where part of the ship is managed primarily for the purpose of making the ship fit for the adventure, with secondary results on the cargo, there is negligent management of the ship within the exception.

As my view of the fact is that, to repair the ship for the voyage, part of the ship—the hatches—was managed, but managed so negligently that cargo was damaged by rain, I think the case falls into the third class above and is covered by the exception of negligence of the servant of the carrier in the management of the ship.

The learned judge below devoted the greater part of his judgment to the facts and dealt with the point under consideration in a few lines. He apparently thought that the hatches were not a part of the ship and that managing them for the purpose of the ship was not

management of the ship. He said that the case fell within art. III. (2) and not art. IV. (2) (a), but, as art. III. (2) is expressly said to be subject to the provisions of art. IV., I do not understand that observation. The obligation properly to keep and care for the cargo is expressly said to be subject to the "immunity" that if cargo is damaged by careless management of the ship the shipowner is freed from liability; and the hatches, ventilating, pumping, and refrigerating machinery and ship's derricks seem to be clearly part of the ship.

There is one other point. Clause 18 of the bill of lading reads as follows: "The following are not to be deemed sufficiently packed (a) Tinplates in boxes unless tin-lined and iron-hooped. . . ." The tinplates in question were obviously and to the knowledge of everybody concerned not so packed, and it is not the practice so to pack tinplates going to Canada, though the package is usual for tropical destinations. Now if the goods had in fact been insufficiently packed, there is a statutory exception of "insufficiency of packing." This was neither pleaded nor proved; and one can take clause 18 to mean that goods in fact sufficiently packed are to be deemed insufficiently packed. So that the ship is excused for damage by its negligence to goods which are sufficiently packed by a "deeming" which is contrary to the fact. This provision appears to me to weaken or lessen the liability of the shipowner as contained in arts. II., III., and IV., and therefore to be null and void. Further, I do not think that the clause would relieve the shipowners from liability for negligence other than in the management of the ship in relation to goods insufficiently packed which they have received to carry with full knowledge of the insufficiency of the packing. This exception or provision does not, therefore, in my opinion, protect the shipowners; but I hold that the exception of negligence in the management of the ship protected the shipowner and therefore the appeal must be allowed and judgment entered for the defendants, with costs here and below. They must, however, pay the costs of the issues of fact on which they failed in the lower court.

SARGANT, L.J.—In this case both the appellants and the respondents have accepted the findings of fact of Wright, J. And, therefore, we must take it that the damage to the respondents' tinplates was due to the penetration of rain water into No. 5 hold where the tinplates were stowed; that only a trifling, if any, damage was so caused during the one day, the 9th Feb., on which the ship was discharging in an ordinary dock at Liverpool certain lumber which had been shipped at Swansea and stowed between decks immediately above No. 5 hold; and that the substantial damage was caused during the seven or eight weeks between the 10th Feb. and an early date in April, while the ship was in dry dock at Liverpool and undergoing repairs which had been occasioned by a collision with the dock-head as she was coming

out on the 10th Feb. During this period the tail shaft had to be taken out, repaired, and replaced, and there was a necessary accompanying shifting of some of the cargo of tinplates in hold No. 5. There was also some scraping and painting of the 'tween decks, together with a constant coming and going of workmen, and, as I understand the learned judge, he has found that, in the course of these operations, the lower hatch above hold No. 5 was from time to time removed, and the hatchway was left insufficiently protected against the heavy rain which occurred during this period, with the result that, to quote his exact words, "during that period rain did get into the lower hold and did get in in sufficient quantity to explain and account for the damage which was observed."

In these circumstances the question arises whether the appellants are freed from their *prima facie* liability to the respondents by reason of the provisions of art. IV., r. 2, of the schedule to the Carriage of Goods by Sea Act 1924, which, so far as material, are "2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship." Or, accepting what I think must be accepted, that there was some neglect or default in the supervision of the operations by the officers of the ship, was it a neglect or default in the management of the ship?

The learned judge's judgment in this action and in a similar action by other claimants in respect of a similar consignment of tinplates is principally occupied with a discussion of the question of liability on the hypothesis that the cause of the damage to the respective consignments of tinplates had not been ascertained. This was in fact his finding of fact with regard to the other consignment and was mentioned by him, though not adopted, as a possible alternative finding in the case of the appellants' consignment. On the present appeal it is unnecessary to consider this part of the case. The only material part of the judgment is to be found where he says: "But if the tinplates were damaged through the negligent admission of rain water into the hold at Liverpool, I do not think that that constituted a case of management of the ship. These words refer to matters affecting the ship as a ship—for instance, its safety, which might incidentally affect the cargo, such as the improper opening of sea connections so as to prejudice the ship's safety while also damaging the cargo."

The brevity of the learned judge's judgment on this point is probably due to the fact that it formed one only of a number of questions both of fact and law with which it had to deal; and no doubt he had not the advantage of so full a discussion and examination of the numerous authorities as we have had. And further, since the date of his judgment, there has been the decision in this court of this very question

of the scope of art. IV. (2) (a) in the important case of *Brown and Co. v. T. and J. Harrison* (*ante*, p. 294; 137 L. T. Rep. 549). Not only was the attention of the court in that case solely occupied with this question, but most of the previous English decisions and one or two important United States decisions were referred to in the judgments of Bankes, L.J. and Atkin, L.J. We are therefore in a better position to solve the present problem than was Wright, J.

With great respect to the learned judge, he seems to me to have paid too little attention to the occasion, scope and purpose of the operations in the course of which the negligent acts or omissions took place. In my opinion, if these operations are operations with regard to the ship as a whole and for ship's purposes and are not merely operations in relation to the cargo, then any negligence in conducting those operations are within art. IV. (2) (a), although the result of the negligence may be limited to damage to cargo and may not imperil or injure the ship at all. And I think that this view underlies all the decisions and is, if not expressed, at any rate, implied, in the language of most, if not all, of the judgments.

For instance in *Brown and Co. v. T. and J. Harrison* Bankes, L.J. says (*ante*, at pp. 298–299; 137 L. T. Rep., at pp. 552–553): "in order to bring any particular matter within the exception it must be something which can be said to be in the management of the ship." And again (*ante*, at p. 299; 137 L. T. Rep., at p. 555): "the more one looks into the authorities the more authority one finds for the proposition that such an act as this, a mere discharging of the cargo, cannot properly be said to come within the expression "management of the ship." And Atkin, L.J. says (*ante*, at p. 303; 137 L. T. Rep., at p. 557): "The stevedores brought in were employed in the ship for the purpose of discharging the cargo and that which was done was not a defect in the ship or a defect in the management of the ship as defined but merely a default of a person in dealing with the cargo." And on the same principle in *The Ferro* (7 Asp. Mar. Law Cas. 309; 68 L. T. Rep., at p. 418; (1893) P. 38), Sir Francis Jeune, P. and Gorell Barnes, J. held that an act of damage done merely in the stowage of the cargo and apart from anything done in reference to the ship could not be held to be mismanagement of the ship.

Again in *The Glenochil* (8 Asp. Mar. Law Cas. 218; 73 L. T. Rep. 416; (1896) P. 10), Gorell Barnes, J. applied the same test. He said: "It certainly seems to me to be a fault in the management of the vessel in doing something necessary for the safety of the ship herself," and again at p. 19: where the act "is done for the safety of the ship herself and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words 'management of the said vessel.'" Further, in *Rowson v. Atlantic Transport Company* (9 Asp. Mar. Law Cas. 347–458; 87 L. T. Rep. 717; (1903) 1 K. B. 114, at p. 117) there is an

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adoption by Kennedy, J. of the language of Gorell Barnes, J. in *The Rodney* (9 Asp. Mar. Law Cas. 39; 82 L. T. Rep. 27; (1900) P. 112, at p. 117), viz.: "I think that the words 'faults or errors in the management of the vessel' include improper handling of the ship, as a ship, which affects the safety of the cargo." And in the Court of Appeal in the same case (89 L. T. Rep. 204; (1903) 2 K. B. 666) the reasoning proceeds on the same lines, particularly in the elaborate judgment of Stirling, L.J.

To the same effect is the judgment of Holmes, J. in the case in the Supreme Court of the United States in *The Germanic* (196 U. S. Rep. 589) where after refusing to the *Glenochil* (*sup.*) and to a case of the *Silvia* (171 U. S. Rep. 462) he said (196 U. S., at p. 597): "If the primary purpose is to affect the ballast of the ship, the change is management of the ship, but if as, in view of the findings, we must take to have been the case here, the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make it the less a fault of the class which the first section" (of the Harter Act) "removes from the operation of the third. We think it plain that a case may occur, which, in different aspects, falls within both sections, and if this be true, the question which section is to govern must be determined by the primary nature and object of the acts which cause the loss."

In the present case it is clear that the operations on the *Canadian Highlander*, in the course of which the hatchway leading to hold No. 5 was left wholly or partially open and so allowed the penetration of rain into that hold, were operations for the purpose of repairing damage to the structure of the ship, and of scraping and painting parts of the ship, and had nothing at all to do with the case of the cargo. Had the 'tween decks hatch been removed for cargo purposes, as, for instance, for the ventilation of the cargo, and there had then been negligence in replacing the hatch or otherwise covering the hatchway, the result might have been different (see, for instance, *Andean Trading Company v. Pacific Steam Navigation Company*, 263 Fed. Rep. 559), though I express no definite opinion on the matter in view of the remarks of Scrutton, L.J. to the contrary effect. But, as things stand here on the findings of fact of the learned judge, I have come to the conclusion that the primary, or rather the sole, nature and purpose of the operations in which the negligence occurred concerned the ship as a whole, and accordingly that the appellants are protected from liability by art. IV., r. 2 (a).

In the view I have taken it is not necessary to deal with the second defence of the appellants, which is based on the particular language of the document in this case, and is said to be rendered void by art. III. (8). I agree that the appeal should be allowed.

GREER, L.J.—This is an appeal by the defendants, who are the owners of the steam-

ship *Canadian Highlander*, from a judgment of Wright, J. awarding the plaintiffs damages for breach of contract evidenced by a bill of lading of which the plaintiffs were the holders.

The question raised by the appeal is whether the defendants are entitled to be relieved from liability to compensate the plaintiffs for the damages they sustained through injury to a quantity of tinplates shipped in the *Canadian Highlander* under the contract of carriage, on the ground that they are protected by the words of art. IV. 2 (a) of the Schedule to the Carriage of Goods by Sea Act 1924. The defendants also relied on a clause in the bill of lading, which reads as follows: "18. The following are to be deemed insufficiently packed (a) tinplates in boxes unless tin-lined and iron-hooped." Other questions were involved in the action when heard by Wright, J., but the above were the only ones that survived and were argued in the Court of Appeal.

The first question may be stated broadly thus: Is the failure to utilise the hatch covers or tarpaulins of the ship with care for the protection of the cargo an act, neglect, or default in the management of the ship within the meaning of the said rule, when it cannot be said to be, or at least has not been proved to be, an act, neglect, or default with regard to the safety, or with regard to the condition or purposes of the ship itself? The learned judge held that the act, neglect, or default, proved by the evidence was not an act, neglect, or default in the management of the ship within the meaning of the said rule.

The material facts may be quite shortly stated. The tinplates were shipped at Swansea, under a bill of lading dated the 6th Feb. 1925, for carriage to Vancouver. The bill of lading had pasted in it the paramount clause giving effect to the provisions of the Carriage of Goods by Sea Act 1924, and the rules comprising the schedule thereto. By sect. 3 of the Act it is necessary for every bill of lading to contain a clause to this effect. The vessel sailed from Swansea, and on her way to Vancouver arrived at Liverpool to discharge some lumber and take in additional cargo. The tinplates in question were in No. 5 lower hold, and the lumber was stowed in the 'tween decks of that hold. The lumber was discharged on the 9th Feb. through the hatchway of No. 5 hold. A good deal of rain fell during part of the time occupied by the discharge. As I understand the learned judge's findings of fact, he decided that the 'tween decks hatches were insufficiently protected by tarpaulins, and some rain penetrated to the lower hold and caused some damage to the plaintiffs' tinplates.

The vessel was moved on the 10th Feb. and unfortunately met with an accident by striking the pierhead. She was found to be damaged, and was taken to dry dock for repairs. It was then discovered that in addition to the repairs necessitated by the accident, she required a new liner to the tail shaft. This made it necessary for the repairers to descend into No. 5 lower hold and do a good deal of work there,

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the nature of which it is unnecessary to describe in detail. While the repairers were at work, the defendants' sailors seized the opportunity of doing some painting in the 'tween decks. There was rain on some of the days when the work was being done which somehow or other fell on the plaintiffs' boxes of tinplates, which extended about half way across the lower hatch-way, from the after end towards the forward end. The ladder leading to the hold was at the after end of the hatch, and the learned judge came to the conclusion that at some time or other the defendants' employees on board the ship must have negligently omitted to see either that the hatch covers or tarpaulins were replaced after the men descended to their work, or that the opening in the hatch was not covered by a tarpaulin. He did not find, and on the evidence in my opinion he could not find, that there was any neglect of the safety or of the condition of the ship itself, or any negligence towards the ship itself, or any part of it. I treat his judgment as meaning that if there was no cargo to be considered, the occasional omission to completely cover the hatchway would not have constituted negligence at all. I agree with this view.

The conclusions of the learned judge are stated as follows: "The conclusion, therefore, I arrive at . . . is that rain did get into the hold during the period of the repairs at Liverpool and also during some part of the discharge of the lumber at Liverpool, and that rain accounted for the exceptional damage."

His final conclusion is stated on pp. 44 and 45: "Mr. Miller further relied on art. IV., r. 2 (a), and contended that if there was neglect on the part of the defendants' servants, it was 'in the management of the ship,' so that the defendants would be excused. But if the tinplates were damaged through the negligent admission of rain water into the hold at Liverpool, I do not think that that constituted a case of management of the ship. These words refer to matters affecting the ship as a ship, its safety as such, which, however, might incidentally affect the cargo, such as improperly opening sea connections, so as indirectly to damage the cargo. The principle was so stated in *Rowson v. Atlantic Transport Company Limited* (89 L. T. Rep. 204; (1903) 2 K. B. 666), where it is somewhat subtly applied to the management of refrigerating machinery, on the ground that its functions were not limited to cooling cargo. I think that in the present case the protection of the tinplate cargo fall under art. III., r. 2, and not art. IV., r. 2 (a). Any other view would largely nullify the former provision."

In my judgment the learned judge was right. The material rules in the schedule to the Act are arts. II., III., r. 2, and IV., r. 2 (a).

By art. II., subject to the provisions of art. IV., under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject

to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.

By art. III., r. 2, subject to the provisions of art. IV., the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

Art. IV., r. 2, provides that neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (a) act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.

In interpreting these rules it is not immaterial to consider the circumstances which gave rise to the enactment of the statute which gives the force of law to these rules.

In 1893, the Congress of the United States of America passed the Harter Act. This Act provides by sect. 2 that it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States and foreign ports, to insert in any bill of lading or shipping document any covenant or agreement "whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo, and to care for and properly deliver the same, shall in any wise be lessened, weakened, or avoided." As pointed out by Mr. Jowitt in his argument for the respondents, this is not a provision imposing a duty to take care, but is a declaration that the shipowner is not to limit his common-law obligation to carry and deliver the cargo by exceptions relieving him, his master, officers, servants, or agents, from the duty of exercising care in the handling, stowing, caring for, and delivery of the cargo.

Sect. 3 then proceeds to provide "that if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of the said vessel."

After the Harter Act was passed, several other countries, including some British Colonies, legislated on similar lines, but not in every case using similar words. It was felt by a large number of shipowners, merchants, and bankers in this and other countries that it was desirable to make the law of the countries interested in international trade as nearly as possible uniform with regard to the matters dealt with by the Harter Act, and recommendations were made by an international body to the British Legislature, which resulted in the passage of the Carriage of Goods by Sea Act 1924.

It seems clear that sect. 3 of the Harter Act when incorporated in a British bill of lading ought to be read as a limitation of the liability of the shipowner as a common carrier, and ought to be interpreted as an exception clause, and any decision of our courts as to its meaning

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is an authority which can be properly applied to the similar exception clause in the Carriage of Goods by Sea Act 1924. Further, I think it is incumbent on the court not to attribute to art. IV., r. 2 (a), a meaning that will largely nullify the effect of art. III., r. 2, unless they are compelled to do so by clear words.

The words "act, neglect, or default in the management or navigation of the ship," if they are interpreted in their widest sense would cover any act done on board the ship which relates to the care of the cargo, and in practice such an interpretation, if it did not completely nullify the provisions of art. III., r. 2, would certainly take the heart out of those provisions, and in practice reduce to very small dimensions the obligation to "carefully handle, carry, keep, and care for the cargo," which is imposed on shipowners by the last-mentioned rule. In my judgment a reasonable construction of the rules requires that a narrower interpretation should be put on the excepting provisions of art. IV., r. 2 (a). If the use of any part of the ship's appliances that is negligent only because it is likely to cause damage to the cargo is within the protection of art. IV., r. 2 (a), there is hardly anything that can happen to the cargo through the negligence of the owner's servants that the owner would not in actual practice be released from. To hold that this is the effect of art. IV., r. 2 (a), would reduce the primary obligation to "carefully carry and care for the cargo during the voyage" to a negligible quantity. In my judgment the reasonable interpretation to put on the rules is that there is a paramount duty imposed to safely carry and take care of the cargo, and that the performance of this duty is only excused if the damage to the cargo is the indirect result of an act, or neglect, which can be described as either (1) negligence in caring for the safety of the ship, or (2) failure to take care to prevent damage to the ship, or some part of the ship, or (3) failure in the management of some operation connected with the movement or stability of the ship or otherwise for ship's purposes. It is worth while noting that art. IV., r. 2 (a), is not directed to acts, neglects, or defaults in the course of management of the ship, but acts, neglects, or defaults in the management of the ship. All the cases in our courts where the ship has been held to be excused come under one or other of these heads.

The decisions of the English courts on the meaning of the Harter Act (when made part of an English bill of lading), and on the Carriage of Goods by Sea Act 1924, seem to me to be in accord with the view of the law above stated. In *The Glenochil* (8 Asp. Mar. Law Cas. 218; 73 L. T. Rep. 416; (1896) P. 10) the President, Sir F. H. Jeune, and Gorell Barnes, J. held that the shipowner was protected from liability for damage caused by the negligent way in which the process of filling the water ballast tanks to stiffen the ship during discharge was carried out. The stiffening was done in order to keep the ship afloat in

proper trim, and was for the benefit of the ship, as a ship. It was held that the negligence complained of was negligence in the management of the ship within the meaning of sect. 3 of the Harter Act, which had been incorporated in the bill of lading contract. That case is distinguishable from the present in that the act complained of was the negligent management of an operation done for the purposes of the ship, as a ship, and as this negligence resulted in damage to the cargo, the ship was held to be protected by sect. 3 of the Harter Act. The negligence complained of was negligent treatment of the ship as a ship indirectly affecting the cargo. In giving judgment the President pointed out that the words "management of the said vessel" were not merely co-extensive with navigation, but at any rate went "far enough to take in this very class of acts which do not affect the sailing or movement of the vessel, but do affect the vessel herself"; and after referring to the judgment in *The Ferro* (7 Asp. Mar. Law Cas. 309; 68 L. T. Rep. 418; (1893) P. 38) he uses these words: "The distinction I intended to draw then, and intend to draw now, is one between want of care of cargo and want of care of vessel indirectly affecting the cargo." If this is the correct way of describing the legal effect of the material words in the Harter Act, it seems to me to mean this, that the shipowner has got to prove two things in order to bring himself within the protection of sect. 3 (1), that there was some act or neglect that can be described as want of care of the vessel, and (2) that damage to the cargo was indirectly caused thereby. As I have already indicated, the evidence in this case failed to establish any want of care of the vessel, but only want of care of the cargo, consisting of a failure to use the hatch covers and tarpaulins sufficiently to afford adequate protection of the cargo. Lord Gorell (Gorell Barnes, J. as he then was), in giving judgment, said: "I think that where the act done in the management of the ship is one which is necessarily done in the proper handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words 'management of the said vessel.'" Having regard to the words I have quoted from the judgments it seems to me that *The Glenochil* (*sup.*) is an authority in favour of the plaintiffs' contentions in the present case.

The facts in the next case, *The Rodney* (9 Asp. Mar. Law Cas. 39; 82 L. T. Rep. 27; (1900) P. 112), were that during the voyage the vessel met with heavy weather and the fore-castle becoming flooded, the boatswain, whilst endeavouring, with the aid of a poker, to clear a pipe used to carry off the drainage, drove a hole through it, thereby admitting water into the forehold and damaging a portion of the cargo. It was decided that there was a fault or error in the management of the vessel, and the shipowner was protected

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by sect. 3 of the Harter Act, which had been made part of the contract of carriage. Here it is clear that the negligent act complained of which damaged the cargo was an act done for the purposes of the ship, which actually damaged part of the ship. The negligence was negligence in respect of the ship which indirectly damaged the cargo. In giving judgment, Gorell Barnes, J., as he then was, said: "Practically there is very little difference, if any, between the case of *The Glenochil* (*sup.*) and this case, except that in the former case there are to be found some expressions referring to the act as being done for the safety of the ship, but those expressions were not intended to limit the meaning of the words "management of the ship." I think that the words 'faults or errors in the management of the vessel' include improper handling of the ship, as a ship, which affects the safety of the cargo."

The next case to be considered is the case of *Rowson v. The Atlantic Transport Company* (9 Asp. Mar. Law Cas. 347-458; 89 L. T. Rep. 204; (1903) 2 K. B. 666). This is the authority referred to by Wright, J. in support of his judgment. The actual decision in that case was that the negligent management of the refrigerating apparatus, which was installed in the ship partly to preserve the cargo, and partly to preserve the food used by the crew, amounted to a fault or error in the management of the ship, and therefore the ship-owner was protected by sect. 3 of the Harter Act, which was incorporated in the contract of carriage. But it is clear that the ground for the decision was that as the apparatus was used not merely for the purpose of the preservation of the cargo, but also for the purposes of the ship herself as a ship, the negligence was accordingly negligence in the management of the ship. Vaughan Williams, L.J. states his view of the proper construction of sect. 3 by saying that the words "in the management of the vessel" mean "in the management of the vessel, *qua* vessel." Romer, L.J. in his judgment asks himself the question whether the negligent engineer was acting in the ordinary course of his duties and on behalf of the vessel regarded as a whole, or was he acting solely, or in particular, in looking after the cargo and for the purposes of the cargo, and as he came to the conclusion that he was acting on behalf of the vessel regarded as a whole, and not merely or particularly on account of the cargo, he came to the conclusion that "the mismanagement of the pipe was a mismanagement of it in working the pipe *qua* pipe, as I have said, and as part of the vessel." Further on he says: "In any point of view it was, in my judgment, an act of negligence by an officer of the ship in the performance of his duties to the ship as a ship, not with regard to any particular cargo, and was such an act as really concerned the management of the vessel as a whole, and, therefore, in my opinion, really came within the express limitation in sect. 3 of the Act." Stirling, L.J., in his judgment, says: "If the refrigerating chambers or refrigerating machines were

entirely devoted to cargo, and the neglect had been, as it was in the present case, the act of turning a handle which intercepted the supply of oil to this particular spot in the machine, I should have felt very great hesitation in saying that was not neglect in taking proper care of the cargo; and for a long while I was under the impression that that really represented the state of things here, and that the negligent act had nothing to do really with the general management of the vessel, but simply with the management of a portion of the vessel which was exclusively appropriated to the cargo. But it now turns out that the refrigerating portion of the vessel does include chambers which are applied and used for carrying provisions for the ship, and these are worked with precisely the one and the same apparatus as the chambers which are devoted to the preservation of the cargo. The duties of the particular engineer in charge were not limited, as I understand, to taking care of the cargo, or indeed to this particular portion of the refrigerators; and, although I think the case very near the line, it does seem to me that I ought to come to the conclusion that the fault or error was committed in the management of the vessel within the meaning of sect. 3 of the Harter Act."

The only other case that I think it necessary to consider is *Brown and Co. v. T. and J. Harrison* (*ante*, p. 294; 137 L. T. Rep. 549). The actual question involved in that case was whether theft by the stevedores' men at Mexican ports amounted to mismanagement of the ship within the meaning of art. IV., r. 2 (a), of the Schedule to the Carriage of Goods by Sea Act 1924. The decision is a decision of the Court of Appeal, and though the facts of the case are not in any way similar to the facts in the present case, it seems to me that the judgments of Bankes, L.J. and of Atkin, L.J. are only consistent with the construction of a contract similar to that decided in *Rowson's* case (*sup.*) with regard to the construction of the Harter Act, and similar to the construction I have indicated in earlier part of this judgment. Bankes, L.J. quotes with approval the passages from the judgment of the President in *The Glenochil* (*sup.*) which I have cited above, and also the judgment of Vaughan Williams, L.J. in *Rowson's* case (*sup.*). He cites with approval the judgment of Holmes, J., in the case of *The Germanic* (196 U. S. Rep., at p. 596) including that part of the judgment which approves the words of Gorell Barnes, J. in *The Glenochil* (*sup.*) that in order to be within the protection of sect. 3 of the Harter Act, the faults or errors should be primarily connected with the navigation of the vessel, and not with the cargo, and Atkin, L.J. says (137 L. T. Rep., at p. 557): "It appears to me that here we are not dealing with anything which is or can be said to be part of the ship as a ship," and at p. 556: "I do not propose to add anything at any length to what has been said by my Lord, with whose judgment I entirely agree, but I think perhaps one might point out this, that in this statute it is plain that a very clear

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distinction is drawn between dealings with goods and dealings with ships, and that 'ship' is defined in the Act. 'Ship' is defined as being 'any vessel used for the carriage of goods by sea'; and it is quite plain that what is meant by 'ship,' when the word is used, is the actual vessel, the *res*, the actual thing itself. One will find phrases in art. IV. that 'neither the carrier nor the ship shall be responsible for loss' and in par. 2, 'neither the carrier nor the ship shall be responsible for loss'; that means the ship as a *res* shall not be responsible for loss and while it is quite true that, in general language, in another context, 'management of the ship' might be construed as meaning management of the business of carrying goods by ship, it seems to me plain that that is not the meaning here, but that there is a clear distinction drawn between goods and ship; and when they talk of the word 'ship,' they mean the management of the ship, and they do not mean the general carrying on of the business of transporting goods by sea. The effect of it is that, in the words of Gorell Barnes, J., as he then was, in *The Rodney* (9 Asp. Mar. Law Cas. 39; 82 L. T. Rep. 27; (1900) P. 112) 'faults and errors in the management of the vessel include improper handling of the ship as a ship which affects the safety of the cargo,' and that construction merely follows, I think, and was intended by the learned judge to follow, his decision in *The Glenochil* (8 Asp. Mar. Law Cas. 218; 73 L. T. Rep. 416; (1896) P. 10). Both these cases of *The Glenochil* (*sup.*) and *The Rodney* (*sup.*) are supported in terms by Stirling, L.J. in the case of *Rowson v. The Atlantic Transport Company* (*sup.*), to which my Lord has referred, and I think that those statements of the meaning of the word 'management' must be taken, so far as this court is concerned, as being authoritative."

As I read the decisions of the English courts, especially the two cases in the Court of Appeal, they mean this. If the cause of the damage is solely, or even primarily, a neglect to take reasonable care of the cargo, the ship is liable, but if the cause of the damage is a neglect to take reasonable care of the ship, or some part of it, as distinct from the cargo, the ship is relieved from liability, but if the negligence is not negligence towards the ship, but only negligent failure to use the apparatus of the ship for the protection of the cargo, the ship is not so relieved. I respectfully agree with this view, but whether it ultimately proves to be a right construction of the Act, I think in this court we ought to follow the opinions expressed by this court in those cases.

With regard to the point made by Mr. Miller on clause 18 of the bill of lading, I think it is unnecessary to say more than this: if my judgment is right, the clause cannot operate as a defence when there is a cause of action for negligence. If I am wrong, then the defendants are entitled to judgment without any need to rely on this clause.

I am of opinion that this appeal should be dismissed with costs, but as the other members

of the court think differently it will be allowed with costs.

Appeal allowed.

Solicitors for the appellants, *William A. Crump and Son.*

Solicitors for the respondents, *Botterell and Roche.*

Thursday, Dec. 8, 1927.

(Before SCRUTTON and ATKIN, L.JJ., and EVE, J.)

THE W. H. RANDALL. (a)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Practice—Collision—Defendants blaming another vessel—Liability admitted by the owners of the other vessel in an action by the defendants—Leave to add owners of the other vessel as defendants—R. S. C. Order XVI., r. 11.

The plaintiffs claimed damages from the defendants, owners of the steamship W. H. R., in respect of a collision between the W. H. R. and barges belonging to the plaintiffs. The owners of the W. H. R. denied liability, alleging by letter to the plaintiffs that the collision was caused by the negligence of the steamship A. An action was commenced between the owners of the W. H. R. and the owners of the A. in which the owners of the A. admitted liability for the collision. The owners of the A. agreed the plaintiffs' damages at the sum of 140l., but refused to pay the costs of the action by the plaintiffs against the W. H. R., which had then been prosecuted to the stage of filing the plaintiffs' preliminary act.

Held (reversing Hill, J.; Scrutton, L.J. dissenting), that the plaintiffs were entitled to amend their writ by adding the owners of the A. as defendants. The case came within the principle of Order XVI., r. 11, by which "no cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties," and in these circumstances it would have been a misuse of the discretion of the court to refuse to allow a party to exercise that right. The proper course would have been for the plaintiffs to have added both parties as defendants in the alternative.

APPEAL by plaintiffs from an order of Hill, J. setting aside an order of the Admiralty assistant registrar giving leave to the plaintiffs to join the owners of the steamship *Anjou* as defendants to the action.

The plaintiffs claimed damages from the defendants, the owners of the sailing barge *W. H. Randall* in respect of a collision between the *W. H. Randall* and barges belonging to the plaintiffs. The defendants denied liability, alleging by letter to the plaintiffs' solicitors that the collision was caused by the negligence of the steamship *Anjou*. The defendants commenced an action against the owners of the *Anjou*, in which the liability was admitted.

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The owners of the *Anjou* in that action admitted liability for the damages claimed by the plaintiffs in their action against the *W. H. Randall*. The amount of such damages was agreed at 140*l.*, but the owners of the *Anjou* refused to pay any of the costs of the action by the plaintiffs against the owners of the *W. H. Randall*, in which action the plaintiffs had filed their preliminary act. The plaintiffs thereupon obtained leave from the assistant registrar to add the owners of the *Anjou* as second defendants. On appeal by the owners of the *Anjou* Hill, J. set aside the order made by the assistant registrar.

Dunlop, K.C. and *Hayward* for the appellants.—The order of the assistant registrar was right, and should be restored. The plaintiffs are entitled to commence an action against the vessel by which the actual damage was done. The costs of the action are just as much part of the damages as the sum of 140*l.* which the owners of the *Anjou* have agreed to pay.

Pilcher for the owners of the *Anjou*.—Joinder of parties is a matter entirely within the discretion of the judge. The judge has exercised his discretion, and the fact that the court might have itself acted differently is not a sufficient ground for interfering with the exercise of discretion by the judge.

Dunlop, K.C. replied.

SCRUTTON, L.J.—I myself should dismiss this appeal because I think the matter of joinder of parties or joinder of causes of action is a matter within the discretion of the judge, and I can see no principle of law which is violated by the judge making the order which he has. I myself have always been prepared to follow the rule which I understand was laid down by the court in 1917 after the alteration of Order XVI. Order XVI. was originally limited to plaintiffs and defendants and causes of action. It was altered in very wide terms before 1917, and in 1917 in *Thomas v. Moore* (118 L.T. Rep. 298; (1918) 1 K.B. 555, at p. 555) Pickford, L.J., giving the first judgment of the Court of Appeal, said: "Whatever the law may have been at the time when *Smirthwaite v. Hanney* (1894, 71 L.T. Rep. 157; (1894) A.C. 494) was decided joinder of parties and joinder of causes of action are discretionary, and in this sense if they are joined there is no absolute right to have them struck out." And the same remark appears to me to apply if there is no absolute right to have them joined, "but it is discretionary in the court to do so if it thinks right."

It seems to me this matter was entirely within the discretion of the judge, and I should myself not interfere on that ground. Mr. *Dunlop* apparently considers that this case involves some matter of principle rather than a question of discretion, and so he asked for guidance. If I could give the Admiralty Court any guidance, I should say they had better follow the practice of the King's Bench Division,

which is that when of two proposed defendants each says: "I am not liable, the other is," you may then issue an order at once joining both. In this case the plaintiffs were told by letter months before they applied to join, and each of the two proposed defendants said: "I am not liable, the other party is." They should, in my opinion, have issued a writ joining the two defendants, that would have avoided the difficulty in this case and would also avoid the danger of not getting bail against the foreign ship which they might easily run by the practice of the Admiralty Court. But my brothers think they can alter the order of the judge without interfering with the discretion of the judge, and they will indicate how it is to be done.

ATKIN, L.J.—I am very sorry to differ from my lord on this matter which involves quite a small sum of money. At the same time I think it does affect quite important rights of the plaintiffs which, it appears to me, they are entitled to assert. The position seems to be that the plaintiffs being owners of barges which were moored in tier suffered damage by reason of a collision with the barge *W. H. Randall*. The barge *W. H. Randall* collided with them, so it says owing to a collision with the French steamship *Anjou*, and the plaintiff communicated with both parties before they issued their writ. It appears that the *W. H. Randall* had issued a writ against the *Anjou*, but, of course, it did not determine any of the rights of the plaintiffs or give them any relief of any sort or kind, and they communicated with both the owners of the *W. H. Randall* and the owners of the *Anjou*. The owners of the *W. H. Randall* said they were not to blame, and the solicitors to the owners of the *Anjou* wrote a letter on the 17th May in which they said: "According to the information before us, there appears to be no question of liability of the *W. H. Randall* for the collision, and in the circumstances we cannot advise our clients to admit liability." Therefore, the plaintiffs issued their writ against the owners of the *W. H. Randall*, which certainly the owners of the *Anjou* cannot complain of, before doing that, having read the letter. If they had done that, which seems to me to be the ordinary practice on the common-law side, they would have joined the *W. H. Randall* and the *Anjou* as defendants, and the *Anjou* would have incurred costs at once by reason of the issue of the writ and having to give bail, and so forth. Proceedings go on to a stage at which the *Anjou* admits liability, and thereupon the plaintiffs seek to have the *Anjou* pay their costs. They have admitted liability both to the owners of the *W. H. Randall* and to the present plaintiffs. But the owners of the *Anjou* say "No." And the attitude they take up is this: "It is quite true that if you had told us in June and done so by the original writ and made us parties from the beginning we should have had no answer to the claim against the *W. H. Randall*"

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and we should have had to pay to you the costs of the action, and that you should add to these costs the costs you have paid to the *W. H. Randall*. But," they say, "because you did not make us a party until October, when you might have made us a party in June, we escape the liability."

I have no doubt at all that the proper order, if the action had been properly constituted, would have been an order which would have protected the plaintiffs in the costs of the action which they quite reasonably brought against the *W. H. Randall*. It appears to me quite impossible to suggest that the plaintiffs are bound to stand by while third parties discuss the question of who is responsible for damage to the plaintiff. They are entitled from the beginning to control that part of the litigation and take steps to see that they will be compensated as soon as they can be by the proper legal procedure.

It appears to me that the plaintiffs had a right to have the *Anjou* added for the purpose of getting the order for costs and it would appear that the only way to get the order for costs is by making the owners of the *Anjou* parties to the action already commenced against the *W. H. Randall*.

We have been referred by Mr. Dunlop to *The Svein Jarl* (1924, 16 Asp. Mar. Law Cas. 159; 129 L. T. Rep. 255) in which Hill, J. made an order where there were two actions, giving the plaintiffs in one action the costs they had incurred in the second. But in that case there were special facts and I am by no means clear that in the absence of very special circumstances that is an order that can be made. The proper course is to join both parties in the alternative in one action. If that is right, ought not the *Anjou* to be joined for the purpose of enabling the plaintiffs to assert the right to an order for costs against them? I think that the owners of the *Anjou* ought to be joined. I think the principle comes within that laid down in Order XVI., r. 11: "No cause or matter shall be defeated by reason of the mis-joinder or non-joinder of parties." And while it is quite true that this is not a question of original liability but a question of liability for costs incurred by reason of the conduct of the plaintiffs, I think it comes within the same principle. If it comes within that principle, there is no doubt it would be a misuse of the discretion of the court to refuse to allow a party to exercise that right. In *Van Gelder Apsimon and Co. v. Sowerby Bridge United District Flour Society* (1890, 63 L. T. Rep. 132; 44 Ch. Div. 374) there was a defect in the action by reason of the mortgages not being added, but, as was said by Bowen, L.J.: "That he, the judge, thought that the defect could be cured by adding the mortgagee of the defendant. I then, am strongly of the opinion that it was his bounden duty to add them under Order XVI., r. 11; for it is of the essence of the procedure since the Judicature Act to take care that an action shall not be defeated by the non-joinder of right parties; and if the judge sees that a mortgagee's

presence is necessary, for the purpose of doing justice, he ought not to allow the action to be defeated but to order him to be made a defendant." In this case it seems to me that the presence of the *Anjou* is necessary for the purpose of doing justice and in these circumstances I think the judge was wrong in interfering with the discretion of the assistant registrar, not only a discretion but the duty of the assistant registrar. I think he ought to have affirmed the order, and I think, therefore, that the *Anjou* ought to be added. I think the result is that this appeal should be allowed and that the order asked for should be made. What will eventually happen, I do not know. It is a small matter and subject to what my brother says I think it would be right to say costs here and below should be costs in the cause.

EVE, J.—I arrive at the same conclusion as Atkin, L.J. It appears to me we must read the rule as a whole. When one so reads the rule it is obvious that its object was to prevent a multitude of actions or to prevent injustice by reason of non-joinder of parties. When one comes to investigate the facts of the case there is a matter on which the plaintiffs are entitled to have the decision of the court, and it is quite obvious that the decision cannot be arrived at in these proceedings in the absence of the owners of the *Anjou*. In these circumstances a state of things has arisen which I think entitles the plaintiffs to have these defendants added. If that position be right, the plaintiffs are, in my opinion, entitled to have the order which was made joining the owners of the *Anjou* restored. I agree with the suggestion which has fallen from the Lord Justice as to the way in which the costs should be dealt with.

Appeal allowed.

Solicitors for the appellants, *Keene, Marsland, Brydon, and Besant*.

Solicitors for the respondents, *William A. Crump and Son*.

Dec. 6, 7, and 19, 1927.

(Before SCRUTTON, ATKIN, L.JJ., and EVE, J.)

THE ST. CHARLES. (a)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Collision — Damages — Loss of use — Enemy vessel seized and used by Italian Government — Requisitioned vessel — Diversion — No substituted vessel — Claim for substituted tonnage — Proof — British "Blue Book" rate allowed — Interest on damages.

The plaintiffs, a foreign government, claimed damages in respect of a collision between their steamship M. R. I. and the defendant's steamship St. C., which took place on the 6th Dec. 1917. After the collision the M. R. I. was

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

beached and part of her cargo transferred to the steamship *G. S.*, which was at that time chartered to the plaintiffs at 5*l.* 10*s.* per day.

The plaintiffs did not charter a substitute for the *M. R. I.*, but they claimed detention at the rate which they would have been required to pay had they in fact chartered a neutral substitute upon the ground that although no specific vessel had in fact been substituted, they had substituted tonnage chartered at the above rate for tonnage which would, but for the collision, have been available on the *M. R. I.* and the *G. S.* The registrar allowed British "Blue Book rates."

Held, that there was no sufficient evidence that the plaintiffs had in fact acquired substitute tonnage at the charter rate, and that the court could not interfere with the rough method at which the registrar had calculated compensation. The registrar was not bound to take the chartering rate for neutrals.

When ashore after the collision some cargo was transhipped to the steamship *G. S.* which was occupied with cargo from the *M. R. I.* for twenty days. The plaintiffs claimed (i.) a sum of 872*l.* 16*s.* 4*d.*, paid by them as an *ex gratia* payment to the owners of the *G. S.*; (ii.) 249*l.* 7*s.* 9*d.* paid to the crew of the *G. S.*; (iii.) thirty-three days' loss of use of the *G. S.* The registrar allowed a sum of 350*l.*, including something for loss of use, in respect of (i.); 100*l.* in respect of (ii.); and disallowed (iii.).

Held, that the plaintiffs, having lost the use of the *G. S.* for twenty days, were entitled to damages in respect thereof calculated at a sum proportionate to that allowed for the *M. R. I.*, per diem, in accordance with the respective sizes of each vessel.

Observations per Scrutton, L.J., as to the way in which the Court of Appeal should treat the findings of the registrar and merchants and as to interest on damages where there has been delay in presenting the claim.

APPEAL from an order of Lord Merrivale, P.

The appellants (plaintiffs) the Italian State Railways, owners of the steamship *Matteo Renato Imbriani*, claimed damages from the respondents (defendants), owners of the steamship *St. Charles*, in consequence of a collision between the *Matteo Renato Imbriani* and the *St. Charles* which occurred on the 6th Dec. 1917 in Almeria Bay. On the 5th July 1921 it was agreed that both vessels were to blame.

After the collision the *Imbriani* was beached. On the 12th Dec. she was refloated, and proceeded to Almeria Bay, where she was temporarily repaired. On the 26th Dec. she sailed for Genoa and arrived there on the 31st Dec. and discharged her cargo, and was permanently repaired. When ashore, after the collision, some cargo was jettisoned, and some transhipped into the *General Salsa*, which vessel was also in the employment of the plaintiffs under requisition by the Italian Government. The *General Salsa* took this portion of the cargo to Spezia.

Shortly after being repaired the *Imbriani* was torpedoed and sunk. On the 28th March 1923 the plaintiffs filed their claim, and amended claims were subsequently filed on the 30th Oct. 1925, the 4th Feb. 1926, and the 12th April 1927. On the 13th April 1927, the registrar made his report, finding the following items (amongst others) due to the plaintiffs:

2. Payment to the steamship *General Salsa* for services in connection with transhipped cargo, 350*l.* (872*l.* 16*s.* 4*d.* claimed by the plaintiffs).

3. Payment to the crew of the *General Salsa* for services lightening the ship, 100*l.* (249*l.* 7*s.* 6*d.* claimed).

11. Loss by detention of *Matteo Renato Imbriani*, sixty days at 200*l.* per day (seventy-two days at 1170*l.* per day claimed).

12. Claim by plaintiffs in respect of the diversion of *General Salsa*, disallowed (38,610*l.* claimed for thirty-three days' detention).

Interest was allowed at five per cent from the 18th April 1918 until the 18th Jan. 1924.

The registrar gave the following reasons for his findings:

Dealing with the main items in the claim, item 2 was in respect of a sum of 872*l.* 16*s.* 4*d.*, paid to the owners of the *General Salsa*. As this vessel was under requisition it is clear that as the ownership for the time being was in the Italian State Railways, no claim could legally be made by the owners of the *Salsa*. The amount claimed was as *ex gratia* payment and, therefore, could not legally be claimed against the owners of the *St. Charles*. The plaintiffs would have a right to recover such a sum as would represent the cost to them of employing the *Salsa* in the emergency caused by the collision in the same way as they could recover the cost of hiring a vessel from a third party. The plaintiffs were paying for the *Salsa* at the requisitioned rate of 5*l.* 10*s.* per day, and they could use her for such purposes as they pleased. It may be that in employing the *Salsa* as they did they incurred some loss, though this is not definitely proved. In our opinion a sum of 350*l.* would be a reasonable payment for the use of the *Salsa* and 100*l.* for the extra work done by the crew (item 3).

Item 11. The claim for loss of time was disputed both as to the time lost through the collision and as to the amount allowable. As regards the time—that lost at Genoa—we allow at sixty days. The circumstances in regard to the collision repairs and to the owners' work are obscure, but in our view the above time is sufficient, for the owners' work must almost certainly have interfered with the collision repairs. As regards the amount to be allowed the plaintiffs claimed on the rate paid to neutral ships and the defendants contended that the requisition rate for Italian ships was the proper basis. It is clear from the case of *The Susquehanna* (17 Asp. Mar. Law Cas. 81; 135 L. T. Rep. 456; (1926) A. C. 655) that the proper measure of damages is the actual pecuniary loss to the claimants. No such loss has been proved in this case and the standard which we were asked by the plaintiffs to apply is clearly excluded by the above decision. After a consideration of the circumstances, we allow under this head 12,000*l.* The defendants contended that interest should not be allowed for more than a limited time.

On the plaintiffs' motion in objection to the report, the President (Lord Merrivale) upheld the findings of the registrar, save that he held

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that interest should be allowed until the 30th Aug. 1924, and confirmed the report with this variation.

The plaintiffs appealed.

Digby, K.C., and *Main Thompson* for the appellants.

Dunlop, K.C. and *Brightman* for the respondents.

The facts and arguments of counsel sufficiently appear from the judgments.

Dec. 19, 1927.—*SCRUTTON*, L.J.—This is an appeal by the Italian Government, the owners of the *Imbriani*, against the decision of the registrar of a number of items in their claims for the damage sustained by them in consequence of a collision between the *Imbriani* and the *St. Charles*, near Almeria, on the 6th Dec. 1917. The President confirmed the report with a slight alteration. As to the way in which the Appeal Court should regard the findings of the registrar and merchants I have nothing to add to the views expressed by Lord Sterndale and myself in *The San Gregorio* (1920, 2 Ll. L. L. Rep. 249) and by Bankes, L.J. in *The Apsleyhall* (1924, 19 Ll. L. L. Rep. 4, 19, 228). They are in very much the same position as a jury except that they give their reasons. So far as their reasons involve legal considerations they can, of course, be questioned. So far as they are findings of fact it takes a strong case to disturb them, but where it is clear that they have made mistakes or that the evidence does not support their conclusions, the court has always retained the power to alter their report, and it is obviously right that the court should maintain such a control. I would add that while the Admiralty Court is so deservedly popular in cases of collisions in which foreign ships are involved, a position which may be partly due to the fact that the underwriters on both sides are frequently English, it is very desirable that the report of the registrar should state the reasons which have actuated the tribunal in allowing or disallowing large amounts, in order that the foreign interests concerned may appreciate what has been done. [The learned Lord Justice considered various items of the appellants' claim and proceeded:] Item 11 was a claim for the loss of the use of the *Imbriani* for seventy-two days at 1170*l.* a day. This sum was arrived at on the basis that the owners of the *Imbriani*, the Italian Government, had in fact chartered a neutral ship in substitution for the *Imbriani*, and would have had to pay that ship 18*l.* a ton a day. The registrar has fixed the loss of time at sixty days, has found no evidence of a substituted neutral ship hired at the rate claimed, and has allowed 200*l.* a day as compensation for the loss of the use of the ship, which is in fact the English requisition rate. I do not feel able to interfere with his assessment either of time or amount. The evidence appears to be that before the collision the Italian Government was a long way short of the ships it wanted because of the war conditions prevailing, and that, as Signor

Piperno said, they could not charter anything to replace the *Imbriani*; they could not, before she was disabled, find ships to make up the existing shortage. I cannot extract from the table on p. 56 of the record any evidence to justify me in displacing the finding of the registrar. If special damage in the shape of hire paid for a substituted ship goes, what is to be done? It might be possible, if suitable evidence were given, as that the *Imbriani* was carrying goods for the use of her owners to assess the value of the loss of sixty days of such service to her owners, but no such evidence was given and I cannot interfere with the rough method in which the registrar arrived at the figure of 12,000*l.* If the award had been based on capital value it would have been much less, but I doubt whether interest on original or depreciated capital value is a satisfactory way to deal with a ship usually carrying goods for her owners. The objection to this item fails.

Items 12 and 2 relate to the claim in respect of the *General Salsa*. This was a steamer of about 4000 tons gross, the *Imbriani* being of 5822 tons gross. The *Salsa* belonged to private Italian owners, but was at the time of the collision requisitioned at a low rate of 5*l.* 10*s.* 6*d.* a day by the Italian Government, who were using her for carrying grain from the United States. At the time of the collision she was at Gibraltar in ballast waiting for bunkers to cross the Atlantic to pick up a cargo as the *Imbriani* would have done if no collision had happened. She left for Almeria on the 11th Dec.; left Almeria for Spezia with parts of the *Imbriani's* cargo on the 26th Dec.; finished discharge at Spezia on the 6th Jan., and got back to Gibraltar about the 11th Jan. The time from leaving Almeria, the 26th Dec., to finish of discharge at Spezia, the 6th Jan., was only lost once to the Italian Government for the *Salsa*, it then doing the work of the *Imbriani*, and this period has apparently been allowed for by the registrar by reducing the days in which the use of the *Imbriani* was lost to the Government. There appear to remain twenty days in which the Italian Government lost the use of the *Salsa*, the 11th to 26th Dec., and the 6th to 11th Jan. Mr. Dunlop suggested the Government should only be paid the requisition rate for those days, but the cheaper the Government got the *Salsa* the more valuable use would be to them, and she was being used in bringing grain from the United States to Italy.

The Government originally based their claim on a payment of 3000 lire made by them to the owners of the *Salsa*, but as the Government could use her for any purpose this was clearly an *ex gratia* payment and was properly disallowed. The Government also claimed for loss by detention for thirty-three days at the same rate as the *Imbriani*, but the claim was said to be by the owners of the *Salsa*. The registrar allowed nothing for this, but being asked by the President whether he had allowed nothing for loss of use of the *Salsa* by the Government, said that he had taken it into

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consideration in a sum of 350*l.* he had allowed under item 2. This sum included damage to the *Salsa* on transshipment, but if there was nothing but loss of use of ship included in it, as there is a clear loss of twenty days' use of the *Salsa*, the registrar must have allowed only 17*l.* a day for the use of the *Salsa*, a ship of 4000 tons, while he had allowed 200*l.* a day for the *Imbriani*, of 5822 tons, both ships doing the same kind of work. There must be some mistake here. When the admitted evidence is carefully gone into there seems to be a clear loss to the Italian Government of twenty days' use of the *Salsa*, and taking a compensation proportionate on the respective tonnages of the registrar's allowance for the *Imbriani*, that is two-thirds of 200*l.*, the Italian Government are entitled under item 12 to twenty days at 130*l.*, in all 2600*l.* But it follows that the item of 350*l.* allowed under item 2 must be reduced, as the registrar says he included compensation for loss of the *Salsa* under this head. I reduce it by 300*l.*, leaving 50*l.* for damage of the *Salsa* herself.

The result of the alterations of the items is to increase the amount of 46,281*l.* allowed by the registrar, by 4170*l.*, item 9, and 2600*l.*, item 12, less 300*l.* deducted from item 2—6470*l.* in all, making the claim assessed 52,757*l.*

Interest. The appellants also objected to the registrar's order as to interest. Interest is allowed in the Admiralty as part of the damages up to the date of judgment. After judgment it is a judgment debt. Where both ships are to blame the judgment is for half the difference between the claims assessed. But where either ship delays the assessment her owners should not be allowed to increase the amount of interest due by their delay. The *St. Charles* got her assessment completed by the 30th July 1924, the *Imbriani* not till the 13th April 1927. The registrar found undue delay and gave the *Imbriani* no interest as damages after the 1st Jan. 1924. The President, after consultation with him, altered the date to the same date as the *St. Charles*, the 30th Aug. 1924. I see no ground for interfering with the finding of the registrar as to delay, and if so no error in the order as to interest. The *Imbriani* gets no interest for a period 1924 to 1927 because she delayed her assessment for that period and cannot increase her interest by her own delay.

Costs. The *Imbriani* has succeeded to a substantial amount as to two items to the extent of 6000*l.* odd, but has failed on other matters which affected at least 100,000*l.* I think the proper order will be no costs to either side either here or before the President.

ATKIN, L.J.—I agree entirely with the judgment which has just been delivered, and I only add a few words out of respect for the learned President and the registrar, from whom we differ. [The learned Lord Justice considered various items of the appellants' claim and continued:] As to item 11 I think that the registrar was not bound to accept the charter rate of hire for neutral ships as representing

the loss to the Government of the use of the *Imbriani* for the period of detention found by the registrar. On the other hand, he would have been wrong in the circumstances if he had measured the loss merely by taking the rate at which the Italian Government requisitioned the ship. I cannot say he was wrong in finding the sum of 200*l.* a day. But on this view I think he was quite wrong in allowing the plaintiffs on items 3 and 12 the sum of 350*l.* only for damage to the *Salsa* paid to her owners and for detention of the *Salsa*, the latter claim having been converted at the hearing to a claim for loss by the plaintiffs. This ship was requisitioned by the plaintiffs and was, as far as one can see, in precisely the same position as the *Imbriani* except that she was at Gibraltar outward bound in ballast to bring back grain from the United States of America, whereas the *Imbriani* was on a return voyage to Italy with a cargo of grain. The *Salsa* was reasonably employed by reason of the collision to avert the full consequences of the collision. She was detained twenty-six days, and I think the plaintiffs in the circumstances were entitled to compensation for a period during which she was diverted from her ordinary use calculated on a similar footing to the compensation assessed for the loss of the use of the *Imbriani*. She was a smaller vessel, and to save the expense and delay of a reference back to the registrar and merchants I think it is right that we should vary the report of the registrar and order the amount mentioned by my Lord.

EVE, J.—I agree.

Appeal allowed. Order varied.

Solicitors for the appellants, *Thomas Cooper and Co.*

Solicitors for the respondents, *William A. Crump and Son.*

Dec. 7 and 19, 1927.

(Before SCRUTTON and ATKIN, L.J.J., and EVE, J.)

THE IKALA. (a)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Collision—Damages—Detention—Commercial vessel—No substituted vessel—Rate at which damages should be calculated.

The plaintiffs claimed damages for detention of their steamship S. At the time of the detention the S., a British vessel, was engaged in importing lubricating oil into this country. Shipping was then being operated under the regulation of the Government, by whom all British vessels were requisitioned; but the S. was not requisitioned, and the Government had agreed that she should not be requisitioned whilst she continued to be engaged by the plaintiffs in

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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THE IKALA.

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this service. By the terms of the licences granted by the Government the plaintiffs could only import a limited quantity of oil in any particular year, and during the year in which the *S.* was detained they in fact imported the full quota permitted: the *S.* in fact performed the same number of voyages during the year in question as she would have performed had she not been detained at all. There was no evidence that the plaintiffs had engaged any vessel as a substitute.

Held, reversing Lord Merrivale, P., that the plaintiffs were not entitled in the circumstances to damages calculated at the rate per diem at which another vessel could have been chartered.

Per Atkin, L.J.: "... whatever the general rule as to the loss of use of vessels in commercial service, there may be circumstances in which the infructuous use of the vessel for the period of detention does not give rise to substantial pecuniary loss," e.g., loss of use for a month of a harvesting machine in the winter or a snow plough in the summer would cause little or no pecuniary loss.

The *Chekiang* (17 *Asp. Mar. Law Cas.* 74; 135 *L. T. Rep.* 450; (1926) *A. C.* 637) and The *Susquehanna* (17 *Asp. Mar. Law Cas.* 82; 135 *L. T. Rep.* 456; (1926) *A. C.* 655) distinguished.

APPEAL from an order of Lord Merrivale, P.

The respondents (plaintiffs), the Anglo-American Oil Company, owners of the steamship *Strathfillan*, claimed damages from the appellants, owners of the steamship *Ikala*, in consequence of a collision between the *Strathfillan* and the *Ikala* which took place in the River Mersey on the 8th Aug. 1917, for which the appellants admitted liability. The *Strathfillan* was inward bound with a cargo of oil, and after discharging part of the cargo at Liverpool proceeded with the balance to Manchester, and completed her discharge there on the 18th Aug. The registrar found that the collision repairs occupied thirteen days, and he accordingly allowed the sum of 7150*l.*, being thirteen days' detention at the rate of 550*l.* The rate of 550*l.* was fixed by the registrar upon evidence that in consequence of the delay of the *Strathfillan*, and for other purposes, it was necessary for the respondents to charter other tonnage. The rate of hire at that time for vessels carrying oil was fixed by the Ministry of Shipping at 100*l.* per day. The cost of unrequitioned tonnage which the respondents could have hired was at that time 250*s.* per ton per voyage, and at that rate, allowing for the hire paid by the Government, the respondents quantified their loss at 550*l.* per day. There was no evidence that any particular vessel had been chartered as substitute for the *Strathfillan*. The appellants called no evidence. On appeal Lord Merrivale, P. confirmed the report of the registrar.

The owners of the *Ikala* appealed.

Digby, K.C. and Balloch for the appellants.—There is no evidence that the respondents

have hired any substitute for the *Strathfillan* or that they have lost 550*l.* a day or any sum. The *Strathfillan* in fact completed the number of voyages which she would have been able to make if no delay had been incurred at all. The respondents imported the quota of oil which they were entitled to import under the Government licences. The registrar was wrong in treating the *Strathfillan* as a vessel free from requisition; although not actually requisitioned, the respondents could not in fact employ her on any service other than that of carrying oil. In the circumstances a percentage based upon the capital value of the *Strathfillan* should be allowed, as in the case of a non-profit earning vessel. In any case the Government rate of 100*l.* per day is sufficient.

Dunlop, K.C. and Hayward.—The proper measure of damage is the value of the ship as a profit-earning instrument; the method of calculating this value adopted by the registrar is satisfactory, and should not be disturbed.

Dec. 19, 1927.—SCRUTTON, L.J.—In this case the owners of the *Strathfillan* have been awarded 7150*l.* for thirteen days, 550*l.* a day, detention of their ship by reason of a collision with the *Ikala*. The *Strathfillan* was a ship owned by the Anglo-American Oil company, bought by them during the war in order to carry for them lubricating oil from the United States to this country, and bought for that trade on the promise of the British Government that she should not be requisitioned so long as she was carrying lubricating oil. It therefore followed that her owners could not charter her for other purposes, and the measure of damages could not be fixed by the rate of hire the owners would have got if they had chartered her. That special damage could not be proved or recovered. The attempt was therefore made, and has so far succeeded, to have another kind of special damage which could be recovered if proved, namely, the cost of hiring another substituted ship. Two voyage accounts were prepared, one before and one after the loss, crediting the ship with freight at the rate then paid to chartered neutrals, and, for some reason quite unintelligible to me, with the port charges which the charterer would have to pay under the neutral charter and debiting her with the actual voyage expenses which the owner would have to pay. These voyage accounts brought out profits of 653*l.* and 532*l.* a day respectively, an average of 592*l.* a day. If the 4700*l.* port expenses wrongly credited were deducted the registrar's figure of 550*l.* a day is more clearly reached. But this measure all turns on proof that a substituted vessel was chartered, and in my view there was no evidence on which this could be found. The import of oil by the ship owners was controlled, they could not import more than 1,188,700 barrels a year, and they did in 1917 import that quantity. The *Strathfillan* after the collision made another voyage in 1917 to produce that quota, and could not if there had been no collision have made a second voyage. She

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had no time to make such a voyage, and if she had it would exceed the permissible quota.

The foreign vessels that were chartered during 1917 both before and after the collision were chartered to fulfil the quota, and would have had to be chartered if there had been no collision. It seems, on these facts, impossible to say that the special damage of chartering a neutral ship as substitute for the *Strathfillan* was proved. What then is to be done? The owners of the *Strathfillan* did in fact lose the use of their ship for thirteen days owing to the collision. Their ship was running in a profit-earning trade in carrying the owners' oil for sale in England, the profit being included in the price for which the owners sold the oil in England. In both the cases of *The Chekiang* (17 Asp. Mar. Law Cas. 74; 135 L. T. Rep. 450; (1926) A. C. 637) and *The Susquehanna* (17 Asp. Mar. Law Cas. 81; 135 L. T. Rep. 456; (1926) A. C. 655), the owners were awarded compensation based on interest on the capital value, but the vessel in *The Chekiang* was a warship, in *The Susquehanna* a Government oil tanker; neither was a trading vessel carrying goods for her owner's profit. It seems to me that the proper measure of damages in such a case is the loss which the owner sustains by losing the use of his profit-earning vessel in the trade of carrying his own goods for sale for thirteen days. It must also be considered that the price of the goods carried was limited, and the quantity of goods to be carried was limited. The judgment of Lord Sumner in *The Chekiang* (17 Asp. Mar. Law Cas. 74; 135 L. T. Rep. 450; (1926) A. C. 637) must also be considered with his comments on the difficulties of assessment.

The case must go back to the registrar for the purpose of assessing the compensation for loss of use of vessel for thirteen days on the above basis. If he is given no materials on which he can estimate such a loss he may have to fall back on interest on capital, but I see no reason why he should be driven to this result.

The appellants must have the costs of the appeal here and before the judge.

ATKIN, L.J.—In this case I cannot find any reliable evidence which supports the registrar's finding that by reason of the thirteen days' delay of the *Strathfillan* caused by the collision, the owners chartered other vessels. In my view the circumstance that the plaintiffs were only allowed to import a specific quantity of lubricating oil in the year in question, and could not use the *Strathfillan* for any other purpose, and that the *Strathfillan*, in spite of the delay, performed the only further voyage which she could make that year, and that the plaintiffs imported that year their full quota, make it impossible for this finding to stand. The case must be referred back to the registrar to find the actual pecuniary loss to the claimants. In considering this I think he will have to take into account the circumstances above mentioned. It may be useful to point out that whatever the general rule as to the loss of use

of vessels in commercial service, there may be circumstances in which infructuous use of the vessel for the period of detention does not give rise to substantial pecuniary loss. To use an analogy from other chattels, the loss of use for a month of a harvesting machine in the winter or a snow plough in the summer would cause little or no pecuniary loss. I think the same consideration would apply to a vessel used only in a seasonal trade or so fixed by regulation or charter that the delay does not prevent or even affect the only commercial use to which the vessel can be put. I do not think these considerations conflict with the principles enunciated in *The Chekiang* and *The Susquehanna*, which the registrar will necessarily apply.

I have nothing to add on the question of interest.

EVE, J.—I agree and have nothing to add.

Solicitors: *Godfrey, Warr, and Co.*, agents for *Bateisons and Co.*, Liverpool; *Thomas Cooper and Co.*

Wednesday, Jan. 11, 1928.

(Before Lord HANWORTH, M.R., ATKIN and LAWRENCE, L.JJ.)

SOCIETE ANONYME PECHERIES OSTENDAISES v. MERCHANTS MARINE INSURANCE COMPANY LIMITED. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Costs—Taxation—Marine insurance action—Costs before action—Costs during stay of proceedings—Order for ship's papers—Stay of proceedings pending affidavit of—Discretion of taxing master—Premature—Order LXV., r. 27, sub-r. 29.

A traveler, the hull and machinery of which were insured by the respondents, sank and became a total loss. On a claim under the policy being made, the respondents on the 7th May 1926 informed the appellants that the loss of the ship was not due to a peril insured against, and that they would resist the claim. The appellants thereupon, having regard to the fact that the members of the traveler's crew would be going on other voyages and then be far away, in June 1926 took evidence from them. The writ was issued by the appellants on the 20th July 1926, and on the 28th July the usual order was made that the plaintiffs should file an affidavit of the ship's papers, the order ending with the words, "in the meantime all further proceedings are stayed." After that order was made, but before the affidavit required was filed, costs were incurred by the plaintiffs in "instructions for brief," preparing "points of claim" and for work done by consulting engineers and marine surveyors. The affidavit was filed and points of claim

(a) Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.

delivered on the 5th March 1927. On the 20th May 1927 the defendants, being satisfied on inspection of the ship's papers that they could not contest the claim, settled the action and were ordered to pay the plaintiffs' taxed costs. The items above referred to of costs of obtaining the evidence of members of the crew, instructions for brief, preparing points of claim, and the fee to the engineers were objected to on taxation as not being costs which ought to have been incurred before action brought and during the stay of proceedings as being premature.

Held, that costs incurred before action were in the discretion of the taxing master, to whom Order LXV., r. 27, sub-r. 29, gave a very wide discretion and he could allow them if he thought, as he did, that they had been incurred for purposes ultimately proving of use in the action; the stay of proceedings was not a stay of activities, and costs incurred during the stay were allowable if the steps causing such costs were not premature, and the question whether in fact they were or were not premature was purely a question in the discretion of the taxing master.

Bright's Trustee v. Sellar (90 L. T. Rep. 155; (1904) 1 Ch. 369) and Harrison v. Leutner (44 L. T. Rep. 331; 16 Ch. Div. 559) applied.

Decision of MacKinnon, J. reversed.

APPEAL by the plaintiffs from an order of MacKinnon made in chambers on the 19th Dec. 1927 ordering that the taxation of costs by the master be reviewed and that the objections taken by the defendants to items in the bill of costs should be allowed. The taxing master on the 1st Dec. 1927 in his taxations allowed all the items of costs to which the defendants objected on the ground that the stay of proceedings pending production of the ship's papers did not entirely paralyse the plaintiffs, so that they could do nothing by way of preparation for the action, and that, therefore, the question was whether any act of the plaintiffs by which costs were incurred during that period was premature, which was a question of reasonableness to be determined by him, and in his view the acts were not premature. MacKinnon, J. reversed that decision, allowing the defendants' objections.

The facts are stated in the headnote, and more fully in the judgment of the Master of the Rolls.

Le Quesne, K.C. and *K. S. Carpmæl* for the appellants.

R. I. Simey for the respondents.

LORD HANWORTH, M.R.—In my judgment, this appeal succeeds. It raises a somewhat novel point, and no doubt, from the large bearing that it may have, an important point.

The case is this: On the 25th Feb. 1926 there was a loss of a trawler. That trawler was insured by the defendants in this action. The trawler belonged to the plaintiffs, and, very soon after the facts as to the loss were ascertained, it was notified on the 7th May by a

letter written to the plaintiffs that the underwriters had determined to fight the case on the ground that the loss was not due to a peril insured against. The trawler had foundered, and it is not difficult to see that among the possible charges which arise from that attitude taken up by the insurers, it might be possible that they were charging the plaintiffs with having scuttled the vessel. Whether that was specifically their intention or not, the plaintiffs were at any rate told that for the purpose of their success in the action it would be necessary for them to be prepared with evidence which should overcome the attitude of the underwriters that the loss was not due to the peril insured against.

In June, in consequence of that notification, the plaintiffs and their advisers sent over to the Continent to take the statements of the crew of the trawler. The members of the crew were said to be under contract to serve in other vessels, and it was quite possible that they would be so engaged, and upon the high seas, in different directions, and their evidence would be lost if steps were not taken immediately to secure it. On the 20th July 1926 the writ was issued, and on the 21st a letter was written by the defendants as to the usual agreement which was to be obtained, that all the underwriters would be bound by the decision in the action. On the 28th July there was a summons for directions, and under that summons for directions an order was made for ship's papers, the usual order for ship's papers. That order is in the usual form, and it stated that there should be a stay until the order for the ship's papers had been complied with. The actual words are these. First of all, there was an order for security for costs in 100l., and a stay meantime; and then there was the order for ship's papers; and then it was ordered, "And that in the meantime all further proceedings be stayed." In October some further statements of witnesses were obtained, and there was the opinion of the engineer, Mr. Camps, also obtained. On the 25th Jan. 1927 the affidavit of ship's papers was prepared, but it was not communicated to the defendants. In March the documents which had been catalogued in the affidavit of ship's papers, were ready, and then, and not until then, communication was made to the other side that the ship's papers were then ready for delivery, and on the 5th March the ship's papers were filed.

On the 20th May the action was settled on terms under which the plaintiffs recovered, and were to be paid by the defendants their taxed costs.

Upon the taxation, questions arose as to the three categories of costs. There were the costs which had been incurred before the action was commenced at all; there were, secondly, the costs which had been incurred after the writ had been issued, and which had been incurred before the time when the order for ship's papers was made; and thirdly, there were the costs which had been incurred during the time when there was the stay of

proceedings laid down or directed in the order for ship's papers. When the costs were brought before the master objection was taken to them that there was a stay of proceedings for security for costs and ship's papers, and the defendant submitted that the items which had been incurred up to the time when that stay was removed were premature; and the master answered that in a manner which I will deal with in a moment.

Upon the master's answer being given, the master made the order allowing in form both some costs, which had been incurred apparently before action, some costs which had been incurred (such as obtaining evidence of witnesses) before the stay was imposed by the order for ship's papers, and also some costs which were incurred during the time when the stay operated.

MacKinnon, J. on the 19th Dec. disagreed with the decision of the master, and ordered that these costs which I have referred to should be disallowed; and from that decision the appeal is taken to this court. The result is that the question is raised, first, as to whether any costs at all could be allowed before action brought; and secondly, whether any of the costs could be allowed during the time when the stay operated.

With regard to costs generally, it must be borne in mind that Order LXV., r. 27, sub-r. 29, allows a very wide discretion to the taxing master, and I do not desire to say anything to in any way circumscribe that discretion. It is to be used by the taxing master, and has been drawn in the terms in which it is in order to give a wide latitude to the taxing master's discretion.

It is said that no costs ought to be allowed which have been incurred before action brought. That would be to state the proposition far too widely. It could not be supported in that form. In the case to which our attention has been called, a case which came before Swinfen Eady, J. of *Bright's Trustee v. Sellar* (90 L. T. Rep. 155; (1904) 1 Ch. 369), the observation is made by Swinfen Eady, J.: "Can he"—that is the master—"allow the costs of a transcript obtained before action?" And it is answered in this way: "It is a matter of discretion. . . . His discretion is not confined to costs incurred after action," and a reference is made to the sub-rule to which I have already referred. Swinfen Eady, J. in that case did not allow and adopt the master's view that there should be certain expenses allowed in the bill which had been incurred before the action was brought, and for the reason that the expenses proved useful in the action, and had been incurred at a time when it was right and proper that the outlay should be made in order to safeguard the position of the intending litigant.

It appears to me, therefore, that there is a power in the masters to allow some costs which may have been incurred before action brought; and if the expense is an outlay made upon materials ultimately proving of use and service

in the action the master has a discretion which he probably would exercise in favour of the party incurring that outlay to allow these costs, because they have been made use of during the course of and at the trial.

Then I come to the next class of costs, namely, the cost which have been incurred before the stay. As to those, it appears clear that just as all other costs which have been incurred in the action and during the action subsequently to writ issued are in the discretion of the master, so such costs to which objection has been taken, namely, the obtaining of the evidence, would fall within the discretion of the master. It is said that it cannot be clear at that moment that would be the issues as defined between the parties at a later stage of the trial, and, therefore, that the outlay then made was obviously unnecessary, and ought not to be allowed. The answer is that if it was a prudent outlay, then the master has power to allow it, and it is for him to judge as to whether or not an outlay made subsequent to the issue of the writ was such as might reasonably be included in the costs to be taxed between the parties.

Then comes the more important point upon which the appeal has been presented to us. MacKinnon, J. has held, apparently, that the stay of proceedings included in the order for ship's papers prevents any costs incurred while that stay was operative from being recovered. I take note that the stay is of "all further proceedings." It is not a stay of activity. The steps which prudence dictates are not forbidden. The question as to whether or not the steps that are taken are or are not premature, is a matter for the taxing master. I agree with the answer made by Sir George King, in these terms: "I do not understand that this order entirely paralyses the plaintiffs so that he cannot do anything by way of preparation for his real proceedings," &c. If this is so the question whether any act by the plaintiffs during that period is or is not premature must be like every other question about premature acts a question of "reasonableness to be decided by me." I think that Sir George King has rightly answered the objection carried in.

In the case of *Harrison v. Leutner* (44 L. T. Rep. 331; 16 Ch. Div. 559), Sir George Jessel approved of the answers made by the taxing masters, who said: "We have always acted upon the principle that the costs of all work in preparing, briefing, or otherwise relating to affidavits or pleadings, reasonably and properly and not prematurely done, down to the time of any notice which stops the work, is allowable, and that the taxing master, having regard to the circumstances of each case, must decide whether the work was reasonable and proper, and the time for doing it had arrived." Those words seem to contain a working rule which properly exhibits the discretion which is entrusted to the masters.

I also would adopt, myself, the words used by North, J. in considering a matter akin to

the question, namely, as to whether or not the activities of the parties' advisers have been paralysed or sterilised, which ever you like to call it. He said this: "If he had said that he was prevented from preparing them"—that is, the affidavits—"by the order which stayed the plaintiffs' proceedings until security for costs had been given, he might have expected that the court would laugh at him."

When one comes to consider the purpose of this order for staying proceedings, and the good sense of it, it appears to me to be clear that it was not intended to do more than prevent unnecessary steps being taken in the action itself, and that it was not intended to prevent such activity as would contribute to the success of the party ultimately, and that is, a step was necessary such as the collection of evidence because the witnesses might be dispersed, it cannot be said that it was within the purview of the order made staying proceedings, that no such expense should be undertaken and no such activity engaged in.

For those reasons, it appears to me that the master's answers to the objections were right, and that MacKinnon J.'s order setting those aside is wrong. The appeal must be allowed, and the answers of the master to the objections upheld with the taxation.

ATKIN, L.J.—I agree. This case has been put before us as one of some importance to underwriters, and I agree that it is. The question arises in respect of costs incurred in an action on a marine policy, partly before the action was brought, and partly during the time during which there was a stay of proceedings under an order for ship's papers. The action was begun in June of 1926, and there was an order made in July for ship's papers, and that order was not in fact complied with until a date, I think, in March of 1927, so that there was a long period during which the stay made under the usual order for ship's papers was operative.

In the first place it is necessary to consider what are the actual terms of the order. The terms of the order are: "That the plaintiffs and all persons interested do produce and show all papers," and so on, "and that in the meantime all further proceedings be stayed." I think it is important to compare that with a similar and concurrent stay which was imposed in the same order, an order that the plaintiffs (who were foreign plaintiffs) should give security for costs within a month, "otherwise all further proceedings in this action be stayed." As far as the legal operation of those two forms of words is concerned, I find myself quite unable to discern any difference. I think they have precisely the same effect, and therefore, in dealing with the question of costs incurred while a stay of proceedings is current, you have, to my mind, to consider the matter as though it made no difference whether the stay was granted by reason of security for costs, or of an order for ship's papers, or of any other.

The contention, or one of the contentions, made by the defendants, was that the effect of the stay of proceedings was such that the plaintiffs could not recover any costs incurred by them during that period—that they were, as the taxing master has put it in his answers to the objections, paralysed. Now that seems to me to be quite an incorrect view of the effect of the order. All that the order does is to stay proceedings, "and proceedings" obviously do not include the preparations which may be made by the parties by seeing witnesses, taking proofs, indulging in correspondence, and so forth. "Proceedings" are such proceedings as are, for instance, taken into account when you have to deal with the provisions of the staying clause in the Arbitration Act. You may not say there where the party applying for a stay has taken any step in the proceedings, and by that it is meant a delivery of a pleading, which is specially referred to, or some step analogous thereto, such as taking out a summons, or appearing on a summons, and so forth; and to my mind it is quite a mistake to suppose that an order to stay is to direct the parties to hold their hands from the time when the order is made and to take no further activities with a view to ascertaining what the facts are and procuring evidence, and so forth. Such a view, it is within everybody's experience, would be quite contrary to the ordinary practice. There is no doubt that while a stay is pending for security for costs or for any other reason, it is the common practice of diligent plaintiffs and diligent defendants to use that time in making some preparation for the trial of the case. They may, of course, go too far—they may make excessive preparation; and if they make excessive preparation, it may well be that the costs will not be allowed; but it is quite plain that nobody understands the order as being an order directing them to do nothing in the action, and I am quite clear that that is not the legal effect of it.

What, then, is the position? The position seems to me to be that the court has ordered, in the case of an action on a marine policy, a stay in order that the defendants may be put in possession of all the written documents that are in the possession of the plaintiffs or parties interested, or which they can reasonably procure under the order; and I have no doubt that one reason for which that order is made is to give the defendants information which otherwise would not be in their possession, to enable them to make up their minds as to what they are going to do in the case—whether they are going to fight it or whether they are going to yield, or whether they are going to admit part of it, and so forth. I think that that object ought always to be borne in mind when the master is dealing with the question of costs incurred during that period; but inasmuch as, as I have said, it is not true that the parties are stricken with paralysis, and it is not true that no costs can be recovered merely because they have been incurred in that period, it is always a question of fact for the

taxing master as to whether the costs were or were not reasonably incurred during that period, always bearing in mind the fact that there is a stay, and also (especially in marine insurance actions) bearing in mind the purpose for which the stay is granted. But subject to that, it seems to me that it is a pure question of fact for the taxing master: Was it or was it not reasonable under the circumstances for the plaintiff to have incurred the costs that he did incur, at the time at which he incurred them?

If nothing had been said by the underwriters, and there was no reason to suppose that they would or would not resist the claim, it might very well be that the plaintiffs would find themselves in a difficulty if they incurred elaborate expenditure to prove liability, if in fact the underwriters subsequently admitted liability. But that is not this case, because in this case the defendant's solicitors had written at a very early stage intimating that the defendants intended to resist liability, and expressing their reason in language which certainly might give rise to an apprehension, at any rate, and a reasonable apprehension on the part of the plaintiffs' advisers, that the plaintiffs were going to be charged with fraud, because the trawler in this case undoubtedly foundered at sea, and the suggestion was that she was lost, not by a peril insured against. That would certainly, or might, convey to anybody concerned in those matters, the suggestion that there was some wilful act alleged other than a peril of the sea.

In those circumstances the taxing master might, I think, very well take the view that it was reasonable, at the earliest stage possible, for the plaintiffs to take the evidence of the crew and the master of the trawler, for the purpose of establishing what the true cause of the loss was, and also to take the evidence of an experienced surveyor, who could survey the vessel before she was repaired, with a view of indicating that the loss was in fact a loss from a peril insured against and was not the result of wilful damage. The ship, I believe, had foundered, and therefore the surveyor would have to report upon the reports of the ship's condition before she had gone to the bottom of the sea.

All that the taxing master has taken into account here, and it appears to me to be purely a question of fact for him, and therefore I think in this particular case there is no reason for upholding the objections which have been taken. It is for him to decide whether the costs were prematurely incurred or not; he has in the circumstances of the case decided that they were not, and it is entirely a matter for him.

The other matter that arises, arises as to the costs incurred before the action was commenced. Upon that one has nothing to do with the question of a stay of the proceedings, but it is a pure question as to whether or not the costs incurred before the writ was actually issued are costs which the plaintiffs can recover under an order for the costs of the action;

and upon that it appears to me to be very important to bear in mind that the taxing masters have got to apply the words of Order LXV., r. 27, sub-r. 29. That rule is the guiding rule in the taxation of costs. It was intended to be. It is intended to sum up generally the principles upon which costs are awarded, and I cannot help thinking that if that rule were really rigorously applied by everybody—and by “rigorously applied” I mean applied in all cases, and giving full effect to the width of its language—there would be many fewer complaints brought by successful litigants than are brought at the present moment, because it is a rule which is intended to give to the successful litigant a full indemnity for all costs reasonably incurred by him in relation to the action. I think it says so in terms, that it is to allow “all such costs as shall appear to him to have been necessary or proper for the attainment of justice.” That is the whole principle that the taxing master has got to determine.

It is quite obvious that those costs are not limited to costs incurred after the writ has been issued. Costs are allowed every day, as appears by the taxing masters' rules, which are not binding, but which govern the practice in a limited form. I am not at all sure that the conventions fixed by the masters are not too narrow; but they may be very wise, because those may be the costs which are commonly in dispute and commonly raised, and it is desirable to deal with them; but the costs certainly extend beyond that. The taxing master has discretion in every case to decide whether the costs incurred before the action were necessary or proper for the attainment of justice, and it may very well be that the costs the taxing master approves may very well be included in that term, as in the case which was put in argument, the case of an accident where a bridge breaks down and it is replaced forthwith, and the state of the bridge is the cause of the action, and where it is essential, therefore, that there should be an inspection by skilled witnesses at once of the state of that bridge. In those circumstances it may very well be that the taxing master might hold that such costs incurred before the issue of the writ were necessary for the attainment of justice, because the actual facts to be ascertained from such an inspection could not be ascertained at a later date, and, of course, the taxing master upon that would have to consider the probability or not of the defendant disputing liability or not disputing liability. That again is purely a question of fact for the taxing master, and he has not misdirected himself. He says in this case that certain costs were properly incurred in taking evidence, and by the professional gentlemen concerned doing what was necessary for the purpose of taking that evidence. I agree that the taxing master in this case seems to have been liberal. The costs incurred in this case seems to strike one as being on a liberal scale, but then that is entirely a question for him, and not a question with which we can interfere.

There is one other point which was raised by Mr. Simey, and it was this, that no costs can be incurred (that is to say, properly incurred at all, as I understand him, in the action) until the issues have been determined (that is to say, have been defined); and he says that these costs were incurred before the defendants had delivered their defence or indicated what their defence would be. All I can say is that that goes very much too far. That would mean this, that the litigant would never be entitled to recover any costs, save the actual costs of proceedings, until the defendant had delivered his defence, because until then the issues are not defined. That again does not seem to be the right view. The question is, in every case, what is the reasonable thing to do, and the taxing master is not bound by any such limit of time, as is mentioned.

For those reasons, it appears to me that the learned taxing master gave expression in his answer to the objections to what I cannot help believing is not only the law, but also has been the general practice in these cases. I think he exercised his discretion as to whether or not the costs incurred were premature or not. It seems to me that that is the only question he had to determine, and in those circumstances I think the objections fail.

The result is I think that this appeal should be allowed, and the objections should be dismissed with costs here and below.

LAWRENCE, L.J.—I agree. The only objection made by the defendants to the taxation by the taxing master of the plaintiffs' bills of costs in respect of the relevant items, and therefore the only objection open to them in this court, was in these terms: "As there was a stay of proceedings for security for costs and ship's papers, the defendants submit that these items were premature." Now that objection was, I think, intended to raise a question of principle; at all events it was so treated by the taxing master, and the only question of principle that I mayself can extract from that objection is that an order for a stay, whether it be pending security for costs or pending delivery of ship's papers, operates not only to stay the proceedings in the action, but also operates to stay what the master's rule has aptly described as the activities of the parties in getting up their case or looking further after the interests of their clients.

The taxing master has evidently had that question argued before him; his answer shows it, and to my mind it is really the only question of principle that can be raised upon that objection, because of course the order itself would be a factor to take into account as to whether certain costs were premature, just as much as any other fact, but that would not make the question decided by the taxing master a question of principle.

Mr. Simey was reluctant, when I pressed him on the matter, to say that the order stayed the proceedings in the sense that it stayed the

hands of the solicitors for either party pending the operation of the stay. All he would say was this, that when such an order had been made, the taxing master was bound to hold that any costs incurred by the parties pending the stay were premature and would have to be disallowed as a matter of principle. Now I think in that he was wrong. There can be no doubt, I think, that an order staying proceedings does not apply to staying the ordinary work of a solicitor in getting up the case. As I have stated, they have to be careful in what they do pending such an order, because the taxing master would no doubt consider that in coming to a conclusion whether they were premature or not.

That leaves only the question of whether in fact these costs were prematurely incurred, and in that I agree with my colleagues that it is a pure question for the taxing master, and is not open to review in this or any other court. It is for him to say whether, in the special circumstances of the particular case, the costs are or are not prematurely incurred; and in considering that question he must, and did no doubt, have in mind the fact that an order to stay proceedings had been made, and no doubt other factors. He having once come to the conclusion, as he has done, that the costs objected to in the present case were not prematurely incurred, in my judgment that is not open to review.

I therefore agree that this appeal succeeds, and ought to be allowed, and that the taxing master's answers were perfectly right.

Appeal allowed.

Solicitors for the appellants, *Thomas Cooper and Co.*

Solicitors for the respondents, *Waltons and Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Wednesday, Dec. 5, 1927.

(Before MACKINNON, J.)

GOOLE AND HULL STEAM TOWING COMPANY LIMITED v. OCEAN MARINE INSURANCE COMPANY LIMITED. (a)

Insurance (Marine)—Collision action—Cost of repairs in excess of value insured—Loss recovered by assured on basis of costs of repairs—Liabilities of underwriters—Method of adjustment—Subrogation of underwriters to rights of the assured in the case of partial loss—Marine Insurance Act 1906 (6 Edw. 7, c. 41), s. 69, sub-s. 1, and s. 79, sub-s. 2.

The plaintiffs' steamship was insured with the defendants. During the currency of the policy the steamship suffered damage by collision with another steamship. The cost of repairs exceeded

(a) Reported by R. A. YULE, Esq., Barrister-at-Law.

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the amount for which she had been insured. In an action between the owners of the two steamships it was held that both vessels were to blame. The plaintiffs received their share of the damage suffered from the other parties and the question was how this sum was to be disposed of, the underwriters having paid the plaintiffs the full amount for which the latter's vessel had been insured.

Held, that there was no difference in principle in the case of partial loss from a case of total loss and that, as the underwriters in the case of total loss were subrogated to the rights of the insured, so, also, in the case of partial loss they were subrogated to the rights of the insured. The underwriters were therefore entitled to the benefit of the whole of the amount received by the plaintiffs on account of the damage suffered, there being no legal authority by which this sum could be apportioned.

ACTION tried by MacKinnon, J. without a jury.

The plaintiffs were the owners of the steamship *Goole* which was insured with the defendants for 4000*l.* against the usual marine risks, subject to the Institute time clauses annexed to the policy, for a period of twelve months from the 31st May 1924 to the 31st May 1925. During the currency of the policy the *Goole* in Jan. 1925, while proceeding up the river Thames, collided with the steamship *Delphinus*. The *Goole* received considerable damage and was beached on the mud near Woolwich Arsenal. She was repaired at a cost of 5000*l.*, the sum agreed upon for the purposes of this case. An action was at once brought by the owners of the *Goole* against the owners of the *Delphinus* in the Admiralty Court in which it was held both ships were to blame and the damages were divided equally between them. The amount due from the *Delphinus* was paid over to the owners of the *Goole*, who then put the matter in the hands of a firm of average adjusters to ascertain the owners' loss and show the loss against the various underwriters concerned. The average adjusters proceeded in the following way. They first allocated the expenditures to the various interests, distinguishing items which were general average from items that were particular average. They then took the accounts as allowed by the registrar and apportioned them in the same way, and then by taking 50 per cent. of the amounts thus shown in each column, they arrived at the amount paid by the *Delphinus*. The total expenditure allocated to the various interests was then brought down and each column credited with its proportion of the recovery from the *Delphinus* less the amount of its proportion of the costs, and thus arrived at the loss sustained by the owners of the *Goole*. This ascertained loss was applied to the policies and as that loss was less than the insured value of 4000*l.* the average adjusters charged the underwriters with the general and particular average. The owners, however, claimed from the underwriters their loss after deducting the amount recovered from the *Delphinus*, and since that sum was less than

the 4000*l.* value of the *Goole* as stated in the policy, they contended that they were entitled to indemnity for the full amount of their loss. The defendants, on the other hand, contended that the method of adjustment was incorrect, and as the limit of their liability was 4000*l.* the adjusters should take the gross figures without deduction of the amount recovered from the *Delphinus* and then state the claim against the underwriters, limiting it to 4000*l.* and charging the balance to the owners. They contended that when this had been done the underwriters should be credited with the amount recovered up to 4000*l.* The court was asked to determine which was the correct way of adjusting the claim.

There were no pleadings in the case, no evidence was called, and the case was argued on an agreed statement of facts.

For the plaintiffs it was argued that taking their loss at 5000*l.*, and the recovery at 2500*l.* the balance of 2500*l.* being less than the 4000*l.* insured, they were entitled to be indemnified in full. Another view was that the amount recovered from the *Delphinus* should be shared on an apportionment basis, namely as 4000*l.* was to 5000*l.*, that is one-fifth to the owners and four-fifths to the underwriters. The defendants argued that as the value of the vessel had been agreed, and if they paid that value, they were entitled to be subrogated to all of the insured's interest to the extent of the indemnity given.

Raeburn, K.C. and *Sir Robert Aske* for the plaintiffs.

Miller, K.C. and *Mitchison* for the defendants.

MACKINNON, J.—This case, while it involves some elementary principles of marine insurance, raises an interesting point of average adjustment. The question in the case ought logically to be: What have the parties agreed by the policy which is their bargain? But the time has long gone past when one can construe a policy otherwise than in the light of the innumerable cases which are now crystallised in the Marine Insurance Act, as laying down the rules of construction for policies in the ordinary terms.

The plaintiffs owned a tug, which was insured by the defendants for 535*l.* upon a valuation of 4000*l.*, the total insurable amount. There were other underwriters for the balance of the 4000*l.* not covered by the defendants, but if that balance had not been wholly underwritten by others, the plaintiffs under the Marine Insurance Act 1906, s. 81, would be deemed to be their own insurers in respect of the uninsured balance, and their share of any insured liability, or their share of any credit which decreased any insurable liability, would be exactly the same as any of the underwriters.

The insured vessel suffered a partial loss by way of particular average damage, and in respect of that partial loss the underwriters in proportion to their subscriptions under sect. 69 were

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liable for the reasonable cost of repairing the damage less the customary deductions which in this case are excluded, because there are clauses saying that there shall be no deduction of thirds, but not exceeding the sum in respect of any one casualty. If the insured in fact spends as a reasonable cost of repairs more than the insured amount of 4000*l.*, then that excess he has to bear himself, not as a sum in respect of which he is his own insurer under sect. 81, but as an expenditure by him outside any insurance calculation at all. In this case the insured did spend more than 4000*l.* The case has been discussed upon hypothetical figures which raise the point of principle, and I propose to deal with it in the light of those figures. If we take the expenditure on repairs as 5000*l.*, the assured have a claim *prima facie* upon the underwriters for 4000*l.* and no more. The extra 1000*l.* is a sum outside any insurable calculation.

As it happened, the particular average damage was caused by collision with another ship, and accordingly the assured brought an action against the owners of the other ship to recover damages; that action was settled on the basis of "both to blame." In the reference before the registrar, the amount expended upon repairs was proved as 5000*l.* That was accepted as a reasonable expenditure, and accordingly the assured was allowed in his decree 50 per cent. on the "both to blame" basis, namely, 2500*l.*

The question in this case is: How does it affect the claim which the assured would otherwise have on the underwriters for 4000*l.*, in that he has already received 2500*l.* from the owners of the other ship. If the underwriters had already paid the 4000*l.*, the question would arise in the guise of an inquiry as to how much the underwriters were entitled to by subrogation. If the underwriters have not paid the 4000*l.*, then the question arises in a slightly different form as to the amount for which the assured must give credit against his claim as already indemnified *aliunde*; but the principle involved in other aspects of the case must be exactly the same.

Now the assured say the true principle on which this calculation is to be dealt with, is this: We have spent 5000*l.* on repairs, we have received 2500*l.* from the owners of the other ship, we are, therefore, 2500*l.* out of pocket, and that 2500*l.* being less than 4000*l.* we can claim in full from the underwriters. On the other hand, the underwriters say: "For this particular average damage to your ship we are primarily liable for 4000*l.*, and no more; you have in respect of that particular average damage to your ship to you by the owners of the other ship, 2500*l.*, therefore we, the underwriters, are only liable for the difference, namely, 1500*l.*; the extra 1000*l.* that you have spent on repairs is outside any insurance calculation altogether." Those are the main contentions.

There is a third intermediate basis which has been suggested. I thought at one stage that it

did not find much favour, but Mr. Raeburn assures me in his reply that he does rely upon it if he is not right in his main contention, and desires to press the question; on that basis the 2500*l.*, it is suggested, should be apportioned so as to give the underwriters 2000*l.* in respect of their 4000*l.*, and the assured 500*l.* in respect of their 1000*l.*, so that the net recovery from the underwriters would be 2000*l.* I will not discuss it at any length for I can see no legal basis for this third method. The real question in this case is: Which of the two main contentions that I have first described is the correct one?

I think the contention of the underwriters is correct. A marine insurance policy is often said to be a contract of indemnity, but I think it must always be remembered that it is not an ideal contract of indemnity, but of indemnity according to the conventional terms of the bargain. When a loss has happened, the question is hardly ever: How much is the assured out of pocket? That might be the proper question if the object of the indemnity was to provide an ideal indemnity. The real question in the case is: What is the measure of indemnity that by the convention of the bargain has been promised to the assured? That may in some cases be less than ideal pecuniary indemnity, in some cases it may be more. If the assured has undervalued his ship in the valuation he has agreed upon he may find that he has suffered pecuniary loss outside any insurable indemnity. That happened very strikingly in the *Balmoral Steamship Company v. Marten* (9 Asp. Mar. Law Cas. 321; 87 L. T. Rep. 247; (1902) A. C. 511) and theoretically the same result might arise upon an unvalued policy, because by the convention of the policy the insurable value of the vessel under sect. 16 is the value at the commencement of the risk, and theoretically you might have some loss happening at the end of a long voyage when the market value of a ship, owing to the change of conditions, has considerably increased. Then by the terms of the bargain, as interpreted in the cases and the Act, the insurable interest in freight allows the gross freight to be insured. That again is laid down in sect. 16, and obviously if freight is lost at an early stage of a long voyage, the assured recovers a great deal more than he ought upon any ideal pecuniary estimation of his loss. Similarly, in some other cases of total loss. When a partial loss occurs, there are various conventional bases for ascertaining the measure of indemnity that is promised. In the case of goods, you have to find the proportion of the damaged value to the sound value of the goods and apply that to the insured value, or the insurable value. That again may well result in an artificial indemnity, differing from the real pecuniary loss to the assured. For instance, it may well be, the valuation includes freight payable at the destination, and the particular average loss of goods in question is a total loss of part of the insured goods in the course of the voyage, upon them no freight would have to be paid,

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and to that extent in recovering the insured value of those goods the assured would be making an actual profit; that is to say, there is an artificial measure of indemnity which differs from the real.

As regards partial loss of a ship by particular average loss the convention is that you are to estimate the depreciation not in the way that depreciation is estimated in the case of goods, because it is impracticable; but you are to estimate the depreciation in terms of the cost of repairs. The assured need not actually do the repairs; if he does not do them, then you are to estimate the cost, instead of taking what he spent upon them, and accordingly, as is laid down in sect. 69, he is entitled in respect of such particular average loss to the reasonable cost of repairs not exceeding the sum insured in respect of any one casualty. When the underwriters, in respect of a particular average loss, have paid the assured the indemnity agreed under this provision, when, in particular, they have paid a sum not exceeding the insured amount (in this case, 4000*l.*) the underwriters are entitled to say: We have paid the agreed indemnity for the whole of the particular average loss you have sustained, and not merely for a part of it. We are therefore entitled to take credit for the whole sum which you, the assured, may recover from a third party in respect of that particular average damage.

That conclusion seems to me to accord exactly with the provision in sect. 79 which deals with the rights of subrogation. Sub-sect. (2) of that section says: "Where the insurer pays for a partial loss"—I quote material words—"he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the insured has been indemnified according to this Act by such payment for the loss," the section does not say indemnified generally so that every penny of pecuniary loss that he has sustained is made good to him, but: "Indemnified according to this Act." It is quite true in this case that the payment of 4000*l.* has not fully indemnified the assured for their expenditure of 5000*l.* on the repairs, but according to the bargain they have made under the policy they have been indemnified "according to this Act" fully for that particular average loss, and the underwriters under sect. 79 are entitled to all the rights and remedies of the assured in respect of that loss, because they have fully indemnified them for that loss.

It is a strange thing that this question appears never to have arisen precisely in the way in which it does in this case with regard to partial loss, but there are two well-known cases: *North of England Iron Steamship Insurance Association v. Armstrong* (3 Mar. Law Cas. (O.S.) 330; 21 L. T. Rep. 822; (1870) L. R. 5 Q. B. 244) and *Thames and Mersey Marine Insurance Company v. British and Chilian Steamship Company* (13 Asp. Mar. Law Cas. 221; 114 L. T. Rep. 34; (1916) 1 K. B. 30).

In those cases the underwriters had for total loss paid the agreed valuations, and therefore by the indemnity according to the Act and the convention of the bargain they had fully indemnified the assured for the total loss of his ship. It was held that in consequence the underwriters were entitled to all that the assured recovered from third parties in respect of that total loss, and that the assured was not entitled to go behind the conventional state of things, for the purpose of showing that on the true value of the ship he had not received a true indemnity, but was still out of pocket.

The principle of those cases seems to me to be directly applicable in the case of a total loss and of a partial loss. I do not think there is any difference. The rights of the underwriters as regards subrogation seems to me to be quite properly laid down in sect. 79 in two sub-sections, one dealing with a total loss, and the other sub-section dealing with a partial loss. The two sub-sections are in identical terms, with one exception, namely, that in the case of a total loss there is, but in the case of a partial loss there is not, cession of the property in the thing insured to the underwriters. Thus sect. 79, sub-sect. 2, provides: "Where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated, &c.," and then the section goes on in the identical words which have been laid down in respect of his rights upon a total loss, there being added in a case of total loss the fact that the underwriters become entitled to the property in the thing insured. That difference between the two cases cannot possibly in my view make any difference as regards the right in this case of the underwriters to the full 2500*l.* as compared with the right of the underwriters if there had been a total loss and the full sum had been recovered by the assured.

In one of those cases, *North of England Iron Steamship Insurance Association v. Armstrong and others* (*sup.*), it has been thought that there was a suggestion by Cockburn, C.J. that supposing the assured recovered more than the sum that had been paid by the underwriters, the underwriters would claim the total sum, and so make a profit. If Cockburn, C.J. did say that, it really depends upon the presence of three words "or worth more" in the report. On the assumption that he did say that, the decision has been to some extent criticised in subsequent cases and in text-books. I do not desire to express any opinion about what would happen whether that is right or wrong with regard to a total loss; it may be that it is right, but I think it could only be right if it rests upon the cession of property to the underwriter upon payment for a total loss; in other words, supposing in this case the collision suit had not been settled on the terms of "both to blame," but had either been decided or settled upon the terms that the other ship, the *Delphinus*, was wholly to blame, and suppose the assured had recovered his full

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5000*l.*, then I think the underwriters would not be entitled to claim 5000*l.*, but only 4000*l.* to wipe out their payment.

There is one other point in the case. It was suggested by Mr. Miller that the working out of the salvage for the underwriters ought to be done upon the basis of separating the valuations. The actual valuation which I have so far spoken of as 4000*l.* is in the following terms: "Hull" and material valued at 25000*l.*; engines and machinery, 1500*l.*; total, 4000*l.* The suggestion of Mr. Miller is: Supposing this 5000*l.* paid by the owners of the ship, was paid only as regards, say 200*l.* or 300*l.* in respect of hull and materials, then it may result in the underwriters getting rather more than they would if the 2500*l.* is treated as paid only in respect of the valuation of 4000*l.* It all arises on the clause in the policy "Average payable on each valuation separately, or on the whole," and I am quite satisfied that that confers an option on the assured whether he will claim average on each valuation separately, or on the whole, and the underwriters have no right to use that clause.

Judgment for the defendants.

Solicitors for the plaintiffs, *Holman, Fenwick, and Willan.*

Solicitors for the defendants, *Waltons and Co.*

PROBATE, DIVORCE, AND ADMIRALTY
DIVISION.

ADMIRALTY BUSINESS.

Nov. 11, 14, and Dec. 15, 1927.

(Before HILL, J.)

THE TOURAINE. (a)

Bill of lading—Damage to cargo—Negligence in "navigation and (or) management of the vessel"—Act of sailor—Exceptions—Exception of faults or errors in navigation—Whether negligence in management impliedly excepted.

Cargo was damaged by water entering the strong room of the defendants' vessel in consequence of a defect in the waste pipe by which the waste was carried from the crew's wash-house. The defect was caused by the act of one of the sailors in forcing an iron rod into the pipe with the object of clearing away an obstruction which was preventing the waste water from running away from the wash-house, thus causing inconvenience to the crew. The sailor was not authorised to clear the obstruction in this or any way. The bills of lading under which the cargo was shipped incorporated the Australian Sea Carriage of Goods Act, by which the shipowners were not responsible for negligence of the master or crew, in "the navigation and (or) management" of the ship.

Held, that the act of the sailor was an act in the management of the ship and that the owners were not responsible.

The bills of lading, whilst incorporating the Sea Carriage of Goods Act, contained an exception of faults or errors in the navigation of the ship.

Held, that by including an express exception of faults or errors in navigation the shipowners had not impliedly surrendered their right to rely upon the exception of negligence in management under the statute.

ACTION for damage to cargo.

The plaintiff claimed against the defendants owners of the Norwegian steamship *Touraine* damages for failure to deliver in good order and condition nine bales of opossum skins, of which the plaintiffs were owners and endorsees of the bills of lading, shipped on board the *Touraine* at Sydney for carriage to Hamburg.

The *Touraine* left Sydney on the 6th Oct. 1926 and arrived at Hamburg on or about the 21st Nov. 1926. The plaintiffs alleged that the bales of skins had been carried in the strong room in the after part of the *Touraine* on the main deck, situated between the main deck and the shelter deck. The crew's quarters were situated upon the shelter deck immediately above this compartment, and a 2in. drain pipe from the sailors' wash-room which passed through the compartment in which the skins were stowed to the side of the ship was fractured and salt water had thereby found its way to the plaintiffs' cargo, doing damage. The plaintiffs alleged that by reason thereof the *Touraine* was unseaworthy and not properly equipped and not fit or safe for the carriage of the opossum skins.

The bills of lading contained the following clause:

This bill of lading to be read and construed as if any clause therein contained which is rendered illegal or null and void by the Sea Carriage of Goods Act, 1924, had never been inserted therein or had been cancelled or eliminated therefrom prior to the execution thereof and is issued subject to all the terms and provisions of and to all exemptions from liability contained in such Act.

The defendants by their defence denied that the *Touraine* was unseaworthy, and relied upon the following terms of the bills of lading:—

(c) The carrier shall not be accountable for the condition of the goods shipped under this bill of lading nor for any loss or damage thereto whether arising from failure or breakdown of machinery insulation or other appliances refrigerating or otherwise or from any cause whatsoever whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not. . . .

(e) Loss or damage resulting from any of the following causes or perils is excepted, viz.: perils of the seas or navigation of whatsoever nature or kind and howsoever caused; any accidents to or defects latent or otherwise in hull tackle boilers or machinery refrigerating or otherwise or their appurtenances (whether or not existing at the time of the goods being loaded or at the commencement of the voyage) provided reasonable means have been taken to provide against such

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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defects and unseaworthiness and any other cause beyond the control of the carrier.

The defendants also relied upon the terms of the bills of lading incorporating the Sea Carriage of Goods Act 1924. They further relied upon art. IV., rr. 1, 2, and alleged that the damage was due to some or one of the excepted perils. If the *Touraine* was unseaworthy, as alleged, such unseaworthiness was not due to want of due diligence on the part of the owners. If the pipe was fractured as alleged by the plaintiffs such fracture was caused during the voyage by some member of the crew negligently poking the pipe with an iron rod in order to clear away any obstruction which blocked up the pipe after the *Touraine* had left Sydney.

The bills of lading also contained the following exception :—

The carriers are not to be responsible for faults or errors of navigation.

The Sea Carriage of Goods Act, No. 22 of 1924 (Acts of Commonwealth of Australia) contains in the schedule the following rules relating to bills of lading :—

Art. III. Responsibilities and Liabilities.—(1) The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to (a) make the ship seaworthy; (b) properly man, equip and supply the ship; (c) make the holds . . . and all other parts of the ship in which goods are carried fit and safe for their reception carriage and preservation.

2. Subject to the provisions of Article IV. the carrier shall properly and carefully load, handle, stow, carry, keep and care for and discharge the goods carried.

Art. IV. Rights and Immunities.—(1) Neither the carrier nor the ship shall be liable for loss or damage resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds . . . and all other parts of the ship in which goods are carried fit and safe for their reception carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from

(a) Act, neglect or default of the master, mariner pilot or the servants of the carrier in the navigation or in the management of the ship. . . .

Dunlop, K.C. and Darby for the plaintiffs.

Langton, K.C. and Lindsay for the defendants.

The following authorities were referred to :—*The Rodney* (9 Asp. Mar. Law Cas. 39; 82 L. T. Rep. 27; (1900) P. 112), *The Schwann* (11 Asp. Mar. Law Cas. 286; 101 L. T. Rep. 289; (1909) A. C. 450), and *Brown v. T. and J. Harrison* (1927, 17 Asp. Mar. Law Cas. 294; 137 L. T. Rep. 549).

HILL, J.—This is a claim made under five bills of lading of bales of opossum skins shipped in Sydney in Oct. 1926 for delivery

at Hamburg and delivered damaged. The damage was by water, whether fresh or salt is immaterial. It was water which entered the strong room in which the skins were stowed from without. The defendants say that the damage was caused by negligence for which they are not responsible. That is the first question to be decided. The plaintiffs, while denying such cause, say that the cause was the unseaworthiness or unfitness of the ship. That is the second question. If the defendants fail on these points they say that (a) they are not liable at all for furs—that depends on the bill of lading read in the light of the Act—or (b) they are liable only to the limited extent per bale fixed by the Act. The Act applicable is the Sea Carriage of Goods Act 1924 of the Australian Commonwealth.

I have come to a clear conclusion as to how the damage was caused. The skins were the only cargo stowed in the strong room. The strong room was aft and between the main and shelter decks. Above it at its fore end on the south side was the sailors' wash-house. This wash-house was on the shelter deck. It had a cement floor. Waste water was carried from the floor of the wash-house to the ship's side by a leaden pipe which passed through the strong room. There was a hole in the cement communicating through a hole in the shelter deck with the upper end of the pipe which was fitted by a flange to the under side of the shelter deck. At the lower end the pipe was fitted by a flange to a hole in the ship's side which was fitted with a storm valve. There were two bends in the pipe. The upper one was a sharp bend a little below the upper end of the pipe. The pipe and also a pipe from the w.c.'s adjoining the wash-house were cased in with a wooden casing, the object of which was to protect the pipes from injury. On the floor of the strong room were scuppers leading to the bilges. The only access to the strong room was by a trunk hatchway opening on the poop deck. Before the skins were loaded there was no sign of moisture in the strong room. During the voyage, before the ship reached Aden some scraping work was done in the trunk way, and the skins were shifted to the fore part of the strong room, and thereby brought nearer to the pipe. At this time nothing wrong was noticed. There was no water in the strong room. At Hamburg the skins were found wet and very seriously damaged. There was water on the floor of the strong room, sufficient to have shifted the dunnage wood. The scuppers were choked and the water had to be baled out. The water had entered the strong room by a hole or crack in the lead waste pipe at the bend a little below the shelter deck. The water had come from the wash-house. It is in my judgment impossible to suppose that this hole or crack existed before the voyage began. It must have come into existence during the voyage. The wash-house was in regular use. It contained a shower bath. It also contained basins which seem not to have been used. But the sailors brought into the house pails of fresh water and there washed

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themselves and sometimes their clothes. The pails were emptied on to the floor. The wood casing in the strong room was not water tight. Had the hole or crack in the pipe been in existence during the earlier part of the voyage, water must have got into the strong room and some signs of water must have been obvious when the chief officer was in that room in connection with the scraping work and the bales were shifted. It was suggested that the hole or crack might have been there all along but plugged by refuse. I cannot believe that any refuse which could get down the pipe could have so effectually stopped an existing crack as to prevent the percolation of any water.

How was this hole or crack which came into existence during the voyage made? I find it proved that it was made by the seaman Olsen. He found the pipe choked so that there was water on the floor of the wash-house and he used an iron rod to clear the obstruction and used it with such force as to pierce or crack the lead of the pipe in the neighbourhood of the bend. It is true that in the log the leak was stated to be due to a burst in the pipe caused by straining of the ship. But at that time the pipe had not been seen by the master or chief officer. The carpenter reported a crack and made the pipe watertight with a stocking of marlin and red lead. It was not until after the next round voyage that the pipe was taken out and examined by surveyors and the real nature of the damage to it ascertained. The sailors were then questioned and the facts ascertained. Naturally until questioned they had not volunteered information which might reflect upon Olsen, and, indeed, may not have supposed that what they had seen Olsen doing had damaged the pipe.

In my judgment, upon these facts, it has been proved by the defendants that the cause of the damage was the negligence of the seaman in making the hole or crack in the pipe. And, in my judgment, such negligence was "neglect in the management of the ship." It was neglect, for it was negligent to use an iron rod and to use it with such force as to pierce or crack the pipe. The wash-house and the waste pipe therefrom were essential parts of the crews' accommodation and therefore of the ship. The act of clearing the pipe of an obstruction was a management of that part of the crews' accommodation and therefore of the ship. If I need authority, I have it in *The Rodney* (9 Asp. Mar. Law Cas. 39; 82 L. T. Rep. 27; (1900) P. 112). It was contended that Olsen was not doing an act of management because he was clearing the obstruction only for his own benefit. I do not agree. It was done in order to put the wash-house floor in a proper state.

Mr. Dunlop, for the plaintiffs, contended that the defendants were not entitled to rely upon an exception of negligence in management. The argument was this: The bill of lading contains a very large number of exceptions including this: "The carriers are not to be responsible for faults or errors of navigation."

In accordance with sect. 6 of the Act, the bill of lading also contains an express statement that it is to have effect subject to the provisions of the rules as applied by the Act. The clause is in the following terms: "This bill of lading is to be read and construed as if every clause therein contained which is rendered illegal or null and void by the Sea Carriage of Goods Act 1924 had never been inserted therein or had been cancelled and eliminated therefrom prior to the execution thereof and is issued subject to all the terms and provisions of and to all the exemptions from liability contained in such Act." By the rules of art. IV. (2) the carrier is not responsible for damage arising or resulting from "(a) Act neglect or default of the master mariner pilot or the servants of the carrier in the navigation or in the management of the ship." By art. V. a carrier is at liberty to surrender any of his immunities under the rules, provided such surrender is embodied in the bill of lading. Now, says Mr. Dunlop, by retaining the exception of faults of navigation, the carrier has impliedly surrendered the immunity in respect of faults of management. I do not accept that argument. The immunity is created by the statute and the surrender must be embodied in the bill of lading. In my opinion the surrender of a statutory immunity must be clearly stated. It is not to be inferred from the needless repetition of another immunity.

There remains the question whether the ship was unseaworthy or the strong room unfit or unsafe for the carriage of the skins, and whether the damage arose or resulted from such unseaworthiness or unfitness. The allegation in the statement of claim was that the pipe was fractured. As the case developed other charges were made and were embodied in amended particulars. The attack was still, in the main, upon the pipe. And I will deal with that first. There was nothing unusual in the construction of the pipe, or in the fact that it was carried through the strong room. A lead pipe is more usual for sanitary purposes and is, indeed, more costly than iron. The material of the pipe was good. The size of the pipe was sufficient. It had been fitted with a rose sunk in the cement; but the rose was broken. Mr. Camps said that it was a matter of opinion whether a rose was advisable—many ships had no rose to such a pipe; no one gave evidence to the contrary. It is obvious that, rose or no rose, some refuse from the wash-house—soap and bits of rag, and so forth—might get down the pipe and that more refuse might get down if there was no rose. It was also possible that such refuse should accumulate at the bend and cause an obstruction to the flow of the water from the wash-house.

It is the sort of thing we are all familiar with. It happened on board the *Touraine*, and had happened before the voyage in question. But the choking of the pipe by itself would not cause water to flow into the strong room. The water would accumulate on the floor of the

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wash-house until it rose above the sill, and then would flow on to the deck and away to the ship's side. When the pipe choked, the seamen would be likely to do their best to clear the obstruction. They had on previous occasions cleared the obstruction by using a wire. If such an instrument were used, the pipe could not be pierced or cracked. If a stiffer instrument, such as an iron rod, were used, and used with sufficient force, the pipe might be pierced at the bend, as happened when Olsen used the iron rod. But I cannot think that anyone concerned with the ship ought to have anticipated that so foolish a means to clear the pipe would be used, or that the sailors ought to have been warned not to act in such a way. The question I have to ask myself is, I think that indicated by Lord Gorell in *The Schwann* (11 Asp. Mar. Law Cas. 286; 101 L. T. Rep. 289; (1909) A. C. 450), and it is this: "Was the vessel in respect of this pipe reasonably fit to be worked in the way which might ordinarily be expected?" I think it was. If so, then, in respect of the pipe the ship was not unseaworthy nor the strong room unfit or unsafe. [The learned judge considered various matters as to seaworthiness raised by the plaintiffs, and continued:] The result is that in my judgment the ship was not unseaworthy nor the strong room unfit or unsafe. The question of due diligence therefore does not arise.

In view of these findings, it is unnecessary to decide the remaining answers of the defendants or the reply thereto of the plaintiffs.

As at present advised, I should have had great difficulty in reconciling with the rules either a total exemption in respect of furs, or plaintiffs argument that art. IV., r. 5, did not fix a limit per bale of 100l..

Judgment for the defendants.

Solicitors: *Waltons and Co.; William A. Crump and Son.*

Monday, Dec. 12, 1927.

(Before HILL, J.)

THE JANERA. (a)

Collision—Action pending abroad—Plaintiffs sued as defendants in an action pending abroad—Identical subject-matter—No counterclaim abroad—Motion to set aside proceedings in this country.

In a collision action proceedings will not be set aside upon the ground that the plaintiffs in the action are defendants in an action pending in courts abroad concerning the same subject-matter.

The court will consider the position of the actions here and abroad only at the time when a motion to stay proceedings comes before it: thus the fact that the plaintiffs have themselves been plaintiffs in an action abroad concerning

the same subject-matter is not a ground for setting aside proceedings in this country if the plaintiffs have abandoned their action abroad.

MOTION by the defendants, Anglo-Egyptian Oilfields Limited, owners of the steamship *Janera*, to set aside the writ and subsequent proceedings in an action by the owners of the steamship *Masconomo*, claiming damages arising out of a collision between the *Janera* and the *Masconomo*.

The collision took place just outside Egyptian waters, and the owners of the *Janera* commenced an action in the Mixed Arbitral Tribunal in Egypt, claiming damages from the owners of the *Masconomo*. The owners of the *Masconomo* themselves commenced an action against the owners of the *Janera* in Egypt, but their action was discontinued prior to the date of this motion. There was no counterclaim by the owners of the *Masconomo* in the action by the owners of the *Janera* in Egypt.

Langton, K.C. and Wilmer for the defendants.

—The proceedings by the owners of the *Masconomo* are vexatious and ought to be set aside. The subject-matter of this action is the same as that of an action pending in the courts in Egypt. In any case the owners of the *Masconomo*, having previously commenced an action abroad, ought not to be allowed to commence another action in this country having the same subject-matter, notwithstanding that they have discontinued their action abroad.

Dunlop, K.C. and Balloch were not called upon.

HILL, J.—In my view this motion fails. It is a motion to stay an action *in personam* which has been brought by the owners of a German ship against the defendants, the Anglo-Egyptian Oilfields Limited, on the ground that they have been improperly served within this jurisdiction. The ground of the application is that it was vexatious of the plaintiffs to issue their writ and that they ought not therefore to be allowed to sue here. The collision in respect of which the proceedings arise happened somewhere near Egyptian waters, and the present defendants—the Anglo-Egyptian Oilfields Limited—began an action against the owners of the *Masconomo*. At some stage of that proceeding the present plaintiffs issued a cross-writ against the owners of the *Janera*. But I have to deal with the matter as it exists to-day. When this motion was pending the present plaintiffs withdrew their cross-action, and therefore they are not parties, as plaintiffs, to any proceeding in Egypt. They still remain parties to a proceeding in Egypt as defendants to the writ issued against them by the Anglo-Egyptian Oilfields Limited.

It seems to me quite clear that the court ought not to stay a plaintiff here upon the ground that he happens to be a defendant elsewhere. That seems to be quite clear, and, therefore, as things stand now in Egypt there is no ground at all for staying the plaintiffs'

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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action. But it is said that I ought to stay the action here because up to a point the plaintiffs took part in the proceedings, and themselves at one time were plaintiffs there. I do not think that I ought to do more than consider the state of the proceedings in the one country and the other at the time when I am asked to stay. As regards the plaintiffs' action in Egypt it is to be presumed that the Mixed Tribunal in Egypt will be able to give the Anglo-Egyptian Oilfields Limited all the costs that have been thrown away by these proceedings of the German owners which have been so abandoned, and the Anglo-Egyptian Oilfields Limited have bail in a sum which appears to be in excess of the damage suffered.

Ought I to stay a proceeding properly brought in this country because the people who have brought it are defendants in a proceeding relating to the same collision in Egypt? I have asked for an authority for that and Mr. Langton says that he cannot find any and I can see no justification, in that position, for staying the action. In general if the cross-action brought by the plaintiffs was still proceeding in Egypt I think then the proper course would have been to put them to election, but as they have already elected themselves—and acted upon their election—to abandon proceedings, and as there are no proceedings by them anywhere else it seems to me I cannot interfere to deprive them of the right which they otherwise undoubtedly have to sue in this country.

Motion dismissed.

Solicitors for the defendants, *Waltons and Co.*

Solicitors for the plaintiffs, *Thomas Cooper and Co.*

Dec. 9, 1927, and March 23, 1928.

(Before Lord MERRIVALE, P. and HILL, J.)

THE ROYAL STAR. (a)

Casualty—Court of formal investigation—Report—Censure of the ship's master—British master's certificate—Certificate not dealt with by the court—Whether right of appeal to High Court by master—Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), ss. 475, 478—Merchant Shipping Act 1906 (6 Edw. 7, c. 448), s. 66—Costs.

Where a court of formal investigation has been held in a British possession to inquire into a shipping casualty, in which a British ship is concerned, and the court severely censures the master of the vessel, but does not suspend or cancel his certificate, the master has a right of appeal against the findings of the court to the High Court, notwithstanding that his certificate has not been suspended or cancelled.

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

Where the Board of Trade unsuccessfully contest the right of the appellant to appeal, the costs of the argument as to the right of appeal may be given against the Board. But notwithstanding that the appellant succeeds on the appeal, the costs of the appeal will not be given against the Board of Trade unless the decision appealed against was made by an officer appointed by the Board.

The *Famenoth* (5 *Asp. Mar. Law Cas.* 35; 48 *L. T. Rep.* 28; 7 *Prob. Div.* 207) and The *Chelston* (15 *Asp. Mar. Law Cas.* 158; 124 *L. T. Rep.* 223; (1920) P. 400) distinguished.

MOTION by the master of the British steamship *Royal Star*, of the Port of London, to hear and determine as a preliminary point the question whether he had a right of appeal from a decision of a court of formal investigation at Singapore. The appellant was a master mariner, and held a certificate issued at Barry. On the 13th Jan. 1927 he was in command of the British steamer *Royal Star* when the *Royal Star* grounded in the Straits of Singapore. The *Royal Star* was in the course of a voyage from the Far East to Liverpool, and was not at the time intending to call at Singapore. A court of formal investigation was held at Singapore by order of the Governor of the Straits Settlements. The court found that the casualty was caused by the negligence of the master in omitting to satisfy himself personally that his charts were up-to-date, and in respect of other matters. They did not consider it necessary to deal with the appellant's certificate, but severely censured him for the above-mentioned acts of negligence.

On the 27th May 1927 the appellant gave notice of appeal. Subsequently he applied to the Board of Trade for a re-hearing which was refused. At the hearing of the summons for directions before the registrar, the Board of Trade objected that no right of appeal lay, and that the court had no jurisdiction to hear an appeal unless the court of formal investigation had suspended or cancelled the appellant's certificate. The registrar accordingly adjourned the application *sine die*, and gave leave to the appellant to issue out a motion to the Divisional Court to hear and determine as a preliminary point the question whether he had a right to appeal.

By sect. 475 (Part VI.) of the Merchant Shipping Act 1894 it is provided as follows:

(3) Where on any such investigation or inquiry [i.e., a formal investigation or inquiry into the conduct of a master, mate, or engineer] a decision has been given with respect to the cancelling or suspension of the certificate of a master, mate, or engineer, and an application for re-hearing under this section has not been made or has been refused, an appeal shall lie from the decision to the following courts, namely, (a) if the decision is given in England or by a naval court, to the High Court.

By sect. 478 (1) it is further provided that the Legislature of any British possession may authorise any court or tribunal to make

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inquiries as to shipwrecks or other casualties affecting ships, or as to charges of incompetency or misconduct on the part of mariners, mates, or engineers where a shipwreck or casualty occurs to a British ship on or near the coasts of the British possession. By subsect. (6) it is further provided :

The Board of Trade may order the re-hearing of any inquiry under this section in like manner as they may order the re-hearing of a similar investigation or inquiry in the United Kingdom, but if an application for re-hearing either is not made or is refused an appeal shall lie from any order or finding of the court or tribunal holding the inquiry to the High Court in England, provided that an appeal shall not lie (a) from any order or finding on any inquiry into a casualty affecting a ship registered in a British possession, or (b) from a decision affecting the certificate of a master, mate, or engineer, if that certificate has not been granted either in the United Kingdom or in a British possession under the authority of this Act.

By the Merchant Shipping Act 1906, s. 66, t is provided :

Where on any investigation or inquiry under the provisions of Part VI. of the principal Act, the court find that a shipping casualty has been caused or contributed to by the wrongful act or default of any person, and an application for re-hearing has not been made under sections 475 or 478 of the principal Act, or has been refused, the owner of the ship or any other person who, having an interest in the investigation or inquiry, has appeared at the hearing and is affected by the decision of the court, may appeal from that decision in the same manner and subject to the same conditions in and subject to which a master may appeal under those sections against a decision with respect to the cancelling or suspension of the certificate.

Dunlop, K.C. and *Hayward* for the motion.—The master has the right to appeal. Sect. 478 of the Merchant Shipping Act 1894 gives a right of appeal except in two cases, namely, where the ship is registered in a British possession or the certificate is not granted in this country. But in any case sect. 66 of the Merchant Shipping Act 1906 gives a right of appeal in clear and unambiguous language. It is understood that the Board of Trade will rely upon the opinion expressed by the court in *The China* (unreported) in 1899 (see Note at end). Whatever view the court may there have taken of the effect of sect. 478, the position has clearly been changed by the Act of 1906, and a clear and unambiguous right of appeal is now conferred. In any case, *The China* was an appeal under the Indian Appeal Acts, which are different from the Acts in question.

Bucknill for the Board of Trade.—The case for the Board of Trade does not rest solely upon the remarks of Jeune, P. and Gorell Barnes, J. in *The China*. The position is that sect. 478 of the Act of 1894 has never been repealed, and sect. 66 of the Act of 1906 does not really enlarge the rights given by sect. 478, as the concluding words of the section plainly show. [HILL, J. referred to *The Golden Sea*

(1882, 5 Asp. Mar. Law Cas. 23 ; 47 L. T. Rep. 579 ; 7 Prob. Div. 194).] The Board of Trade desire that a decision should be given as to whether there is any appeal in the circumstances of the present case. [Reference was made to *The Ida* (1886, 6 Asp. Mar. Law Cas. 57 ; 54 L. T. Rep. 497 ; 11 Prob. Div. 37).]

Dunlop, K.C. was not called upon to reply.

LORD MERRIVALE, P.—This is a preliminary application in a proposed appeal of an officer in the merchant marine against a finding of the Wreck Inquiries Court in the Straits Settlements by which he conceives himself to be aggrieved. The court in the Straits Settlements found him guilty of negligence in three particulars whereby a vessel of some 8000 tons had been stranded, and expressed its severe censure judicially and declared that it did not deem it necessary to deal with his certificate. That, of course, is a grave matter for an officer in the merchant marine, especially an officer who has been in charge of one of the great ships which sail the wide seas, and he seeks to secure reconsideration of those findings of negligence, and of the censure which has been so expressed.

Whether he is entitled to a re-hearing is a matter of statute. He is not entitled to a re-hearing unless some statute, which creates the jurisdiction under which he has been placed at disadvantage, confers that right of re-hearing. The view has been taken that there is a limited right of re-hearing which does not apply to his case—that under the terms of the relevant section in the Merchant Shipping Act, if his certificate had been dealt with, he would have been entitled to be re-heard, but that in view of the fact that his certificate has not been dealt with the statute gives him no right of re-hearing. That, of course, is a matter purely of the construction of the statute. The matter has been well and concisely argued, and it was hardly necessary that Mr. Bucknill should emphasise the fact that the Board of Trade has no desire to restrict in the case of officers in the merchant marine service, their right of access to His Majesty's courts when they are aggrieved. The Board of Trade would fall short of its duty if it pursued any such course. It has not pursued any such course, and does not, and in desiring a determination of the preliminary question here the Board of Trade has simply taken an account of opinions expressed from the Bench from time to time, and views which have evidently been held by the judicial authorities in respect of which neither of us, I am sure—no one who is aware of their eminence or of their ability—would entertain any doubt. But the question still has to be determined.

It is said on behalf of the proposed appellant that under the relevant section of the Merchant Shipping Act 1894, ss. 475 and 478 in particular, the appellant—the proposed appellant—probably had a right of appeal—that there is a construction of the section which would give

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him a right of appeal—but it is said further that under the Merchant Shipping Act of 1906, s. 66, he has unmistakably a right of appeal. The relevant sections of the Merchant Shipping Act of 1894 certainly do not make it clear beyond all doubt. I think they are capable of a construction which would give the right of appeal. After providing for wreck inquiries, and establishing tribunals which have power to deal with the certificates of masters, mates and engineers, and providing power for the Board of Trade to order the re-hearing of any such inquiries, sect. 475 goes on to say: "Where, on any such investigation or inquiry, a decision has been given with respect to the cancelling or suspension of the certificate of a master," and so forth, an appeal shall lie. I pressed Mr. Bucknill (perhaps a little too closely) as to whether in this case there had been a decision with respect to the cancelling or suspension of the certificate of the proposed appellant, but Mr. Bucknill found an answer to the inquiry which was that it depended upon the true construction of sect. 475, sub-sect. 3. This was a decision with respect to the cancelling or the suspension of the certificate of the proposed appellant. It was decided to be unnecessary to cancel or suspend his certificate. That does not look like the kind of decision against which the right of appeal is of necessity to be assumed. That leaves the matter an open question. I do not express any concluded view as to the proposition that there would be a right of appeal there—I leave that matter where it is. But sect. 475 dealt with wreck inquiries in this country, and the subsequent sect. 478 dealt with wreck inquiries in the Dominions overseas, and dealt with them in a different manner. Because, after giving to the Board of Trade the like power of ordering a re-hearing which was expressed in sect. 475, sect. 478 went on to say: "An appeal shall lie from any order or finding of the court or tribunal holding the inquiry to the High Court in England." It was suggested that a possible view of the two sections was that those general words in sect. 478 are limited by the specific words in sect. 475, and we are asked to apply a well-known rule of construction. In my view those general words in sect. 478 are not limited by the express words in sect. 475. In my view an appeal lies at the instance of a party to the proceedings from an order or finding of the court or tribunal holding the inquiry except, in the specified cases, where such an appeal, it is directed, shall not lie.

That is the view I hold upon the Merchant Shipping Act of 1894, but many things have happened since 1894. From time to time there has been resort to this court by persons alleging themselves to be aggrieved, and it was found that persons might suffer a substantial grievance by proceedings before tribunals dealing with shipping casualties, and be left without a specific right of redress. There was a case to which my brother referred of the owners of a vessel who were in effect placed in a position of great disadvantage and were held not to be within

the provisions of the Act which gave the right of appeal, and by reason of occurrences of that kind sect. 66 was placed in the Merchant Shipping Act of 1906, and that directed that where, in any investigation or inquiry such as is here under consideration, the court found that the shipping casualty has been caused or contributed to by the wrongful act or default of any person—the owner of the ship or any other person—who, having an interest in the investigation or inquiry, has appeared at the hearing, and is affected by the decision of the court, such person may appeal. It is necessary after reading that section for us to see whether the proposed appellant here comes within its terms. Had he an interest in the investigation or inquiry? He had. He was accused of negligence and was subject to the cancellation of his certificate, or to the endorsement of his certificate.

Had he appeared at the hearing? He had. He had appeared and given his evidence. Was he affected by the decision of the court? That has been submitted as the true question here. He was found guilty of negligence—that is, of professional misconduct. He was found guilty at a public proceeding, and the decision of the court was placed on record. The court sat in public, as such courts do, and, of course, ought to do. To my mind it is impossible to say that an officer in the merchant service, who has been tried upon charges of negligence and found guilty, is not affected by the decision of the court. It seems to me that he is placed very nearly in the position of a person tried under a criminal charge who is found guilty, but who is subjected to no sentence. That being so, it seems to me that the proposed appellant has a right of appeal probably under the sections of the Act of 1894, but certainly, under sect. 66 of the Act of 1906. I do not think there is any substantial danger of a great rush of litigants to the court giving the right of appeal, and if the court should be obstructed in that way it will know how to deal with any such phenomenon.

In my view the proposed appellant is entitled to succeed upon this motion.

HILL, J.—I agree. Whether under sect. 475 of the Merchant Shipping Act 1894 a man who is found guilty of negligence, but whose certificate was neither cancelled nor suspended, had a right of appeal, I express no opinion. But assume that he had not such right under the 1894 Act, in my opinion the words of sect. 478 of the Act of 1894, which are so much wider than the words of sect. 475, gave him in such a case a right of appeal from a colonial court of inquiry. But any doubt is removed by sect. 66 of the Act of 1906, which was passed—as is clear upon its terms—in order to enlarge the right of appeal, and which clearly includes the master in this case, in that he appeared, and, indeed, must have been given notice to appear, because it was proposed that his certificate should be dealt with, and he was, in my view, quite clearly a person affected by

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the finding that the casualty had been caused by his negligence.

I therefore agree that he has a right of appeal.

Appeal allowed. Order as to costs to stand over until hearing.

The appeal was heard before the court (Lord Merrivale, P. and Hill, J.) on the 23rd March 1928. The court held that the master had not been guilty of negligence, accordingly allowed the appeal and set aside the censure upon the master.

Dunlop, K.C.—It is submitted that the appellant is entitled to the costs both of the previous hearing and of the hearing to-day. The appellant has been successful in proceedings in which the Board of Trade has unsuccessfully taken part as a litigant. [Lord MERRIVALE, P.—The Board of Trade did not take part in to-day's proceedings as a litigant. The question is whether the taxpayer should bear the cost of to-day's proceedings.] It is submitted that the Board of Trade does take part as a litigant—*The Famenoth* (5 Asp. Mar. Law Cas. 35; 48 L. T. Rep. 28; 7 Prob. Div. 207), where Sir James Hannen pointed out that the Board of Trade were entitled to costs where they succeeded, and the same rule must be applied in favour of the appellant where the Board of Trade were unsuccessful. [Lord MERRIVALE, P.—In that case it was the officer of the Board of Trade who made the decision.] It was also the officer of the Crown, though not, admittedly, of the Board of Trade, who made the decision complained of in the present case. [Lord MERRIVALE, P.—Not the representative of the British Exchequer.] If the Board of Trade had been successful the appellant would have been ordered to pay the costs. [Lord MERRIVALE, P.—That is a different matter. The appellant would have put the public Exchequer to an expense. It is a question of principle whether the Crown in performing a public duty must impose costs on the Exchequer merely by performing the duty.] In *The Chelston* (15 Asp. Mar. Law Cas. 158; 124 L. T. Rep. 223; (1920) P. 400) the successful appellant was allowed his costs. [Lord MERRIVALE, P.—In that case the master had been deprived of his certificate by the Board of Trade, and was seeking to recover it.] Under rule 20, Shipping Casualties and Appeals and Re-hearings Rules 1923, the court has power to make orders as to the costs. If it is a matter of discretion, discretion should be exercised in the appellant's favour. [Lord MERRIVALE, P.—There is, no doubt, power. It is a matter of principle.]

Bucknill.—In *The Grecian* (1902, unreported) upon the hearing of an appeal from a naval court of inquiry at Halifax, which had suspended the certificate of the appellant for three months, the President (Sir F. Jeune) said: "I do not think that costs should be given against the Board of Trade in this case. I think that the Board of Trade have acted in the matter—it is

almost impertinent to say so—with great propriety. They conducted the case with great fairness in the court below and here. It is a public matter, and although we do differ from the court below, I do not think it is a case where costs could possibly be given against the Board of Trade." The rule was then the same as it is now.

Lord MERRIVALE, P.—I am glad that the matter has been discussed as it has been. I think that upon principle the appellant is entitled to the costs of the previous argument to determine his right to appeal, but for the reasons which I have suggested in the course of the discussion, I do not think that it would be proper in this case to make any order against the Board of Trade for payment of costs. The Board of Trade has discharged its public duty. There was no litigation between them and the appellant. The order which I propose to make is that the applicant should have the costs of the previous motion, but that there should be no costs of this appeal.

HILL, J.—I agree.

Solicitors, *G. F. Hudson, Matthews, and Co.; Solicitor to the Board of Trade.*

NOTE.—*The China*, unreported, March 25, 1899.—This was a re-hearing of an investigation into the circumstances attending the stranding of the British steamship *China*, belonging to the P. and O. Steamship Company, on Perim Island, close to Azalia Rock, on the 24th March 1898. The first hearing took place under the provisions of the Indian Merchant Shipping Act V. of 1883, as amended by Act VI. of 1891, and was held at Aden. The court considered that the supernumerary second officer, Mr. Crawford, was deserving of severe censure. The Board of Trade ordered a re-hearing, which took place before a Divisional Court of the Probate, Divorce, and Admiralty Division consisting of Jeune, P. and Gorell Barnes, J. Upon the re-hearing the court found that Mr. Crawford did not in the circumstances neglect to discharge his duties. The report of the Divisional Court contained the following passage: "The court desires to express its opinion that the action taken by the Board of Trade in ordering a re-hearing of this case has been both just and proper. Mr. Crawford's certificate was not dealt with by the court at Aden, and he was therefore unable to appeal against the judgment of that court, and unless the case had been re-opened by the Board of Trade he would have been without any opportunity of having his conduct further inquired into, and of clearing himself from the censure passed upon him."

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 27, 30, and 31, 1928.

(Before SCRUTTON and ATKIN, L.JJ. and EVE, J.)

ELLERMAN LINES v. READ AND OTHERS. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Injunction—Ship—Salvage—Contract—Breach—Seizure of ship under process of foreign court—Judgment obtained by fraud.

English courts, while they have no power to restrain a foreign court from acting upon a judgment obtained in that court, have jurisdiction to restrain a British subject from taking proceedings in the foreign court to obtain the fruits of a judgment obtained by him by fraud against the property of another British subject then within the jurisdiction of that foreign court.

APPEAL from a decision of MacKinnon, J. in an action tried by him without a jury, and there was a cross-appeal by the defendants as to costs.

The plaintiffs were the owners of the steamship *Falernian*. The defendants were joint owners of, and the defendant Landi, a naturalised British subject, was master of, the salvage vessel *Semper Paratus*.

In Nov. 1924 the *Falernian*, which was stranded in the Black Sea off the Rumanian Coast, was salvaged by the defendants' vessel upon the terms of a salvage agreement dated the 24th Nov. 1924. That agreement, which was in the standard form approved by Lloyd's on the terms of "No cure, no pay," provided that the remuneration for the salvage services would be settled by arbitration in London, that security for the payment of that remuneration should be given in London, and further the salvors agreed not to arrest or detain the property salvaged except in the event of any attempt being made to remove the same without the salvors' consent before security had been given to the committee of Lloyd's. The deposit of an open guarantee was accordingly made in London. The *Falernian* was then taken on to Constantinople where she was placed in dry dock for purposes of temporary repairs, after which she was to be towed to England or Holland in order to have more extensive repairs carried out, but before she left the defendant Landi caused her to be arrested at Constantinople and proceedings were instituted in the Turkish courts against the master of the *Falernian* upon the ground that the vessel was about to be removed without security having been given. Upon an oath falsely given by Landi that security had not been given, and the master of the vessel taking no further part in the

proceedings, judgment was given by the Turkish court for the amount claimed by the plaintiffs for salvage services in respect of the vessel and cargo. Subsequently a creditor of Landi obtained judgment against him which was executed on the *Falernian* with the result that the vessel passed out of the hands of the plaintiffs.

The plaintiffs accordingly instituted the present action in which they claimed (1) a declaration that the Turkish judgment was invalid as against the plaintiffs and the *Falernian* and any other ships or property of the plaintiffs; (2) damages for breach of contract; and (3) an injunction restraining the defendants and (or) their servants and agents from taking any steps to enforce the Turkish judgment against either the steamship *Falernian* or against any other ships or other property of the plaintiffs or against the master of the steamship *Falernian* or his property.

MacKinnon, J. held that as the plaintiffs were not parties to the Turkish proceedings the doctrine of *res judicata* could not apply to the question of breach of contract, and the plaintiffs were entitled to damages, but these damages did not include the loss of the ship, since this was not a necessary consequence of the breach, and, further, that the court could not grant an injunction restraining the enforcement of the Turkish judgment anywhere else in the world. The plaintiffs appealed and the defendants cross-appealed as to costs.

Raeburn, K.C. and David Davies for the plaintiffs.

Wilfrid Lewis and G. K. Rose for the defendants.

SCRUTTON, L.J.—This is a curious, and—fortunately for English commerce—a rather unusual case. It arises in this way: The *Falernian*, a steamship belonging to the Ellerman Line, was in the Black Sea in the autumn of 1924, and on the 21st Nov. she stranded on the Roumanian coast. There was somewhere in the neighbourhood a well-equipped salvage tug called the *Semper Paratus*, partly owned by a Count Zanardi Landi, who appears to be a naturalised British subject, and who was also the captain of the *Semper Paratus*. He had two co-owners, a Mr. Read and a Mr. Grech, whose name is well known in salvage cases, and on the 24th Nov., following the very usual practice between people who regularly carry out salvage work and English shipowners, with Lloyd's underwriters at their back, a salvage agreement in the well-known Lloyd's form was entered into between the captain of the *Falernian* and Count Landi. The general lines of that agreement are that the salvors agree to salvage on terms "No cure, no pay"; if cure is effected the amount is to be determined by a Lloyd's arbitration in London, and the salvor is secured in getting his money by having an undertaking to pay whatever is found due in terms and from persons approved by Lloyd's, and if he agrees

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

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to have his remuneration determined in this way, and is protected by guarantees approved by high authority of Lloyd's Committee, the agreement goes on to provide that: "The contractor engages not to arrest or detain the property salvaged except in the event of any attempt being made to remove the same . . . without his consent before security as aforesaid has been given to the committee of Lloyd's." So, if the salvor is protected under the Lloyd's agreement by getting his approved security, he agrees not to arrest or detain the property salvaged, but to rely on the guarantee which has been approved by Lloyd's as a means of getting the money awarded to him by the very competent tribunal to which Lloyd's arbitrations go; and this agreement, with the terms of which Count Landi, as a well-known salvor, must have been perfectly familiar, was accordingly entered into.

The *Falernian* was refloated in March, and taken to Constanza, a Roumanian port near, and after having had some 2000*l.* apparently spent on her in the way of temporary repairs by the owners, arrived at Constantinople. For some reason or other, Count Landi got suspicious of something—I do not know, nor does it appear, what it was—and he arrested the vessel at Constantinople within the jurisdiction of the Turkish courts. Now if he was then a holder of a security for the sum due in the manner provided by the agreement, that was a clear breach of his agreement. He had, as a matter of fact, been told by his solicitors before this, that they had an open guarantee, that is to say, a guarantee for the full amount of the award, from Messrs. Ellerman, the owners of the *Falernian*, and who were people as to whose financial stability there could be no possible doubt; and by writing to his solicitors he had approved of their taking that security; and when apparently he did arrest the vessel for some reason or other, his English solicitors told him: "You have no possible right to do that. You have made an agreement, and you have got the security, and you are breaking your agreement by arresting the steamer." But he went on.

The English shipowners, when they heard of the arrest, issued a writ against him on the 9th Sept. 1925, claiming damages for breach of the salvage agreement, the damages being occasioned by the arrest of the vessel in breach of that agreement. Negotiations between the parties went on; the solicitors, acting on behalf of the shipowners, took no further steps to apply for an injunction at that time, and the procedure in the Turkish courts took its course. The master had had some Turkish process served upon him, and his advisers in Constantinople had been furnished with a copy of the salvage agreement or the agreement itself—I do not know which—and a copy of the security which had been given for the amount due under the award. Armed with that, they apparently thought that they had only to bring these to the notice of the Turkish courts, and the ship would be released. But the

Turkish courts appear to have a procedure which is not unlike some of the English procedure at the time of the Norman Conquest, by which one party can put the other party to his oath. There was a similar procedure, of course, in England; you could put the other party to his oath, accompanied by his friend, or you could make him walk over hot plough-shares, or you could throw him into the water under certain circumstances, and if he survived any of those tests, if he took the oath accompanied by his friend, or if he walked over the hot plough-shares without anything happening to him, which was sometimes managed, he got off. However, there is a Turkish procedure by which a plaintiff can put the defendant to his oath, with the unfortunate result that if the defendant screws himself up to take the necessary oath, the proceedings are at an end, and you cannot go any further. By some error of judgment, and perhaps undue confidence in Count Landi's sense of truthfulness, the plaintiffs here put the defendant Count Landi to his oath, because when the defendants had put forward in the Turkish courts their case that the proceedings must be all wrong because Count Landi had signed the Lloyd's agreement and had got the security, to their amazement the representatives of Count Landi put forward the case: "Oh, but if a security was given, our English solicitors had no authority whatever to accept it." This was in face of a letter which Count Landi himself had written, but which was not in Constantinople at the time, approving the security. So, when after some difficulty Count Landi was found, he being away at the time, the oath was put to him. There is a dispute about the form in which it was put, but I gather that the judge accepted the form as stated by the legal representative of the ship in the Constantinople court. The oath was put in this form: "We ask that Landi swear that he has not given authority or any power whatever to Messrs. W. A. Crump and Son to take a guarantee or security concerning the salvage of the ship *Falernian* from her owners which he has salvaged in pursuance of the contract of Nov. 1924," and that oath being put to Count Landi he deliberately swore that he had not given Messrs. Crump and Son any authority, and he did that in face—although he had not it before him at the time, but in face as it appears afterwards—of his own letter expressly approving the authority. The judge having heard Count Landi in the witness-box attempt to justify what he did, has found that he deliberately perjured himself, and that he had obtained and maintained the arrest of the vessel by a gross and deliberate fraud. That, fortunately, is an incident unusual in English commerce; and I want to say at once that if Count Landi is right in saying: "I was called hurriedly upon to take this oath and I did not appreciate exactly what I was doing and at the time I thought I was swearing the truth," he must have been convinced long ago that what he was swearing was a mistake, and yet

he has maintained the attitude of insisting on a judgment which was obtained, as he must now know, by a mis-statement of his.

In face of that oath given by Count Landi, the Turkish proceedings finished. The courts were, by their procedure, bound to accept it, the effect of which was that Count Landi was not breaking his salvage agreement by arresting the ship before he had got a security accepted by his authority. No doubt the representatives of the ship were put in a difficult position. What were they to do? Were they to retire when this sort of thing was going on in the Turkish courts, or were they to stay and try to see whether by some other means they could defeat the fraud that Count Landi was committing. They came to the conclusion, rightly or wrongly, that the best thing for them to do was to retire from the court. Thereupon, Turkish procedure pursued its course. The defendants were not there. Count Landi, who had already received 4000*l.* under the agreement on account of salvage services which he had taken quite cheerfully, claimed 25,000*l.* salvage, far more, apparently, than the value of the salvaged property; but under Turkish procedure, if the plaintiff claims a sum of money and the defendant does not appear, the plaintiff gets what he claims without any investigation as to whether it is right or not. So the judgment went against the master for 25,000*l.*, and the ship was there detained to answer that judgment.

In Feb. 1926, judgment having been given in Nov. 1925, and negotiations with Count Landi having failed, an injunction was applied for in the English action and Rowlatt, J., first of all *ex parte*, granted an injunction restraining the defendants, their agents and servants, from taking steps to enforce the Turkish judgment. He granted it until the matter could come before another judge with the defendant appearing. It came before Roche, J. on the 8th March, when counsel for two of the defendants—namely Count Landi and Mr. Read, and the solicitors for Mr. Grech, did appear, and said that they knew nothing about it and they had only just had the information. Roche, J. continued the injunction restraining the defendants from "Taking steps to proceed further either by assignment or by themselves to enforce a judgment of the 'First Commercial Chamber of the Competent Tribunal of Stamboul' . . . and from taking any further proceedings other than the arbitration in respect of the *Falernian* or any other vessel of the plaintiffs in connection with the salvage of the *Falernian* until further order." The reason for that latter clause being put in was that Count Landi and his advisers, seeing that they were not going to get 25,000*l.* out of a vessel which was apparently only worth 3000*l.* or 4000*l.*, thought that they might put pressure upon the Ellerman Line by proposing to arrest other vessels of the Ellerman Line and so get the money which they had obtained by Count Landi's false statement. As the representatives of the defendant, Count Landi and Mr. Read said

that they were not fully instructed, Roche, J. gave them leave to bring the matter on again if they received further instructions, and the matter came on again before Greer, J. on the 19th April, who continued the injunction in the terms that had been granted by Roche, J., but as he had some doubt as to the jurisdiction of the court to do a thing which might interfere with the Turkish court, he gave leave to appeal from his own order and extended the time for appealing from the order of Roche, J. No appeal was brought. The case came on for trial and the owners of the *Falernian* asked for a declaration and an injunction and damages. As to the injunction, when the plaintiffs delivered their statement of claim in May, for some reason which I do not quite understand, they did not ask for an injunction in the varying terms in which the three judges had granted it, but they asked for one in different terms. The injunction that they asked for was to restrain generally the defendants from enforcing the Turkish judgment against the *Falernian* or against any other ship or other property of the plaintiffs, without making any limitation as to where they should enforce it, that is to say, whether it was directed to be enforced in England, or whether it was directed to be enforced all over the world, and they also asked for damages.

With regard to the injunction, MacKinnon, J., who, as was to be expected, took a very serious view of Count Landi's conduct, while he granted the injunction restraining the defendants from enforcing the judgment in England, did not feel himself able to grant an injunction restraining them from enforcing it out of the jurisdiction of the English courts, being moved thereto by a fear that such an injunction would be going beyond the powers of this court, which cannot control the proceedings of or in foreign courts. For that reason, of course, he did not grant such a wide injunction as had hitherto been given; but by some slip—for which I think everybody concerned must be responsible, counsel as well as the judge—while he held that he had no jurisdiction to grant an injunction enforceable outside the jurisdiction of the English courts, he did grant it, and he continued it until the hearing of the appeal. If he had no jurisdiction to grant it, he had obviously no jurisdiction to continue it, and it could only have been by some slip that counsel asked him for it when he held that he had no jurisdiction to grant it, or that he continued it.

On that part of the case I am unable to share the learned judge's doubts. Here is an English contract which has been broken by a naturalised British subject, considerable portions of the contract are to be performed in England, and the naturalised British subject, who has been properly served with a writ and is a party to an English proceeding, is proved to have broken his contract, and in breach of his contract and by fraud to have obtained a foreign judgment, which he is proceeding to enforce against the property of the person

with whom he contracted, in breach of his contract and in fraud. In such a case the English courts have always, as I understand the decisions, professed and asserted their power to stop the person who is before them, who is a British subject, in a suit which is dealing with an English contract, from breaking his contract. Of course they do not grant an injunction restraining the Turkish courts from acting; they have no possible power to grant such an injunction, but they can grant an injunction to restrain the British subject, who is fraudulently breaking his contract, and who is a party to an action before them, from making applications to foreign courts for the purpose of breaking his contract or obtaining the fruits of a fraudulent breach of contract.

There is a series of authorities which appear to me to show that. One of the neatest ways in which it is put, perhaps, is by Lord Brougham L.C. in the case of *Lord Portarlington v. Soulby*, where he says (3 Myl. & K., at p. 107): "In *Love v. Baker* it appears that one only of several parties who had begun proceedings in the Court of Leghorn was resident within the jurisdiction here, and the court allowed the *subpoena* to be served on him, and that this should be good service on the rest. So far there seems to have been very little scruple in extending the jurisdiction. Lord Clarendon refused the injunction to restrain these proceedings at Leghorn, after advising with the other judges; but the report adds, '*sed quare*, for all the bar was of another opinion'; and it is said that, when the argument against issuing it was used, that this court had no authority to bind a foreign court, the answer was given, that the injunction was not directed to the foreign court, but to the party within the jurisdiction here. A very sound answer, as it appears to me; for the same argument might apply to a court within this country, which no order of this court ever affects to bind, our orders being only pointed at the parties to restrain them from proceeding." And exactly the same thing as Lord Brougham said, is said in slightly different words in the judgment of the House of Lords in the case of *Carron Iron Company v. Maclaren* (5 H. L. Cas. 416) as to the jurisdiction between the English and the Scottish courts, and it is said in the judgment of Lord Cranworth, L.C. at p. 439: "But even when there is no question as to the foreign litigation being or not being necessary, or being or not being likely to be so effectual as litigation in this country, still if a person within the jurisdiction of the Court of Chancery is instituting proceedings in a foreign court, the instituting of which is contrary to equity and good conscience, the court will, on a bill filed here, restrain the prosecution of such foreign suit, just as if it had been a suit in this country. This was the case of *Lord Portarlington v. Soulby*, where Lord Brougham, after fully considering the principles on which a court of equity acts in these cases, restrained the defendant, the endorsee of a bill of exchange, from suing the plaintiff in the Irish courts on that bill, upon certain equitable grounds, which

would have warranted a similar injunction against any action in the courts of this country."

There seems no doubt, therefore, that the English courts have jurisdiction, not to restrain a foreign court, but to restrain a person subject to the English jurisdiction from taking proceedings in a foreign court in breach of a contract and in fraud.

Counsel for the respondent, who said everything that could be said for a client for whom there was very little to be said, took the point that while he did not dispute that the injunction might be granted against instituting the proceedings, no injunction could be granted after the foreign court had given a judgment, restraining a person who had obtained that judgment from getting the fruits of his judgment. It was said that there was no authority for the English court acting after judgment. I think it is time we made one; for I cannot conceive that if an English court finds a British subject taking proceedings in breach of his contract in a foreign court, supporting those proceedings by fraudulent lies, and obtaining a judgment by fraudulent lies, the English court will say: "We cannot interfere to stop you, a British subject, from enforcing a judgment which you have obtained by fraud against the property of a person towards whom you have broken your contract." I am quite clear that there is jurisdiction in our courts to grant an injunction restraining Count Landi from taking the fruits of the judgment which he has obtained by fraud, and that such an injunction ought to have been granted.

The remaining questions were as to damages. The owners of the *Falernian* asked for damages under four heads. They asked for the hire of the tug they had had to send out to tow the *Falernian* from Constantinople to Marseilles, the value of which was lost by reason of the arrest. The learned judge gave them that and there is no appeal. They also asked for the legal expenses incurred for the purpose of obtaining the release of the *Falernian*. The learned judge gave them those, and there is no appeal. The two questions, however, in respect of which the appeal arises are these: The Ellerman Line asked for the wages and expenses of the master and crew of the steamship *Falernian* from the date of the arrest of the ship. The learned judge, in his judgment, said that they were entitled to reasonable expenses, because the point was taken that many of these expenses and detentions were unnecessary because they ought not to have detained the master and crew as they did until the sale of the ship; and the judge, in his judgment, gives them expenses up to a reasonable time. But when the judgment came to be settled, although the learned judge said that he did not know much about the facts, for some reason he felt able to decide the fact, and he gave the expenses of detaining the master and crew up to the time when the judgment was pronounced—namely, on the 3rd Nov. Now the ship had not yet been parted with or sold, and there were

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considerable doubts as to what might happen; and I am not able to say on the material before me, and I do not think the learned judge had any material before him, for saying that directly the Turkish judgment had been given, the master and crew ought to have come away. As a matter of fact, if they were to leave Constantinople on the 3rd Nov. they had to be brought home, so that the figures after that date would have to be investigated; and we propose to alter that fixed date of the 3rd Nov. and to say that they are entitled to the wages and expenses of the master and crew for a reasonable time having regard to all the circumstances, and the tribunal which assesses the damage will have itself to go more closely into the facts and negotiations than the learned judge did, or than we have been able to do, and will have to say up till what date they think it reasonable in view of all the circumstances, to detain the master and crew.

Then the last claim for damages was this: The plaintiffs claimed either the value of the *Falernian*, or, alternatively, the loss of use of the *Falernian*, from the 15th Nov. 1925, at 25l. per day. What ultimately happened to the *Falernian* was this: Mr. Landi's brother appeared. Count Landi, unfortunately, said he owed his brother a debt, and the latter desired to have the claim that Count Landi had against the *Falernian* handed over to him, so that he could make good his debt against his brother, who would not pay him. That was done, and it formed part of the Landi procedure in this matter. The ship was ultimately sold for the benefit of the brother Landi for 3750l., which obviously was very inadequate to satisfy a judgment for 25,000l.

The question is whether the plaintiffs are entitled to say that the breach of contract of Count Landi, and the fraud by which he obtained the judgment, have caused them the loss of the *Falernian*, because what Mr. Landi says, in effect, is this: "Assume that I was fraudulent; assume that I was breaking my contract; if you had acted with sufficient vigour, you would have defeated my fraud, and so you cannot say that the loss of the ship is the result of my fraud. It is the result of your gross and culpable negligence in not taking sufficiently ingenious measures to defeat my fraud." I am bound to say that I have no sympathy with that line of argument at all. When a man commits fraud, it does not do to say: "You ought to have found me out, and you were contributorily negligent in not finding me out, and in not being able to defeat my fraud." In my view, it is part of the damages, that the plaintiff should have the value of the ship. On the question as to the date, following the analogy of the cases on capture, which I have looked into, the date should be the date when the Ellerman Line were first deprived of their property in the ship by the arrest. The tribunal which is assessing the damages must determine the value of the ship on that date, which will include, of course, whatever value has been added by the money that the Ellerman

Line have spent on the ship to get her to that point where she was arrested.

The appeal will therefore be allowed; the injunction granted will be in the terms of the statement of claim, against all three defendants, and the matter must go to a special referee to be agreed upon by the parties. If they cannot agree, they must come to the court, and the court will then decide what tribunal shall assess the damages. The damages will be, varying the judgment of the court below, in the case of the second item, the wages and expenses of the master and crew, from the date of the arrest of the ship to a reasonable time after, having regard to all the circumstances, and will include the value of the *Falernian* at the time when she was arrested in the Turkish courts.

ATKIN, L.J.—I agree. This is a case in which the judge gave judgment below for the plaintiffs, and granted certain relief. The plaintiffs appeal against the judgment, saying that they are entitled to further relief than that given to them by the learned judge. The defendant has a notice of cross-appeal, but he does not appeal against the judgment for the plaintiff; he only appeals in respect of a question of costs, which, in the view that we take of the case, does not arise.

Therefore, there is an undisputed finding of fact by the learned judge, that the defendant Landi did commit a breach of contract, and that all the defendants, who were the partners in that transaction, are liable for the consequences of that breach of contract. There is a further finding by the learned judge, that the defendant Landi procured a judgment of the Turkish courts by a fraudulent misrepresentation. As I say, that is not disputed, and it would appear from the facts that the findings could not reasonably be disputed. What is the consequence of that? It seems clear that the defendant Landi committed a plain breach of the salvage agreement by arresting the *Falernian* in Constantinople; and there is no doubt at all that he arrested the ship for the purpose of founding proceedings in the courts at Constantinople, and in order that he might obtain from those courts a salvage award, and have a remedy against the ship and also against the master. He pursued the action, and claimed his salvage award.

As far as my own judgment is concerned, in allowing this appeal, and taking the course that we do take, I, for my part, have no criticism at all to pass on the Turkish courts or upon their procedure. It appears to me that they acted in accordance with their law, in accordance with their own procedure, and took considerable pains to ascertain what the true facts were. It was obviously put before them by the master of the *Falernian* that there was a salvage agreement by which Count Landi had agreed that the salvage payment should be assessed by arbitration in England, and by that manner only, and I think the court, accepting the view that if the agreement had

been complied with they ought not to exercise jurisdiction, considered the question of whether or not the terms of the salvage agreement had been complied with by the parties. That depended upon whether a condition precedent in the salvage agreement to the obligation not to arrest the ship had been performed—namely, whether security had been given in England by the owners of the vessel. They investigated that matter. The onus was thrown upon the master, who was asserting the lack of jurisdiction, and in order that he might perform his obligations, he was allowed, as it is said, to put the plaintiff Count Landi to the oath. That procedure, no doubt, may have had its origin in a very early mode of procedure, but it certainly has continued up to the present day in our courts. There was an old practice in equity, where the plaintiff could always establish the allegations in his bill, and did establish them, by making the defendant answer on oath all the allegations which were put to him in the form of interrogatories. But we, in our courts, and in our Commercial court, have at the present moment a procedure by which the defendant may administer interrogatories to the plaintiff, and, if he can, establish his case by putting in evidence the answers to the interrogatories, so that I do not see much difference, really, in the procedure. However, the oath, or the interrogatory, was put to Count Landi, and he answered it falsely and fraudulently, because he knew quite well that he had had the security, whereas he swore that he had not. Upon that oath being given, the court did not proceed with the claim, but proceeded to give the parties an opportunity to deal with the matter and put in their answer, and thereupon, no doubt acting on the instructions of the present plaintiffs, no further appearances were made on behalf of the master, and the proceedings then continued in the Turkish courts on default of appearance; and, apparently, in accordance with their code, there being a claim and no answer to it, it only remained to give judgment for the amount of the claim without it having to be proved. That is a procedure which is not in accordance with our own procedure, but which, of course, it is perfectly open for any civilised country to adopt if they think it is a proper procedure.

Thereupon, judgment was given. The arrest of the ship was confirmed; the very large award that was asked for, some 22,000*l.*, was made, and, apparently, it was made also in the form of a personal judgment against the master. Since then, that judgment has been made effective in the Turkish courts, and it has been made effective by proceedings taken by Count Landi's brother, claiming to be a creditor. The merits of that claim we do not know; there is no evidence before us that it is not a genuine claim, although obviously it excites suspicion. But there may well have been creditors; and Count Landi's explanation of his breach of contract in the instance by arresting the ship, is that he did it under pressure from his

creditors, who insisted upon his arresting the ship. There may be creditors; one does not know. At any rate, the ship was eventually sold, and since then proceedings have been taken by the same creditor, or alleged creditor, against another vessel of the plaintiffs, although that has been stopped by the action of the Turkish courts, who refused to allow the judgment to be enforced against another ship of the plaintiffs until they were satisfied that the Turkish plaintiff Count Landi had such a right, and that his rights were not limited to the value of the ship which was seized.

That is the present position of affairs, and the plaintiffs now come and say: "Here is a judgment which has been obtained by reason of an original breach of contract, obtained further by fraud upon the Turkish court, and in the first instance we are entitled to a declaration that that judgment is not to be treated as valid, at any rate in England, and, secondly, we are entitled to an injunction to restrain the person who so obtained it from enforcing it. They have got the declaration, and there is no complaint made about that. The question is whether they are entitled to an injunction; and it is said that the court has got no power, no jurisdiction, to grant such an injunction. True it is—it is said—that the court from time to time has granted injunctions against persons commencing proceedings or continuing proceedings in foreign courts, but such a power as that ceases once a judgment has been obtained, and once a party has obtained a judgment that proceeding is sacrosanct, and the party cannot be restrained from taking advantage of it.

That appears to me to be a most remarkable contention. I put the case in argument of a person who had obtained a foreign judgment against a third person, and assigned that to a judgment creditor, assuming, for the purpose of argument, that an Englishman resident in this country assigned a judgment for value to another Englishman, and for further assurance covenanted not to enforce the judgment abroad except for the benefit of and with the consent of the assignee. It is said, apparently, that in such a case, the English court could not restrain the vendor from violating his contract. Or assume that an agent conducting a case, and having powers of management, obtained a judgment on behalf of his principal abroad, and then sought to enforce it for his own benefit and contrary to the instructions of the principal. In such a case it is said that that agent could not be restrained from acting in breach of his fiduciary duty to his principal. Well, all I can say is that the English courts are not so bankrupt of resources as to be incapable of granting a remedy in cases such as these. There is no principle upon which the remedies granted by the English courts should be so restricted. The principle on which an injunction is granted in such a case is not that the English court assumes to itself some jurisdiction over the foreign court, and that it arrogates to itself some superiority which entitles it to dictate to the foreign court, and

say that the procedure of the foreign court is inferior to its own, or that their means of arriving at the truth are inferior to its own; the principle has nothing to do with a criticism of the foreign jurisdiction. It is directed to the personal attitude of the defendant, and if the English court finds that a person subject to its jurisdiction has committed a breach of a direct covenant, or that he has acted in breach of some fiduciary duty, or in any other respect which is recognised by a court of equity, has violated the principles of equity and conscience, so that it is inequitable that he should enforce that remedy, then this court will restrain him; and it restrains him, not by issuing an edict to the foreign court, but by saying that the particular defendant is in conscience bound not to enforce those proceedings. It was every-day procedure in the old days of equity, to grant an injunction against a person from proceeding upon a judgment obtained in a common law court, where it was necessary to do so. Therefore, I think that the criticism that has been addressed to the claim for an injunction, which, indeed, has been accepted by the learned judge, is unfounded. It appears to me to be essential in the interests of justice in this case that the injunction should be granted restraining the defendant from reaping any advantage from the judgment which has been obtained by him, first of all in breach of an express contract, and, secondly, by reason of a gross fraud.

The other matter that arises is on the question of damages. As to that I have nothing to add to what has been said by my Lord. It appears to me that it was unfortunate that the learned judge should have fixed the date up to which the wages of the master and crew were to be paid, because it obviously is a question for consideration as to what was reasonable, and what was a reasonable time; and I cannot think that the date of the Turkish judgment was or can be, without further consideration of the whole of the circumstances, fixed as being a reasonable time at which the master and crew ought to be withdrawn from the ship. The circumstance that they had to be brought home afterwards, and their wages would still be running, is, I think, a cogent circumstance to indicate that that date in itself cannot be the correct date.

The only other question is as to the value of the ship. Now the learned judge has held that the owners have not lost the ship by reason of the proceedings, but have lost the ship by reason of their not taking any further part in the proceedings than they did. In other words, he has held that they ought to mitigate their damages, and that if they had continued to appear before the foreign court, *non constat* but that the foreign court would have made an award which was equivalent to an award which might have been made by the British court, and if such an award had been made against them, then, in some way or other, they would have taken it up, and would have been exposed to no further liability, and would not have lost their ship.

That appears to me not to give effect to the paramount consideration in this case, which was, that the proceedings themselves were in direct breach of contract, and that the plaintiff in those proceedings, Count Landi, was pursuing them in fraud. The owners of the vessel here say: "It is not reasonable to have expected us to have gone on with the proceedings in Turkey. It is true that we might, if we had gone on, have diminished the large award of 22,000*l.*, but if we had gone on, we should obviously have submitted to the jurisdiction, and would have taken the risk of such an award as the Turkish courts should choose to make, which might, it is true, have been smaller than the award that an arbitrator might give us under the contract, or might have been much larger, but it was unreasonable for us to take that risk, and why should we be compelled to take that risk, when the whole proceedings initiate with a direct breach of the contract which the plaintiff in those proceedings had entered into with us, that it was to be decided by an arbitration? and by compelling us to go on in that way he is really taking advantage of his own wrong." I think that that is a cogent consideration in this case. It appears to me, on considering the facts—and this is a question of fact for us, as it was for the learned judge—that the learned judge ought to have held that it was not reasonable to expect the plaintiffs in this action to have continued the proceedings in Turkey, and that they acted reasonably in taking the course that they did. That being so, it appears to me that the loss of the vessel follows directly from the initial breach of contract, the arrest of the ship, followed up as it was by the fraud of the defendant Landi.

I think, therefore, that the appellants, the plaintiffs in this case, are entitled to recover damages based on the value of the ship at the date when the breach of contract was committed, which resulted in the loss—namely, at the date of the arrest.

I would also say that I consider it unfortunate that there has been a series of irregularities in this case in connection with the claim for an injunction; but the injunction that was eventually granted was granted before the statement of claim was delivered, and it was in wider form than that which was, as I have no doubt, deliberately adopted by the pleader in the statement of claim. I think myself that it would have been extremely doubtful whether the judge below ought to have granted any other injunction than that asked for in the statement of claim, without an amendment of the statement of claim, which was never asked for. However, the learned judge came to the conclusion that he could not grant an injunction, but nevertheless he granted an interim injunction from the hearing until the hearing of the appeal, which it is very difficult to explain. When that judgment was drawn up, instead of reciting what the order of the court was, and what the defendants were restrained from doing, the judgment in itself only refers to continuing an

injunction granted by Rowlatt, J. on such and such a date, varied by Roche, J. on another date, and continued by Greer, J. on another date, without stating in the terms of the judgment at all, what it is that the court is ordering the defendant to abstain from doing. That seems to me to be very bad practice, and really, if such a judgment as that, in that form, were brought to the attention of any foreign critic, familiar with the careful way in which judgments are drawn up, I think it would be likely to expose the English courts to contempt.

I cannot help saying that this is a matter of great importance, that the orders of the court, when they are drawn up, should be drawn up in accordance with what, after all, has been the established practice, and should make clear what it is that the court is actually ordering should be done. There is considerable laxity in these matters, I am sorry to say, especially in judgments drawn up in the King's Bench Division. We had a case the other day where a judgment had been given for an account, and all that was recited in the judgment was that the judge having ordered an account to be taken between the plaintiff and defendant, it is hereby adjudged that an account be taken between plaintiff and defendant, without saying what the account was to be about, or anything else. There are other irregularities that come to our notice from time to time, and I have thought it necessary to say that, because I think the attention of practitioners in the court, and of the officers of the court, should be drawn to the fact that orders should not be passed unless they are in accordance with the usual and proper forms in such cases.

I agree that the appeal should be allowed, and the judgment when it is drawn up, will contain the terms of the precise order of the injunction which is being granted; and, inasmuch as no question arises as to the costs below, it is sufficient to say that the order below will be varied in the way which has been directed, and the appeal will be allowed with costs.

EVE, J.—I agree, and more particularly in the concluding observations of Atkin, L.J., with regard to the form which has been adopted in the various orders made in the course of this case. I am not sufficiently conversant with the practice of the King's Bench Division to express an opinion as to whether or not this is an exceptional case; but, assuming, as I do, that one could hardly find in many cases so many matters for criticism, I would desire to say that in the exercise of the judicial discretion in granting injunctions, and in framing orders which are to restrain the liberty of the subject, the judges in that division, of which I am more competent to speak, exercise the greatest care, not only in determining whether an order should be made, but as to the ultimate form that the order assumes; and I agree with my learned brother that if the orders in this case were produced to a foreign tribunal,

acquainted, and more particularly acquainted, with the practice of the other division, I think there would be good ground for saying that they would regard them as something little short of astonishing.

So far as the jurisdiction is concerned, the jurisdiction of the court to make an order granting an injunction such as is claimed in this case, is established by a long line of authorities, commencing with *Bushby v. Munday* (5 Madd. 297), and *Carron Iron Company v. Maclaren* (*sup.*), and coming down to quite recent dates. I myself can see no logical reason to support the argument that it ceases to be exercisable so soon as a judgment has been pronounced by the foreign tribunal. No doubt it is a jurisdiction to be exercised with caution, but if ever there was a case calling for its exercise, surely this is the one. The foreign proceedings here were instituted and prosecuted in clear breach of the contract, the judgment was ultimately obtained by a deliberate and flagrant misrepresentation, and the plaintiffs are in those circumstances entitled to all the protection which this court can extend to them.

I have nothing to add to what has been said as to the extension of the inquiry to ascertain the damages inflicted upon the plaintiffs, and I agree in thinking that they are entitled to an injunction against each of the three defendants in the terms claimed in the statement of claim.

Appeal allowed.

Solicitors for the appellants, *Parker, Garrett, and Co.*

Solicitors for the respondents, *Amery, Parkes, and Co.*, and *Leader, Plunkett, and Leader.*

Friday, Feb. 10, 1928.

(Before SCRUTTON and SANKEY, L.JJ. and ASTBURY, J.)

COMPAGNIE CONTINENTALE D'IMPORTATION v. HANDELSVERTRETUNG DER UNION DER RUSSIAN SOVIET REPUBLIC IN DEUTSCHLAND. (a)

ON APPEAL FROM THE KING'S BENCH DIVISION.

Contract—Sale of goods—Cargo of grain—Conditions—Construction—Notice of appropriation—To be "given" to buyer within seven days—Date of bill of lading—Notice dispatched by sellers within seven days—Whether sufficient compliance with condition—Validity.

On the 26th Nov. 1926 the agents of the Russian Soviet Republic at Hamburg (hereinafter called the sellers) sold to buyers at Rotterdam 6000 tons of South Russian wheat. The contract of sale was in the form of the London Corn Trade Association, Black Sea and Danubian Grain

(a) Reported by T. W. MORGAN and J. S. SCRIMGEOUR, Esqrs., Barristers-at-Law.

Contract, and was subject to a number of conditions printed on the back. One of the conditions provided that notice of appropriation, with ship's name and date of bill of lading, should be given by the shippers of the grain tendered under the contract to the buyers within seven days from the date of the bill of lading, and a provisional invoice based on the bill-of-lading weight, with ship's name and date of bill of lading, must be sent by shippers' house or representative in London to the buyers within three business days after arrival of documents in London. The sellers shipped the grain under the above contract on a steamer at N., and the bill of lading was dated the 30th Dec. 1926, and it was agreed that the seven days after the date of the bill of lading included the 6th Jan. 1927. On the 4th Jan. 1927 the sellers telegraphed to the buyers, tendering a cargo of wheat under the contract of the 26th Nov. and giving the name of the ship at G. for order. This telegram was confirmed by letter. On the 6th Jan. the buyers wrote refusing to accept that as notice of appropriation because it did not give the date of the bill of lading. On the same day, the 6th Jan., the sellers posted to the buyers a provisional invoice, which gave, *inter alia*, the date of the bill of lading. This was received by the buyers on the 7th Jan. The buyers returned it on the ground that no tender had been made in conformity with the condition in the contract. The dispute was referred to arbitration.

Held, affirming the decision of Wright, J. (*infra*), that on the proper construction of the words of the condition, the notice of appropriation must reach the buyers within the time specified, namely, within seven days from the date of the bill of lading, and in this case no valid notice of appropriation had been given by the sellers to the buyers within the time required by the condition.

APPEAL from Wright, J. on an award stated in the form of a special case, by the Appeal Committee of the London Corn Trade Association (*infra*).

On the 26th Nov. 1926 the sellers, the German representatives of the Russian Soviet Republics, carrying on business at Hamburg, entered into a contract with the buyers, a company carrying on business at Rotterdam, to sell to the buyers 6000 tons of South Russian wheat. The contract was in the form of the London Corn Trade Association, Black Sea and Danubian Grain Contract, and was subject to a number of conditions printed on the back thereof. The sellers shipped the wheat on a steamer at Novorossisk, and the bills of lading were dated the 30th Dec. 1926. It was agreed that the period of seven days from the date of the bills of lading included the 6th Jan. 1927. On the 4th Jan. 1927 the sellers telegraphed, and confirmed the telegram by letter :

Contract twenty-sixth November tender 6099.737 ke wheat no. K.O.5 S.S. Marigo L. Novorossisk Gibraltar for order.

On the 6th Jan. the buyers wrote in reply that they could not accept that as a notice of appropriation because the date of the bill of lading was not stated. On the same day the sellers posted to the buyers a provisional invoice (which did give, *inter alia*, the date of the bill of lading), which the buyers received on the 7th Jan. On receipt of it the buyers returned it on the ground that no tender had been made in conformity with the contract.

The dispute was then referred to arbitration, and the arbitrators decided that the sellers had given a proper and sufficient notice of appropriation. The buyers appealed from that decision to the Appeal Committee of the London Corn Trade Association, and the Appeal Committee awarded, subject to the opinion of the court on a special case, that the buyers had not received a proper and sufficient notice of appropriation within the meaning of condition 1 of the contract, and were, therefore, under no liability to the sellers, and that the award of the arbitrators should be set aside.

Condition 1 on the back of the contract was as follows :—

Notice of appropriation with ship's name, date of bill or bills of lading, and approximate quantity loaded shall be given by the shipper of the grain tendered under this contract direct or through his house or representative or agent in London to his buyer within seven days from date of bill of lading and by each other seller within the seven days, or in due course if received by him after that time ;

. . . Provisional invoice based on bill of lading weight with ship's name and date of bill or bills of lading shall be sent by shipper's house or representative in London to his buyer within three business days after arrival of documents in London . . .

The Appeal Committee found as facts that the letter of the sellers confirming their telegram on the 4th Jan. was intended to be a notice of appropriation, but that it was not a good notice of appropriation, because it did not state the date of the bills of lading, and was properly rejected by the buyers. They also found that the provisional invoice of the 6th Jan. was not intended as a notice of appropriation, and that it was a well-recognised custom that notice of appropriation and provisional invoice were separate and distinct documents.

The sellers appealed.

Somervell for the appellants.

Le Quesne, K.C. and *Lilley* for the respondents.

Oct. 25, 1927.—WRIGHT, J.—This is a special case stated by the Committee of Appeal of the London Corn Trade Association, and the arbitration in respect of which it arises was between the *Compagnie Continentale D'Importation*, of Rotterdam, who were the buyers, of the one part, and the *Union der Sozialistischen Sowjet Republiken Handelsvertretung*, of Hamburg, who were the sellers, of the other part.

The dispute arose over a contract dated the 26th Nov. 1926, and that contract was a

contract for the sale of a cargo of South Russian wheat of about 6000 tons, as per bill or bills of lading dated or to be dated Dec. 1926, new style, shipment to be from Asoff and (or) Black Sea ports.

A dispute has arisen with reference to the notice of appropriation. Shipment was actually made by a vessel called the *Marigo L.*, the bill of lading being dated the 30th Dec. 1926. On the 4th Jan. 1927 the sellers telegraphed to the buyers tendering that shipment, but omitting to give the date of the bills of lading. On the same day that telegram was confirmed by a letter from the sellers to the buyers, but that letter again was subject to the same omission, namely, that it did not state the date of the bills of lading.

As the bill of lading was dated the 30th Dec. 1926 the seven days allowed by the contract expired at five o'clock on the 6th Jan. 1927. On that day the buyers wrote to the sellers complaining that they had not received a tender which was correct, namely a tender containing the date of the bill of lading, and, covering that letter, the sellers sent a letter to the buyers dated the 6th Jan. 1927 in these terms: "In fulfilment of our contract of the 26th Nov. 1926 we take the liberty of sending you below a provisional invoice shipped for your account per above steamer." Then the provisional invoice follows, and at the end of the provisional invoice appear these words: "Contract No. 10,679 against direct bill of lading dated 30/12/1926." and further and other particulars. That communication of the 6th Jan. 1927 is the first notice giving the date of the bill of lading. On the same day, the 7th Jan., the buyers, having received this invoice, sent it back by letter, saying: "We herewith return to you your invoice of yesterday relating to the above contract, as we have not received any tender in accordance with contract." It is on these materials that the questions arise.

The Committee of Appeal in stating their case have found that the tender was not in order, and that the buyers were entitled to reject it. They have made their award, however, subject to the opinion of the court on any point of law, and Mr. Somervell, who has argued the case for the sellers with the ability which he always shows, has taken two points. He has said in the first place: "There was a proper notice of appropriation under clause 1 of the conditions and rules in the contract"—a clause to which I will refer in a moment—and he has said, in the second place, that the notice of appropriation which he relies upon is that contained in what is called the provisional invoice, and that that is in time because it was sent off on the 6th Jan., and the material time is not the receipt of the notice by the buyer, but the time at which it is sent off by the seller. In order to succeed, he must succeed on both these points.

Before I read the conditions and rules, so far as they are material, I ought to add that the Committee of Appeal have found,

and found as a fact, that there is a custom of the trade—I will read the exact terms of the finding: "that it is a well recognised custom that notice of appropriation and provisional invoice are separate and distinct documents."

I have to consider the terms of condition 1, bearing in mind also the finding of a custom, which I shall deal with quite separately. I will deal first with the clause apart from the question of custom. The clause says: "Notice of appropriation with ship's name, date of bill or bills of lading, and approximate quantity loaded, shall be given by the shipper of the grain tendered under this contract direct or through his house or representative or agent in London to his buyer within seven days from date of bill of lading and by each other seller within the seven days, or in due course if received by him after that time; should the shipper's notice be delayed beyond the seven days through any cause beyond his control, it shall be given within one business day from arrival of documents in London, and shall be passed on by each other seller to his buyer in due course on receipt. On demand of buyer, seller shall give a copy of the particulars contained in the notice of appropriation received from his seller, and buyer shall, on demand, give to seller a written receipt of notice of appropriation. A valid notice of appropriation when once given, shall not be withdrawn. Provisional invoice based on bill-of-lading weight, with ship's name and date of bill or bills of lading shall be sent by shipper's house or representative in London to his buyer within three business days after arrival of documents in London and by other sellers to their buyers in due course after receipt. A notice or tender to the broker or agent shall be deemed a notice or tender under this contract. Any appropriation or invoice received after 5 o'clock p.m. or half-past 12 p.m. on Saturdays shall be deemed to have been received on the business day following." That, I think, is all that is material.

I shall deal with the two questions in this order: I shall first consider what, in my judgment, is the true effect to be given to the words: "Notice of appropriation shall be given by the shipper within seven days from date of bill of lading." Mr. Somervell argues that this means that the shipper shall put into some medium of communication, post-office or telegraph, a notice; and that once he has done that he has given notice to the buyer, and that if he gives that notice within seven days he has fulfilled his obligation in that respect. I do not take that view. I think the essential feature in this contract is that the buyer should receive a definite intimation at the earliest possible moment of what grain is being tendered to him under the contract. This contract has a reference to the "Black Sea and Danubian Grain Contract," but the same principles may, so far as I know, equally apply to all other grain contracts with reference to grain shipped from any part of the world.

However, I shall deal with it on the basis of the contract which it in fact is.

Seven days are given to the shipper in which to give his notice of appropriation. He may receive the information by cable from any part of the world, and seven days would be quite sufficient to place him in possession of that information and to enable him to convey that information to his buyer; and I think the intention is that the seven days which are allowed should be seven days within which the buyer is to receive the information. I treat the word "given" here as meaning given by the shipper actually to the buyer, so that the buyer receives the information, and receives it within seven days.

Mr. Somervell has strongly relied on a difficulty which he says on this construction will affect each other seller, that is to say, the first buyer who resells and every other buyer down the chain, if there be a chain, on the construction which I have given to it. Each other seller is to give notice within the seven days, and it is provided, as I have read, that the business day is to end at five o'clock for the purpose of receipt of any appropriation or invoice.

Mr. Somervell argues that in a case where the first buyer, or indeed any buyer who has resold, receives the notice of appropriation two minutes after five o'clock on the seventh day, he will be obviously and necessarily in default, on the construction which I have placed upon these words, whereas if all that is meant by giving notice of appropriation is putting a notice of appropriation into the post, or some other medium of communication, that default will be avoided, because the first buyer who is also a seller, or indeed any other person in the chain who is similarly affected, if he receives the notice two minutes before five o'clock, he will still have the whole of that evening in which to put the notice of appropriation in the post.

It may be that that somewhat extraordinary result does follow from either view, and it may be that there is this difficulty on the construction that I have adopted; but if that is so, that, I think, simply means that there is a *casus omissus*, and I do not think that that fact ought to deter me in coming to the conclusion as to the construction of these words "notice of appropriation." Except in one case in this document, wherever you have references to notices which are to be given, and the direction is that they are to be given by a communication received by the party to whom they are addressed, you have appropriate words added. For instance, in clause 5 you have the words: "After giving notice by letter or telegram," and the words "by letter or telegram" are added in order to define the technical or formal way in which notice is to be deemed to have been given. In a similar way in clause 11 it says: "Notices under this rule to be given in writing, and sent by post to, or left at the place where the person, firm or company to whom they are addressed is carrying on." I

think in both those cases you have an express provision to show that there is to be a conventional meaning attached to the words "notice given." Similarly, in the Rumanian loading strike clause in the margin on the face of the contract it says: "Shipper shall give notice by cable." This is a conventional act which is deemed to constitute the giving of notice. Where you have no such conventional meaning attached, then I think the words "notice shall be given" ought to receive what I regard as being their proper meaning. Again, I notice that in clause 4 you have the words "notice to retain documents shall be given by buyer to seller before 11.30 a.m. on the day of payment," which clearly means not put into some medium of communication, but given in such a way as to be actually received. That is to say, you have in clauses 1 and 4 not a conventional meaning attached to the word "given," but what I think is the normal and proper meaning. I think, therefore, that the notice of appropriation was out of time.

I had been referred to a decision of McCardie, J., in the case of *Produce Brokers Company v. Weis and Co.* (87 L. J. K. B. 472), where he attached a similar meaning to the words "notice shall be sent." But that was a somewhat different case, and the words there were different, and I do not rely upon that case, because, after all, every contract has to be construed according to its own language, its own meaning, and its own purpose; and one contract is not necessarily any criterion for the construction of another contract.

That conclusion would be sufficient for me to uphold the decision of the Committee of Appeal in this case, but I think it necessary also to deal with Mr. Somervell's second point. He relied, as I have pointed out, upon the fact that a provisional invoice, containing all the particulars required in a notice of appropriation, had been sent. In my view it was out of time when it was sent, but, apart from that, he says not only that it was in time, but that it constituted a sufficient and proper notice of appropriation.

Against that conclusion, quite apart from the construction of the contracts, there is a finding of custom. A finding of custom by arbitrators is now within their jurisdiction, and it is a finding of fact, and I have no right to go beyond that finding of fact, although I should be entitled, and indeed bound, as a matter of law to go behind the custom and to refuse to give effect to the finding of the committee, if I were satisfied either that it was unreasonable or that it was in contradiction of the written instrument.

So far as the written instrument is concerned, it does not in terms say whether the notice of appropriation is to be the same document or a different document from the provisional invoice. I incline to the view that it contemplates two different documents; but if the matter is left open on the contract, then I think that a custom which provides definitely that the documents are to be two, would not

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be inconsistent with the written document, and would receive effect as a custom which could be properly incorporated in the written document.

I see very good reason why the notice of appropriation should be treated as something different from the provisional invoice. The notice of appropriation has to be given within seven days from the date of the bill of lading, but it is certainly desirable that it should be given at the earliest moment at which information reaches the seller, so as to enable him to give the necessary particulars. The necessary particulars would in the ordinary course, I apprehend, be cabled to him, and if the practice were to grow up of having only one document, the shipper might perfectly well wait until the end of the seven days, and then by that time he would have received, we will assume, the documents in London, or his representative would have received the documents in London, and he would then wait, and not send in the notice of appropriation as early as he might have done; but he could send the provisional invoice within seven days. That, I think, would be not a desirable course from the point of view of the conduct of business.

The notice of appropriation was obviously contemplated, under the contract, at the lowest, as likely to be a different document. It contains more limited particulars, and it is to be given by the shipper, either direct or through his house or representative or agent at London, whereas the provisional invoice is to be sent by the shipper's house or representative in London. Those two descriptions may mean the same thing, but however that may be, I think the contemplation is that there should be two separate documents, and I think, therefore, that the finding of custom ought to receive effect, because I see no ground in law why it should be treated as invalid.

Quite apart from the custom, I should, as I have said, be disposed to construe the words of the clause, if it were necessary to consider that, as meaning that there were to be two documents separately given, each fulfilling the description contained in the clause.

The result is that I decide against the sellers' contentions on both points, and the award will be upheld in the form in which it is made by the Committee of Appeal.

The sellers appealed.

Somervell for the appellants.

Le Quesne, K.C. and *Lilley* for the respondents.

SCRUTTON, L.J.—This is an appeal from a judgment of Wright, J. affirming a decision of the Appeal Committee of the London Corn Trade Association, and the point is quite a short one.

A seller in Hamburg sold to a buyer in Rotterdam certain grain, and so sold it on the contract form of the London Corn Trade Association. The contract was for a cargo of South Russian

wheat shipped from Novorossisk, and in the ordinary course of business, and as provided by the contract, where you sell a cargo you have, under the contract; to give notice of appropriation of that particular cargo to the contractors to whom you have sold the cargo without specifying a ship. The clause in the contract is that "Notice of appropriation with ship's name, date of bill or bills of lading and approximate quantity loaded shall be given by the shipper to his buyer within seven days from date of the bill of lading." The importance of the date of the bill of lading is that generally, and in this case, there is a provision that the cargo shall be shipped in a certain time, in this case in the month of December; consequently the date of the bill of lading must be within the time of shipment.

The date of the bill of lading was, in fact, the 30th Dec. The notice is to be given within seven days from the date of the bill of lading, and it is common ground that within seven days from the date of the bill of lading the buyer had not received a valid notice of appropriation. He had not received a valid notice of appropriation because for some reason the date of the bill of lading had been left out of what purported to be the notice of appropriation which was given by the letter or cable of the 4th Jan. By the 6th Jan., when the seven days had expired, the buyer had not received any notice of the date of the bill of lading; consequently there was no valid notice of appropriation unless Mr. Somervell's point is a good one.

Mr. Somervell's first point, which is the point on which we decide against him, is this: Notice is given by the shipper when a communication is started to the buyer, is put into the post or is started by cable. It is immaterial that it does not reach the buyer, it is enough if within the seven days the shipper has given it through the post, and the fact that it was not received till after the seven days, during which notice of appropriation shall be given, is immaterial.

I am afraid one must put the answer to that very shortly, from my point of view; I think when a contract says "Shall be given by the shipper to his buyer" it means "shall be given to his buyer," and does not mean shall be given to the post office, or shall be given to the telegraph office, or shall be given to a clerk who loses it on the way or any other means of putting it in transit without its arriving.

The important matter is that it shall get to the buyer, it is not that the shipper shall put it in the post, but the buyer is the person to receive it because under the elaborate system of chain contracts which has been developed in the grain and other trades, what the buyer will have to do is to pass it on, and he cannot pass it on till he gets it.

I agree entirely with the way in which Wright, J. has put it, but I am gratified to find that the commercial men who compose the Appeal Committee of the London Corn

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Trade Association apparently take the same view. That being so, no valid notice of appropriation having been given within seven days, consequently the appeal fails. It becomes unnecessary, therefore, to decide the second point, which is that if you have not put it in your notice of appropriation but have put it in your provisional invoice, that will do, although it is not in the notice of appropriation.

We have not heard Mr. Somervell on that point, therefore I do not express any final opinion, but I am bound to say, while reserving my right to change my opinion if I heard it argued, I should have thought it is quite clear that a notice of appropriation and a provisional invoice were two entirely different things for two entirely different purposes. I should have agreed with the finding which the Appeal Committee of the London Corn Trade Association make that they are two different things. I should have thought it was not enough if you left it out of your notice of appropriation to put it into a document used for quite a different purpose. As I say we have not heard Mr. Somervell on that point and I do not decide it; it is sufficient that we decide the first point against him.

The appeal must therefore be dismissed, with costs.

SANKEY, L.J.—I agree. We are called upon to interpret a very short sentence in a condition contained in the Black Sea and Danubian Grain Contract of the London Corn Trade Association. The words in condition 1 are: "Notice of appropriation shall be given by the shipper to his buyer within seven days." What is the meaning of the words "shall be given to his buyer within seven days"? Mr. Somervell contends that the word "given" is susceptible of two meanings. He says that the clause may either mean the shipper shall cause the notice to be dispatched, or shall cause it to be received within seven days. He says that the first of those two alternatives is the correct interpretation, and he puts many difficulties which he says would arise should we interpret it in the second of the two ways, that is, "cause to be received."

In my view the second of the two alternatives is right. I think the word "given," as Wright, J. said in the court below, means given by the shipper actually to the buyer so that the buyer receives the information and receives it within seven days.

That I think is the plain and the proper meaning of the words and I think if there were any doubt on it we should be entitled to look at the other passages in the conditions and rules with regard to notice being given which provide in some instances that it may be given by post, in other instances it may be given by telegram. That may or may not qualify the period applicable to the case, but I think that the plain and proper meaning is the one I venture to suggest, and which Wright, J. put. I also think that the other passages in the

conditions and rules tend to the same construction of the rule in question.

With regard to the second point, it has not been argued before us, and I do not express any opinion.

ASTBURY, J.—I agree, and for the same reasons.

Appeal dismissed.

Solicitors for the appellants, *Coward, Chance, and Co.*

Solicitors for the respondents, *Thomas Cooper and Co.*

Feb. 21, 22, and 23, 1928.

(Before SCRUTTON and SANKEY, L.JJ. and RUSSELL, J.)

DEE CONSERVANCY BOARD AND OTHERS v. MCCONNELL AND ANOTHER. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

River—Vessel moored at wharf—Subsequent sinking by negligence of owners—Navigation of river obstructed—Access to wharf rendered impossible—Vessel abandoned to underwriters—Liability of owners at common law—Expenses of removing wreck—Damages recoverable—Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27), ss. 56, 74).

A wooden ketch which was lying heavily laden in the river Dee alongside a wharf of which the second plaintiffs were the licensees sank to the bottom of the river, thereby obstructing the navigation of the river, and rendering access to the wharf impossible. Both plaintiffs accordingly entered into a contract with a salvage association to have the wreck removed, but before any expenses had been incurred in connection with the removal of the obstruction, the defendants gave notice of abandonment to to their underwriters, which was not accepted.

In an action brought to recover the salvage expenses,

Held, that as the ketch had been sunk through the negligence of the defendants the latter could not escape their liability by abandoning the wreck, but were liable at common law by way of damages in respect of the costs reasonably incurred by the plaintiffs jointly in removing the obstruction.

The Ella (1915) P. 111) approved.

Dictum in The Utopia (7 Asp. Mar. Law Cas. 408; 70 L. T. Rep., at p. 50; (1893) A. C., at p. 498) doubted.

Barraclough v. Brown and others (8 Asp. Mar. Law Cas. 290; 76 L. T. Rep. 797; (1897) A.C. 615) distinguished.

APPEAL from the Liverpool Court of Passage.

The first-named plaintiffs, the Dee Conservancy Board, were constituted by the Dee

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

K K K

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Conservancy Act 1889 (52 & 53 Vict. c. clvi.), which, by sect. 6 incorporated, *inter alia*, sect. 56 of the Harbours, Docks, and Piers Clauses Act 1847. By their Act the plaintiffs had by sect. 66 power to make, maintain, and use wharves, stages, landing-places, jetties, and to grant licences to persons doing the same.

The plaintiffs, John Summers and Sons Limited, were licensees of a wharf at Connah's Quay on the river Dee.

The defendants were the owners of the wooden ketch *William Shepherd*, which was sent to Messrs. Summers' wharf to load some rubbish, and sank alongside the wharf on the 18th July. The plaintiffs thereupon brought the present action against the defendants to recover the expenses incurred by them in removing the wreck, whereby, as the plaintiffs alleged, the navigation of the river and access to the wharf was obstructed. In the alternative the plaintiffs claimed damages for nuisance.

Before any expenses in connection with the removal of the wreck had been incurred, the defendants gave notice of abandonment to their underwriters, but that notice was not accepted. The facts are fully set out in Scrutton, L.J.'s judgment.

At the trial the learned judge found that the ketch had sunk owing to the negligence of the defendants, and he held that the board were entitled to recover their expenses of removing the obstruction. As to Messrs. Summers, he held that as no physical damage had been caused to the wharf and no loss had been proved they were not entitled to recover damages.

The defendants appealed, and there was a cross-appeal by John Summers and Sons Limited.

Trapnell (Dunlop, K.C. with him) for the defendants.

Eastham, K.C. and *R. E. Gething* for both plaintiffs.

SCRUTTON, L.J.—Mr. Trapnell has argued this case with a clearness and ingenuity worthy of a better cause, but I am afraid on the facts of this case I do not see my way to accede to his argument.

The facts are rather curious. Two gentlemen living in Ireland were the fortunate or unfortunate owners of a very venerable wooden ketch. The ketch was over sixty years old, and it had been last surveyed twenty-two years before, and it was in such a condition that it would not keep afloat unless it was regularly and steadily pumped; and the owners knew it. They sent it to a wharf on the river Dee, belonging (and I use the word "belonging" although it is not quite clear what it was) to Messrs. Summers, one of the plaintiffs, to load some rubbish which was being taken away while the wharf was being altered. There was a master, a mate, and two hands on board. The two hands were not paid wages, but were paid by shares of freight. The history of the unfor-

tunate vessel was this: The two members of the crew, the sharing members, did not like the vessel, not unnaturally, considering the way she was leaking; they did not like only having a share of the profits, so they went, and that left the master and the mate. On the 15th July the master went home leaving the mate. On the 16th July the mate thought he had had enough of it, and he went home, and there was this elderly ketch that wanted pumping regularly every day left with nobody on board at all. The agent—some complaint being made by the owners of the wharf to the agent acting for the owners of the ketch—wired to the master at his home in Ireland that nobody was looking after the ketch, and somebody must look after it. The learned judge, having heard the statements from the master and one of the owners, disbelieves both of them, and finds that the master and the owner both knew of that telegram, and neither of them did anything; neither of them took the slightest steps to have anything done to this leaky vessel which was lying alongside the wharf, and the elderly ketch did the only thing she could be expected to do; she slowly settled down until the water came to the big leaks above her Plimsoll line, and then went to the bottom heavily laden with this rubbish, and was consequently a very difficult ship to deal with, because she was just a heavy mass of rubbish lying on the bottom—lying in a navigable channel of which the Dee Conservancy Board owned the soil, for the use of which they took tolls, and which they had a duty to maintain in a navigable condition.

The ketch was lying against one of the berths of the wharf of Messrs. Summers, completely blocking the use of the wharf to Messrs. Summers. Now what was to happen? I have not seen the documents, but so far as I can gather the ketch was insured. I am rather surprised to find that anybody would insure her; they cannot have known much about her seaworthiness; but she was insured in two ways. She had the ordinary Lloyd's Policy with the London Insurance Corporation, and that policy would cover the vessel against total loss, constructive or otherwise, and she was also insured in a protection club which insures various liabilities outside the loss covered by the marine policy. She was insured by a well-known firm of whom one can say that there is nothing about insurance that they are not fully acquainted with. The owners, when they heard the vessel had sunk, gave notice of abandonment to the Lloyd's policy people, the London Insurance Corporation, who, not knowing anything about it, took the usual steps. They said "We decline to accept; we put you in the same position as if you had issued a writ"—to do which is the regular form in insurance cases. That was somewhere about the 20th July.

It so happens that in the case of most harbour authorities there are statutes which provide for a case not covered by common law, and which provide for the case of damage done,

and the stranding of ships, where there is no negligence on the part of the owners. That was a case in which there was previously no common-law liability, and so a statutory liability is placed in certain events on owners of ships which strand or do damage to dock property without any negligence on the part of their owner. The wording of those sections renders the owners liable to pay, and there was a well-known decision of the House of Lords in the case of *Arrow Shipping Company Limited v. Tyne Improvement Commissioners*; *The Crystal* (7 Asp. Mar. Law Cas. 513; 71 L. T. Rep. 346; (1894) A. C. 508) a case in which I was counsel, in which it was held that the expression "owner" means owner at the time when the expenses have been incurred; it does not mean owner at the time when the stranding takes place; and it was also held that if you have then abandoned the ownership so that you are not in possession or have no ownership, you, the original owners of the ship when she sank, are not liable. Well, somebody told the owners and their Irish solicitors that—without they knew it of their own knowledge—I suspect that the protection association told them, because probably the cost of removal, if it fell upon anybody, would fall on the protection association and not on the ordinary marine policy; and on the 3rd Aug., the abandonment not having been accepted on the 20th July, the solicitors for the owners said to the Dee Conservancy: "We have abandoned," and from that time they took up the position "If you incur expenditure we are not liable; under the case of *The Crystal* we abandon." However, the solicitors for the Dee Conservancy, as to whom also there is not much about insurance that they do not know, said "You have mistaken your position; this is a case where we are claiming for negligence," and the parties stood at arm's length from that time, the Irish owners through their solicitors saying "We have abandoned, and we are not liable for any sum you claim under your statutory rights; see *Arrow Shipping Company Limited v. Tyne Improvement Commissioners*; *The Crystal*" (*sup.*), and the Dee Conservancy through their solicitors saying "you are mistaken; we are claiming for negligence at common law (see *The Ella* (1915) P. 116)," and the question now arises, which of them was right?

The position before these statutes were passed was, as I have said, that the owner was liable for negligence. I say nothing about nuisance at present for reasons which will appear hereafter. The owner of the ship which caused damage was liable for it. He did not escape liability for damages arising through his negligence by saying "I abandon." Take the two cases I have put; If I own a dog which bites mankind, and I know it bites mankind, and it bites a postman, I do not escape liability to the postman by saying: "I abandon the dog." The liability remains at common law for my negligence in keeping a dog which bites mankind, and which I know bites mankind. Or to take another case; if I negligently drive

a motor car which crashes off the highway over a private person's lawn and stops on the only drive to his house and obstructs it, and the owner of the private lawn desires to say: "You have damaged my lawn, and you have blocked the access to my house, and I have had to spend money in removing the car to give me access to my house because you will not remove it," the owner of the motor car does not escape liability by saying: "Oh, I abandon the car, it is quite true it is across your front drive blocking your access, but I abandon it, and there is an end of it." In that state of the common law, statutes were passed which gave certain remedies in cases where the owner of the ship was not liable at common law, namely, in cases where the ship was under the control of the owner's servants, but none of them was guilty of negligence—where it stranded by the act of God; and the language of the sections, which gave the owners of docks and harbours a right to claim for damages done to their works without negligence, and entitled the owners of docks and harbours to apply to recover the costs of removing the cause of obstruction to their harbours, was in each case rather ambiguous, and the well-known case of *River Wear Commissioners v. Adamson and others* (3 Asp. Mar. Law Cas. 521; 37 L. T. Rep. 543; 2 App. Cas. 743) did nothing to remove that ambiguity, but considerably increased it; and it is only in the case of *Great Western Railway Company v. Owners of steamship Mostyn* (*ante*, p. 367; 138 L. T. Rep. 403; (1928) A. C. 57) recently decided in the House of Lords, that it has authoritatively been laid down that the statutory liability extends to cases where the ship is under the control of the servants of the owner, but they are not negligent, but does not extend to cases where no one is on board the ship when it does the damage; but that leaves the original liability at common law untouched. The new liability is, of course, only given on the statutory terms, and only in cases where nobody is negligent. The old common-law liability, whatever it is, remains in cases where the damage is done by the negligence of the owner's servants, and it appears to me that Lord Herschell's language in *Arrow Shipping Company Limited v. Tyne Improvement Commissioners*; *The Crystal* (*sup.*) although not having that crystal lucidity which Lord Herschell's language generally has, makes that clear. Lord Herschell (7 Asp. Mar. Law Cas., at p. 515; 71 L. T. Rep., at p. 348; (1894) A. C., at p. 516), in that case says this: "Although I am of opinion that in the present case, there being no evidence that the disaster was due to the negligence either of the appellants or their servants, they would be under no liability at common law."

Stopping there, Lord Herschell seems pretty clearly to say that if there had been negligence, and the disaster was due to negligence, they would have been liable. But he goes on, "for damage caused by the obstruction or for the expenses incurred in removing it, yet I am unable to find any valid ground on which

the operation of sect. 56 [of the Harbours, Docks, and Piers Clauses Act 1847], which casts upon the owner the liability to pay for the expenses of removing the obstruction, can be limited to cases in which such liability would exist at common law"; and the cases in which liability would exist at common law are the cases referred to at the beginning of the paragraph—disaster due to the negligence either of the appellants or their servants. The view of the liability at common law is the view which was taken in the case on which the plaintiffs rely, the case of *The Ella* (1915) P., at p. 116), where Sir Samuel Evans, the then President of the Probate, Divorce, and Admiralty Division, held that persons who had by their negligence sunk in the harbour at Southampton another vessel, which thereby became an obstruction to the harbour, and which the harbour authority therefore removed, were guilty of negligence, and were liable at common law for damages for their negligence to the extent of the cost of removing the vessel which their negligence had sunk so as to become an obstruction to the harbour. If that case is good law it governs this case. The subsequent history of that case is only this, that in *The Solway Prince* (31 Times L. Rep. 56) a little later Sir Samuel Evans followed his own decision, and neither in *The Ella* (sup.) nor *The Solway Prince* (sup.) did the counsel for the parties who were held liable for damages think they had a sufficiently good case to take the matter to the Court of Appeal, and it is obviously open to the Court of Appeal to consider that case.

The only matter which has caused me any doubt is an *obiter* expression of Sir Francis Jeune in giving the judgment in *The Utopia* (7 Asp. Mar. Law Cas. 408; 70 L. T. Rep. 47; (1893) A. C. 492), which language is repeated by Sir Gorell Barnes sitting as a judge of the Admiralty Division in the case of *The Snark* (8 Asp. Mar. Law Cas. 483; 80 L. T. Rep. 25; (1899) P. 74). That was not a case where there was any negligence at all. A vessel had sunk in the Straits of Gibraltar without any negligence, and the question raised was whether people who subsequently ran on her as she lay there could recover damages from the owners of the sunken vessel. There was no question, therefore, at all of what the liability of the owners of the sunken vessel, the *Utopia*, would have been if she had sunk through their negligence; but Sir Francis Jeune, in giving the judgment of the Privy Council, states a general proposition, part of which it was not necessary for him to deal with because the facts did not raise it. He says (70 L. T. Rep., at p. 50; (1893) A. C., at p. 498): "The result of the authorities may be thus expressed. The owner of a ship sunk whether by his default or not (wilful misconduct probably giving rise to different considerations) has not, if he abandon the possession and control of her, any responsibility either to remove her or to protect other vessels from coming into collision with her." He does not say, it will be noticed, that the owner of a vessel sunk by his default is

under no liability to the people who are damaged by the sinking. He does not say that, but he does say that whether sunk by his default or not, he is not under a responsibility to remove her (and bear in mind he is talking about the Straits of Gibraltar and trying to speculate to whom the soil in the Straits of Gibraltar belongs) or to protect other vessels from coming into collision with her if he has abandoned her. There has been a great number of cases which have dealt with the liability after the vessel has sunk to vessels which come into collision with her, one of which is *The Douglas* (5 Asp. Mar. Law Cas. 15; 47 L. T. Rep.; 7 Prob. Div. 151), in which the vessel was sunk through negligence, but the only question argued was whether there was negligence after the vessel had been sunk, and the Court of Appeal held that as immediately she was sunk the owners of the vessel had given notice to the Thames Conservancy that she was sunk, that was all they were bound to do, and they were entitled to assume that the Thames Conservancy would light her, and were therefore not liable after she was sunk to light and buoy her, or warn other vessels away. Now those words "by his default," if they are to be taken as meaning that if he abandons he is under no liability for damage caused by his default—if Sir Francis Jeune meant that (I do not think he did from the language of the passage)—I respectfully disagree, and I think it is contrary to Lord Herschell's view in principle. I do not understand how you can wipe out your common-law liability for negligence by abandoning your property which has done the damage. That has been the only difficulty which I had, and why I doubt whether Sir Francis Jeune was really talking about this point at all. If he was, it was certainly *obiter dicta*, it was not the matter which was argued before him, and, in my opinion, it conflicts with the decision of the Privy Council, and, with the greatest respect, one is not technically bound in the Court of Appeal to follow it. Therefore I see no difficulty whatever in the present plaintiffs, one of whom is the owner of the soil with the right to take tolls for navigation, and the duty to keep the navigation open, and the other of whom is the owner or licensee with an interest in a wharf, the use of which is prevented by this vessel having grounded alongside the wharf in a berth, and so stopping the access to the berth—I see no difficulty whatever in their recovering damages directly caused by the negligence. Now what damages are directly caused by the negligence of a person who negligently deposits an obstruction on your soil, blocking your right of way? I should have thought it was obvious that if the person who deposits the obstruction declines himself to remove it, which is the position here, because the owners of the ketch said: "We have abandoned it; we have nothing more to do with it, we cannot help it blocking your wharf or your right of navigation; we have nothing further to do with it; we wash our hands of it"—the damages arising from that negligence would be

the reasonable costs of removing the obstruction. Messrs. Summers are not bound to allow this obstruction to remain blocking one of their berths for all time. The owner will not remove it, he says: "I am not the owner; I have abandoned it." They surely have the right to remove it, to minimise the damage, and prevent their wharf being stopped for all time by this old ketch, and they incurred the expense which the judge has found to be the reasonable expense of removing it. The Dee Conservancy Board were undoubtedly, according to the statute, the owners of the soil where the vessel sank; they are the owners of the soil in a navigable channel which they have the duty to maintain—a duty for which they take tolls, and a duty for which they would be liable to vessels from whom they took tolls if damage resulted from an unmarked obstruction in the channel. It seems to me that they have a common-law right to remove the obstruction caused by negligence. What happened was this, and some point which appears to be rather technical was raised as to who can recover it. Here is a property deposited by the negligence of its owner in a place which affects both plaintiffs. They jointly make a contract to have it removed with the Liverpool Salvage Association. The letters mention that they are acting jointly, although the actual acceptance of the contract is made in the name of the Dee Conservancy. The letters about that time all state that they are acting jointly, and when the Liverpool Salvage Association asks to be paid, the Dee Conservancy pay part and Messrs. Summers pay another part. Under those circumstances it appears to me that judgment ought to have been entered for both of them for the one sum; the satisfaction of one would be a satisfaction of the other, but the two joint plaintiffs are entitled to recover from the defendants that sum once, but not twice. Therefore it appears to me that the appeal should be dismissed with costs, the cross-appeal of Summers allowed, and judgment entered for the Dee Conservancy Board and Summers as joint plaintiffs for 1569l. 8s. 9d. with costs, and in view of the somewhat technical character of this particular point that has not involved any extra costs, because in fact no costs were given in the court below on this matter, I think there should be no costs of the cross-appeal.

SANKEY, L.J.—I agree, and with regard to the facts I do not wish to say anything more than what my Lord has already said, except to draw attention to the finding of the learned judge in the court below that the defendants in this case, the present appellants, have been found to be guilty of negligence.

What are the duties of the Dee Conservancy Board and of the defendants in a case of this character? The duty of the Conservancy Board is best laid down in the well-known case of the *Mersey Board v. Gibbs*; *Mersey Board v. Penhallow* (2 Mar. Law Cas. (O.S.) 353; 14 L. T. Rep. 677; L. R. 1 H. L. 93), in the judgment of

Lord Cranworth, the then Lord Chancellor (14 L. T. Rep., at p. 684; L. R. 1 H. L., at p. 122), where he says: "Where such a body is constituted by statute, having the right to levy tolls for its own profits, in consideration of making and maintaining a dock or a canal, there is no doubt of the liability to make good to the persons using it any damage occasioned by neglect in not keeping the works in proper repair. This was decided by the Court of Queen's Bench, and the decision was affirmed in the Court of Error in the case of *Parnaby v. The Lancaster Coal Company* (11 A. & E. 223). The ground on which the Court of Error rested the decision in that case, is stated by Tindal, C.J. to have been that defendants there who constituted the company, made the canal for their profit, and opened it to the public upon payment of tolls. And the common law in such a case imposes a duty upon the proprietors to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may do so without danger to their lives or property." Now that being the duty of the Dee Conservancy Board, what is the duty of the defendants in regard to their vessel? That was laid down in the case of *White v. Crisp* (10 Exch. 312). Alderson, B., on p. 320, says: "This subject was discussed by Maule, J. in an elaborate judgment, in the case of *Brown v. Mallett* (1848) 5 C. B. 599), and from the principles there laid down by him (which, however, were not all absolutely necessary for the decision of that individual case), we do not disagree at all. He there lays it down thus—that it is the duty of a person using a navigable river with a vessel of which he is possessed and has the control and management, to use reasonable skill and care to prevent mischief to others; and he adds that his liability is the same whether his vessel be in motion or stationary, floating or aground, under water or above it. For in all these circumstances, the vessel may continue to be in his possession and under his management and control. This duty arises out of the possession and control of the vessel being in him." Those being the duties respectively of the Dee Conservancy Board and of the defendants, what are the rights of the Dee Conservancy Board? As I understand the argument on behalf of the appellants, it is to the following effect. It is said that in such a case as the present, the rights of the Dee Conservancy Board are regulated sometimes by a special section in a private Act of Parliament referring to such a company, and sometimes by reason of the adoption of the Harbours, Docks, and Piers Clauses Act 1847.

The Dee Conservancy Board was constituted by the Dee Conservancy Act of 1889, sect. 6 of which Act incorporated the Harbours, Docks, and Piers Clauses Act 1847, with certain exceptions, but including sect. 56, which contains a power in the harbour master to remove wrecks, and in effect what the argument for the appellants comes to is this, that in the case of a

wreck sect. 56 constitutes a code, and it is only in accordance with the provisions of that code that a person who suffers damage from the presence of a wreck can obtain his remedy. I do not agree with the contention that sect. 56 constitutes a code to govern all cases. To begin with, it was pointed out by Sir Samuel Evans, P., in the case of *The Ella* (*sup.*) that the words there are not exhaustive. At p. 120 he says: "It was contended that the remedies of the plaintiffs were confined to those given by sect. 56 of the Harbours, Docks, and Piers Clauses Act 1847. Those remedies are clearly not exhaustive. The clause only deals with the owner of the wreck, and makes him liable, while he remains in law the owner, whether he had been innocent or at fault."

Before that section was passed it is quite possible that there may have been two different cases: first of all the case where there had been a wreck without any fault of the owner, and secondly, a case where there might have been a wreck owing to the owner's default. In the first of those two cases there would be no liability at common law before the Act. In the second of those two cases where the owner was at fault and had been negligent there would, in my opinion, have been a liability at common law. The effect of the section is to give a remedy even where the owner has not been in default, and I quite agree that in a case where the owner has not been in default you can only follow the prescribed remedy given by sect. 56 to the prescribed tribunal: (see *Barraclough v. Brown and others*, 76 L. T. Rep. 797; (1897) A. C. 615). But this does not appear to me to touch the other case of where the owner was in default, and I think it would be a wrong construction of the statute to hold that sect. 56, while giving a remedy in cases where there was no action before, takes away a remedy in cases where there was an action before. I think you would want express words to do that. I am confirmed in that opinion by the words of Lord Haldane in the recent case of *Great Western Railway Company v. Owners of the Steamship Mostyn* (*sup.*). Although, perhaps, I am not entitled to speculate upon what sect. 56 was meant to touch, I do not think it was meant to touch the case where the owner was in default, and to take away a remedy which already existed in my view at common law. I agree with Mr. Trapnell, who, if he will allow me to say so, has given us the benefit of a very acute and learned argument referring to a number of cases, that in a number of cases there are expressions which would appear to be in his favour, and, therefore, I think it becomes necessary to look for a moment at those cases, and to endeavour to distinguish them.

First of all, with regard to the case of *The Douglas* (*sup.*), you must, in considering cases, always have regard to the matter which was under discussion. In the case of *The Douglas*, in consequence of the sole default of her master and crew, the vessel had sunk in the Thames.

Her mate sent a message to the harbour master to inform him of the accident, who said he would cause the wreck to be lighted. It was not lighted; and the result was that another vessel ran into the wreck, and an action for damages having been instituted on behalf of the owner of the damaged vessel against the owner of the *Douglas*, the judge at the trial refused to admit evidence showing that the mate of the *Douglas* had sent a message to the harbour master, and that the latter had promised to light the wreck, and held that the evidence was wrongly rejected, that the collision had not been caused by the negligence of the owners of the wreck, and that they were not liable for the damage done. In the judgment of Brett, L.J., at p. 160, of which the headnote is in effect a resumé, he says: "As to the mate, he gave instructions to the captain of the tug *Endeavour* to inform the harbour master. The latter evidently took it as a piece of information upon which he was to act, for he in effect promised to send lights within an hour. The mate of the *Douglas* had a right to assume that the harbour master would do what he promised. Upon the evidence before us there was no negligence and no liability upon the defendants." That was a question of failure to light the wreck. Held that the owners of the *Douglas* were not liable because they had taken the proper steps after the wreck.

With regard to the case of *The Utopia* (*sup.*), that is of a similar character. It has already been pointed out that there the owner of the wreck remained in possession, but the port authority undertook and neglected the duty of indicating its position so as to secure ships entering the harbour from the danger of collision with her. Held that neither the owners nor the wreck were liable for the collision. The control and management thereof had been legitimately transferred by the owner to the port authority. It was a case, therefore, proceeding on the question whether the owners had neglected the duty of indicating the position of the wreck. It was held that, under the circumstances, they had not. It is true that Sir Francis Jeune, giving the judgment of the Privy Council, says "The result of the authorities may be thus expressed: The owner of a ship sunk, whether by his default or not (wilful misconduct probably giving rise to different considerations), has not, if he abandon the possession and control of her, any responsibility either to remove her or to protect other vessels from coming into collision with her." Those two words "or not" were not necessary for the decision of the case. Over and above that, the learned judge was not dealing with the problem which confronts us. Those words were referred to and followed by Gorell Barnes, J. in *The Snark* (*sup.*). He uses the identical words: "The owner in whose possession she was at the time of the sinking, and whether the sinking has occurred by his default or not (wilful misconduct as stated in the above passage probably giving rise to different

considerations), may, however, abandon the wreck." It was a case of the same class as *The Utopia*. He says that the vessel had been negligently loaded and it became a wreck and he abandoned possession. Held by Gorell Barnes, J. that the defendants were personally liable, as they had a duty to perform, namely, to use reasonable care to warn other persons of the position of the wreck. That judgment was affirmed (9 Asp. Mar. Law Cas. 50; 82 L. T. Rep. 42; (1900) P. 105), and turns upon the same facts as *The Utopia* turned upon, but as has already been pointed out by my Lord, Lord Herschell appears to take a different view. I will not say a different view, because I do not think either in the case of *The Utopia* (*sup.*) or of *The Snark* (*sup.*) that the view was really a different one, but in the case of *Arrow Shipping Company Limited v. Tyne Improvement Commissioners; The Crystal*, Lord Herschell evidently has in mind the liability at common law when he says: "Although I am of opinion that in the present case, there being no evidence that the disaster was due to the negligence either of the appellants or their servants, they would be under no liability at common law for damage caused by the obstruction or for the expenses incurred in removing it, yet I am unable to find any valid ground on which the operation of sect. 56, which casts upon the owner the liability to pay for the expenses of removing the obstruction, can be limited to cases in which such liability would exist at common law." Those words seem to me clearly to contemplate a case like the present.

With regard to the last of the material cases cited on behalf of the appellants, *Barraclough v. Brown and others* (*sup.*), I agree that it is a case which it is somewhat difficult to follow, but in my view it is only an authority as to the tribunal to which a person must resort who seeks to enforce his rights under the private Act there in question, viz., sect. 47 of the Aire and Calder Navigation Act 1887. It says in the headnote: "Where a statute gives a right to recover expenses in a court of summary jurisdiction from a person who is not otherwise liable, there is no right to come to the High Court for a declaration that the applicant has a right to recover the expenses in a court of summary jurisdiction; he can only take proceedings in the latter court." Now it appears, (1897) A. C., at p. 617 of the report in the House of Lords, that the question there was set down for trial, under, I suppose, Order XXV., r. 2, but it is said in the statement of facts which is taken from the judgment of Lord Watson: "The order did not specify what the point of law referred to was, but it seems to have been, practically speaking, confined to the question what was the true construction of sect. 47 of the Aire and Calder Navigation Act 1889. The claim was preferred upon two separate grounds: the first being that the respondents, as owners of the ship at the time when she sank, are, at common law, responsible to the undertakers for the injury thereby done to the navigation of the River Ouse, and for all costs necessarily

and reasonably incurred by them in repairing such injury, and the second, that sect. 47 of the Act of 1889 makes the persons who were the owners of the vessel at the time when she sank liable to repay such costs to the undertakers." No reference was made in the Court of Appeal to the appellant's common-law claim, but it was raised and insisted upon by him at the Bar of the House of Lords. Lord Dayeys says: "I agree with your Lordships that there is no common-law right of action in this case." What I think he meant there was, that in a case properly coming within sect. 47 of the Aire and Calder Act 1889 you have to go to the proper tribunal, namely, the justices. Lord Watson said: "At present I make this observation upon the plaintiffs' alternative claims, that, whilst it appears to me that the first of them might be legitimately pursued before the Queen's Bench Division, I am not satisfied that the second of them could be competently entertained, except by a court of summary jurisdiction as is prescribed by sect. 47."

Those being the cases referred to by Mr. Trapnell, the last case to be considered is *The Ella* (*sup.*), and I think in fairness that if that case is rightly decided, the defendants in this case are liable. I need not read it again. It has been referred to, I will not say at improper length, but at great length by learned counsel in the case. The President in giving his judgment on p. 121 says: "Negligent navigation of the defendants' vessel was admitted. This, in my opinion, was a breach of duty towards the plaintiffs, which caused them damage, to be measured by the expenses which they had a right to incur, and which, I think too, they were bound to incur." Now if that case is right it seems to me that it answers both points made by Mr. Trapnell—both the point as to liability, and the point as to the measure of damages. I quite appreciate the number of cases cited by Mr. Trapnell on that point, of which *Winterbottom v. The Earl of Derby* (16 L. T. Rep. 771; L. Rep. 2 Ex. 316) is an example, but I cannot see that the measure of damages as applied by the learned judge in the court below was the wrong one. As pointed out by my Lord, it is the duty of the plaintiff in such a case to show that he has minimised the damage. In this case I have already said what the duty of the Dee Conservancy Board was with regard to the public, namely, to keep the navigable river free from obstruction which might have caused damage. Here they were the owners of the soil. With regard to Messrs. Summers they had the licence to which we have already been referred, by which they were entitled to use the wharf, the approach to which and the occupation of which was obstructed by the wreck in question. What is it suggested the board ought to have done if their rights are, as I have said, namely, to keep the river in a properly navigable condition, and to have the wharf accessible to vessels which desired to use it? Are they to leave the wreck there for ever, or are they

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under the circumstances to do what would probably minimise damages in the future, namely, to remove the wreck so as to free the channel from obstruction, and allow the wharf to be occupied in the future? In my view the learned judge was right in both conclusions at which he has arrived, and for the reasons given by my Lord I think judgment ought to be entered for the two respondents as joint plaintiffs for the amount found due by the learned judge.

RUSSELL, J.—In my opinion this case is covered by the decision in *The Ella* (sup.), if that case was rightly decided. So far as it bears upon negligence, one of the points decided in *The Ella* (sup.) is that the owners of a vessel which by negligence sank a barge which obstructed the navigation were held liable at common law to repay the harbour authorities the sum which they incurred in removing the obstruction, and they were held entitled to recover the expenses as damages arising from negligence. In the particular case the amount was directed to be assessed by the registrar, but in the present case there has been no contention or suggestion put forward that the amount involved, namely, 1569*l.*, was an unreasonable sum. I may say, as regards *The Ella* (sup.), in passing, that an appeal was brought and entered, but was subsequently withdrawn. I see no reason to suppose that *The Ella* (sup.) was otherwise than rightly decided upon that point, but I prefer to keep an open mind upon the question as to how far it was rightly decided on the point as to nuisance, because I appreciate that there are passages in the case of *Barraclough v. Brown and others* (sup.) which would require careful consideration when that point arises.

Here the negligence complained of, namely, the negligence which caused the sinking of the barge, is negligence which in its results affects both plaintiffs. In my opinion the proper course to pursue is that indicated by my Lord, namely, to enter judgment for the sum of 1569*l.* in favour of both plaintiffs, to dismiss the appeal with costs and on the cross-appeal to enter judgment for both plaintiffs for that sum and give no costs on the cross-appeal.

Appeal dismissed.

Cross-appeal allowed.

Solicitors for the appellants, *Holman, Fenwick, and Willan.*

Solicitors for the Dees Conservancy Board and John Summers and Sons Limited, *Alfred Bright and Sons*, agents for *Batesons and Co.*, Liverpool.

Feb. 28 and March 5, 1928.

(Before SCRUTTON and SANKEY, L.JJ. and RUSSELL, J.)

DE MONCHY AND OTHERS v. PHOENIX INSURANCE COMPANY OF HARTFORD AND OTHERS. (a)

ON APPEAL FROM THE KING'S BENCH DIVISION.

Insurance—Policy—Construction—Liability of underwriters—Limitation of time for bringing action—Limitation clause in policy—No limit in certificate—Certificate to take the place of policy—Action under certificate.

On the 27th July 1923 sellers in America sold to the plaintiffs in Rotterdam 100 barrels of turpentine at a c.i.f. price in Dutch guilders, for sixteen gallons net, shipping weight "one gallon out per barrel," American net weight to be reduced at one gallon equals 3.25 kilos; payment by draft at sight with bill of lading and insurance policy attached, and for certificate of insurance; insurance documents to include risk of leakage in excess of one per cent. upon the basis of the above reduction in weights. Turpentine was a very volatile substance, expanding and evaporating under heat, and American turpentine was sold for export in barrels by gallons. A complicated system of gauging the barrels was adopted, which included a system of filling a barrel to one gallon short of its capacity to allow for expansion. The practice in the trade was not to weigh, but to measure, the amount of turpentine shipped in America, and to weigh, not to measure, the amount delivered in Europe, and a conventional measure to turn gallons into weight was used in the trade to see whether what was shipped was delivered, and it was taken in the trade that the normal loss on a voyage by evaporation was one per cent. There was a system of insurance of leakage from any cause over the normal one per cent. On the 23rd Aug. 100 barrels of turpentine were gauged at Jacksonville in Florida and, allowing for the one gallon per barrel, a shipment of 5107 gallons was certified. The steamer on which the turpentine was shipped remained on the coast of Florida from the 23rd Aug. to the 19th Sept. before sailing for Rotterdam and there was considerable evaporation. The sellers, to carry out their contract of insurance, obtained an American certificate of insurance issued under what were stated to be policies of insurance issued by the defendants, covering risks of "leakage from any cause in excess of one per cent. on each invoice . . . conversion of kilograms to be made into American gallons shall be made on the basis of 3.25 kilograms to the gallon." In the alleged policies there was a condition that no claim under the policies could be maintained unless brought within a year after the happening of a loss, but the certificate of insurance had no such limitation of time. When the turpentine was discharged in Europe in October, the weight was short, as compared with the weight calculated from the number of gallons shipped in Florida in August. The

(a) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

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plaintiffs claimed against the defendants for the loss in excess of one per cent. but the defendants declined to pay in the absence of injury to the barrels or some clear sign of leakage. As the action was not brought within one year of the loss the defendants also relied on the condition in the policies limiting the time for bringing an action to within one year.

Held, (1) that the defendants were liable to pay for loss of weight or bulk, in excess of one per cent., even if such loss was caused by change of temperature, and (2) as the condition limiting the time for bringing the action was not in the certificate, nor was any notice of it given to the consignees, the defendants could not rely on it. The plaintiffs were entitled to succeed on both points.

Decision of MacKinnon, J. affirmed.

APPEAL from the judgment of MacKinnon, J.

The plaintiffs claimed under a certificate of insurance in respect of a loss of turpentine by leakage on a voyage from Florida to Rotterdam. The plaintiffs were the owners of a quantity of turpentine which had been shipped in barrels from Florida, having purchased 100 barrels from sellers in America for shipment to Rotterdam. The sellers, under their contract of insurance, had insured the turpentine with the defendants, two insurance companies, for the voyage. The perils insured against included leakage, and the plaintiffs claimed for loss alleged to have been caused by leakage. The plaintiffs were interested in a certificate of insurance dated the 17th Aug. 1923 issued under an alleged policy of insurance subscribed by the first defendant company, and another alleged policy subscribed by the second defendant company. Each of the defendant companies insured respectively for 50 per cent. of 14,925 florins on 100 barrels of turpentine shipped from Jacksonville, Florida, to Rotterdam, on a steamship, the *Cape Town Maru*. The alleged policies contained, *inter alia*, a clause "to pay leakage from any cause in excess of one per cent. on each invoice . . . conversion of kilograms into American gallons shall be made on the basis of 3.25 kilograms to the gallon."

The practice in the trade was not to weigh, but to measure, the amount of turpentine shipped, and to weigh, not measure, the amount of turpentine delivered.

On the 25th Aug. 1923 the plaintiffs shipped on the *Cape Town Maru*, at Jacksonville, 100 barrels of turpentine for carriage to Rotterdam. During the voyage the steamer met with heavy weather, and when the turpentine was discharged at Rotterdam it was alleged that 372.75 kilograms out of a total of 16,597.75 kilograms shipped had disappeared.

Turpentine was a volatile substance which expanded when heated, and the weight of a gallon would depend on the actual temperature at the moment, and a conventional weight per gallon was, therefore, agreed on. Up to a loss of 1 per cent. no claim could be made, but where there was a greater loss the underwriters had been in the habit of paying on the basis of the

conventional weight, taking the difference between the weight shipped and the weight delivered as the amount of the loss. In this case the underwriters took the point that the insurance was only against leakage, and though, if the temperature fell, the contents of a barrel might occupy less space without any of the contents being lost, for such loss of bulk the underwriters would not be liable. They contended that "leakage" must be construed strictly, and that the word was applicable only where something which had been in a receptacle had accidentally got out of it and had been lost.

Another point taken by the defence was that the insurance was subject to a condition that no claim under it could be maintained unless brought within a year after the happening of the loss. The action had not been brought within a year. The condition referred to was in the original policies, but not in the certificate under which the plaintiffs were suing. The certificate stated that it represented and took the place of the policy.

MacKinnon, J. held that the contract was to pay for loss of weight or bulk even if that loss of weight or bulk was caused by change of temperature and not by loss of some of the contents of the barrels, and that, as the alleged policies were not contracts of insurance at all, but the certificate was the actual insurance, and as, in the circumstances, the clause with regard to the limitation of time for making a claim could not be read into it, the plaintiffs were entitled to recover.

The defendants appealed.

W. A. Jowitt, K.C., and *van den Berg* for the appellants.

Porter, K.C., and *McNair* for the respondents.

SCRUTTON, L.J.—This appeal against a judgment of MacKinnon, J. raises two questions, the first, as to the construction of a clause insuring against the leakage of turpentine; the second, whether a term requiring an action to be brought within one year of the loss is part of the contract of insurance. This latter question involves the consideration of the important subject of the American system of insurance by American certificate to be tendered under a contract of sale of goods *c.i.f.* as "insurance."

It appears that turpentine expands and evaporates under heat, and that in the sale of American turpentine for export it is sold in barrels by gallons. A complicated system of gauging the barrels is deposed to in the affidavit of Mr. Register, which I do not repeat, but it includes a system of filling a barrel to one gallon short of its capacity to allow for expansion, which capacity is gauged in America, the turpentine is weighed on arrival in Europe, and a conventional measure to turn gallons into weight is used in the trade to see whether what is shipped is delivered, it being taken in the trade that the normal loss on a voyage by evaporation is 1 per cent. There is a system of insurance of leakage from any cause over the

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normal 1 per cent. This being the course of trade, on the 27th July 1923 the Columbia Naval Stores Company sold to de Monchy, Rotterdam, the present plaintiffs and respondents, 100 barrels of turpentine at a c.i.f. price in Dutch guilders per sixteen gallons net shipping weight "one gallon out per barrel," referring to the system of gauging barrels with one gallon short; American net weight to be reduced at one gallon equals 3.25 kilos; payment by draft at sight with bill of lading and insurance policy attached, and (or) certificate of insurance; insurance documents to include risk of leakage in excess of 1 per cent. upon the basis of the above reduction of weights. To carry out this contract, Mr. Register, on the 23rd Aug., gauged 100 barrels of turpentine at Jacksonville, Florida, and made the capacity 5207 gallons, from which he subtracted 1 gallon per barrel and certified to shipment of 5107 gallons. The Japanese steamer *Cape Town Maru* was on the coast of Florida from the 23rd Aug. to the 19th Sept. before she sailed from Savannah for Rotterdam, and there were, therefore, considerable possibilities of evaporation. Meanwhile, the sellers, to carry out their contract of insurance, obtained an American certificate of insurance from the Phoenix Insurance Company of Hartford, and the Great American Insurance of New York. This document must be seen to be believed. "There is, apparently, a blank form of certificate of insurance which the companies issue to persons who have a contract of insurance with them somewhat similar to an open cover. Someone has filled in a blank certificate with the subject-matter of the insurance, "100 barrels pure gum turpentine;" the voyage, "per steamer *Cape Town Maru* from Jacksonville to Rotterdam;" and the value insured, "14,925 florins;" and then someone has stamped on the front of the document a clause which is also completely illegible and which is stamped over what can be discovered from other sources to have been originally a warehouse to warehouse clause. Someone has stamped on the back two or three clauses which are again on the original almost completely illegible and which also obliterates the names of the agents to whom claims should be made. From a legible copy of another certificate, supplied to this court by the underwriters, it is clear what has happened. The leakage clause should be stamped on the front of the certificate where there is room for it, and the warehouse clause would appear clearly below. Instead of that, the war risks clause has been stamped on the front (1) illegibly, and (2) obliterating the warehouse to warehouse clause. Apparently appreciating this, the war risks clause has been stamped a second time on the back, also nearly illegibly, and then the leakage clause has been stamped underneath it. Whether this destroys the protection of the warehouse to warehouse clause we have not to determine.

There was no evidence who produced this monstrosity, but we were told in court that the sellers put the stamps on and apparently the

agents of the companies then countersigned and approved it. I have rarely seen a more discreditable document from a business point of view and the American companies and sellers ought to be ashamed of having tendered it as a business document.

However, for the present point its relevance is the clause as to leakage. The certificate states that the insurance is under policies No. 924 of the Phoenix Insurance Company 50 per cent. interest, and No. 387 of the Great American Insurance Company. Certain bundles of documents were produced to us as representing these policies, and again the originals must be seen to be believed. It is sometimes said that in English policies the office boy sticks on slips and imprints stamps at his own sweet will, regardless of contradictions and repetitions; but an English policy is simplicity itself compared to these bundles. I deal only with the clauses about leakage. In the bundle of documents said to be Policy No. 924, there will be found: (1) A clause "not liable for leakage to molasses or other liquids unless occasioned by stranding or collision." (2) A clause that the company are not liable for leakage from turpentine in barrels when the ship is stranded, &c., and then only for excess of 3 per cent. (3) A clause that for an additional premium leakage may be covered by a clause (a) to pay leakage over 3 per cent. in excess of ordinary leakage of 1 per cent., or (b) to pay leakage from any cause whatsoever in excess of 1 per cent. (4) A clause dated the 15th June 1923, the so-called policy being dated the 21st Sept. 1921, providing a substituted clause for clause 3 (b) above. It is this clause, apparently, for parts of it are illegible, which is stamped on the back of the insurance certificate.

When the *Cape Town Maru* arrived at Rotterdam the cargo was weighed by warehousemen in the usual way and a weight note signed. It appears from this weight note that while the average gross weight was about 202 to 197 kilos a barrel, and the average tare 35 to 37 kilos, there was one barrel with only 144 kilos gross, one 181, one 183, one 190, and a series of 195, 195½, and 196 kilos. The weight and gallons converted at the rate in the certificate produced a shortage of 374 kilos or 115 gallons. One per cent. leakage would be 51 gallons or 166 kilos, and there was accordingly a claim for 64 gallons or 208 kilos leakage. On this being presented to the American companies they refused to pay, saying that they would only pay on barrels which showed signs of leakage and (or) ullage at time of discharge from the steamer. "Consignees are not entitled to claim the difference between the shipped and landed weights unless the entire consignment shows signs of leakage." They were told by their English agents, and evidence was given to that effect, that it is impossible to see signs of leakage owing to turpentine being so volatile, and, when dry, leaving no stain on the outside of the barrel. They persisted in their refusal to pay European

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consignees, though paying their American assured on similar claims.

The action was therefore brought by the consignees, and the companies argued that the evidence of loss of weight was unsatisfactory, that the claim of the consignees did not take into account that the same weight of turpentine would bulk more in Florida in August than at Rotterdam in October, and that there were no signs of leakage.

In my opinion the position of the American companies is untenable. It is probably quite true that the amount claimed as loss by evaporation or leakage from any cause (and evaporation is only a subtle form of leakage) is not the accurate amount, and that if the Kew Laboratory had investigated the matter with strict scientific accuracy a different result would have been arrived at; but the answer is that the insurers have adopted a conventional and business means of roughly estimating the loss; barrels do not all weigh the same, but they have agreed a conventional tare of 80lb. a barrel. The business methods of gauging and weighing are no doubt not precise, but they are those contemplated. The evidence by which they were proved is the ordinary evidence accepted in business matters and in the Commercial Court. It is known that American turpentine is sold and shipped by the gallon, and so a conventional method of turning gallons into kilos is agreed. The underwriters do not mean to insure ordinary evaporation or leakage, and so for one premium they only insure leakage in excess of 4 per cent., for a higher premium leakage in excess of 1 per cent. Anyone would except turpentine which lay on steamer on the coast of Florida for nearly a month in August and September to show more than ordinary evaporation or volatile leakage, and it did; in addition two casks leaked badly. In my view this defence of the underwriters fails, and does not reflect any credit on their business methods.

I now turn to the second and more difficult question. The voyage insured was in Sept. and Oct. 1923. A long discussion as to this loss, and losses by other consignees, took place between the companies, their English agents, the consignees, and their insurance agents, during 1924 and 1925, and the writ was ultimately issued on the 12th Feb. 1926, on one consignment as a test case. The defence was delayed by the affidavit of ship's papers, but when in Feb. 1927 it was delivered it contained a defence which the judge by mistake attributed to junior counsel for the defendants, but which we were informed was inserted by instructions of the American underwriters, to the effect that there was a clause in the contract of insurance that no action should be maintainable unless commenced within one year from the date of the loss. No such clause appears on the certificate and during the time that the case had been discussed, from the loss to the writ, no hint had been given by the underwriters that there might be such a defence to the action. Their solicitors had been asking

for all sorts of information which was quite unnecessary if the point was good and protesting that the underwriters were anxious to get this test action decided as soon as possible.

The clause in question appears in a printed form of policy, headed in print "Cargo" and containing partly in writing the words "Columbia Naval Stores Company of Delaware. . . . Do make insurance and cause to be insured as per form attached." It is not clear who make insurance, the Columbia Company or the companies whose printed names appear at the top of the form. Otherwise the form throws no light on what is insured, nor does the "form attached" which consists of five or six different sets of clauses, in many respects contradictory. If material it would be interesting to set out the various clauses as to war risks, capture and seizure contained in the bundle. In the middle of the printed form of policy there appears this clause: "It is agreed that no suit or action for the recovery of any claim arising under this policy shall be maintainable in any court unless such suit or action shall have been commenced within one year from the date of the happening of the loss out of which the said claim arose." No reference to it appears on the certificate, and if the European consignee wanted to comply with it, he would first have to find out that it was on the form of policy in the United States; secondly, to decide whether it was part of the contract of insurance, thirdly, to find out in what State the policy was issued—which, as the two companies have their head offices in two different States, and the policy was countersigned in a third, is not very easy—fourthly, to ascertain what the laws of each State as to limitation were; and lastly, to see which was the "shortest time permitted." The forms bundled together contain many clauses which it is difficult to believe can apply. For instance, there is in the form attached a clause, "It is warranted by the assured that in all cases where certificates are issued in foreign currency the following clause shall be expressed in each certificate, 'premium and losses, if any, to be settled at . . . ' " a sum to be filled in "per pound." No such clause appears in the certificate though it is countersigned by the underwriters. Is the clause part of the insurance in the certificates?—and instances might be multiplied.

I look at the matter from a business point of view. The underwriters know that these certificates will be tendered as contracts of insurance which can be sued on in Europe, thousands of miles from the bundle of documents called Policy No. 924. They say of the certificate that it "represents and takes the place of the policy." They say that "the clauses stamped or written on the back hereof are made a part of this certificate." They do not say that all or some of the clauses in a bundle of documents headed 924 are part of the certificate. On the contrary they say that the certificate takes the place of the policy and represents it. How is it open to underwriters

to say that there is a clause not on the certificate which limits the right of recovery under it? If that is so, the certificate does not represent or take the place of the policy. The certificate contains the particulars of the goods insured and valued and the voyage and the ship and the full clause insuring against leakage, from all causes, above 1 per cent. Why cannot the consignee, taking the certificate, sue on it for loss by leakage according to its terms which take the place of and represents the policy? It may be that if any clauses on the form of policy are relevant to the amount of claim, they may be looked at for the purpose of "adjusting" the claim; But, in my opinion, if the underwriters wish to defeat the adjusted claim by the introduction of a time limit, they must give notice of it on the face of the certificate which takes the place of the policy; otherwise they are simply laying a trap for the European consignee who has no means of knowing of the time limit. Apparently, the question has arisen in the courts of the State of New York, and in that case, *Graham Brothers v. St. Paul's Insurance Company* (1 American Maritime Cases, 836) the judge, Glennon, J., took the same view, and held that unless notice of such a clause was given on the face of the certificate it could not be enforced by the underwriters. The judge said: "Notwithstanding that the certificate provides that the insurance is subject to the terms of the open policy, I think that a due regard for the holder's rights would require that this limitation be brought to his attention by a proper reference thereto in the certificate itself. While it is true that the so-called open policy produced upon the trial by the defendants contained such a limitation, still how is the holder of the certificate to know of such limitation?" This seems a sound business view with no legal reasons against it and I accept it and am glad that the courts of the country of origin of this certificate system take the same view of it as I do.

The case may be put in another way. The clause itself refers to a claim arising under the policy. It appears to me that this claim arises under the certificate which alone states the goods and voyage assured, and in this case the risk. If the underwriters wish to bind the assured by a clause of which they give him no express notice on the certificate, they must at any rate make it clear in the document which they try to incorporate that any clause of limitation refers to a claim under the certificate. A somewhat similar line of argument was acted on by this court in the case of *Koskas v. Standard Marine Insurance Company* (17 Asp. Mar. Law Cas. 240; 137 L. T. Rep. 165) on which the appellants relied. I do not quite know why they relied on it, for what was decided in that case was that the underwriters had not made it clear that notice to Lloyd's agent of a loss was a condition of recovery on the policy; and so could not rely on such a clause as a condition precedent; and all the judges point out the

extreme difficulty of knowing how much, if anything, in the policy was incorporated in the certificate. We were told in the present case: "You must incorporate something for the perils insured against are not exhaustively stated in the certificate." They are for the purpose of claiming for "leakage from any cause"; and if the warehouse clause forms part of the certificate, as it does, apparently, in the original form with which the court has been supplied, the perils insured under the land portion of that clause are stated on the face of the certificate. So are the war risks. It is true that sea perils are not so stated, and underwriters would find some difficulty in resisting their incorporation in the certificate, as a clause against them, which they had negligently omitted. But it is a different thing to try and incorporate a clause in their favour of which they have given the European assured no notice. The judgments of this court in the case of *Donald H. Scott and Co. Limited v. Barclays Bank Limited* (129 L. T. Rep 108; (1923) 2 K. B. 1) contemplate that a certificate may be such that an action may be brought on it. Incidentally the form of this certificate fully justifies the view in that case that some certificates may not be good tender to a purchaser. In this case, however, the purchaser accepted the certificate.

In my opinion the judgment of MacKinnon, J. was right and the appeal should be dismissed with costs. I would add that I see no reason to think that the American system of a supposed continuous policy and certificates is any improvement either from a business or legal point of view on the English system of open cover, declarations, and separate policies, where required—rather the contrary.

SANKEY, L.J.—The plaintiffs in this case sued under a certificate of insurance dated the 27th Aug. 1923, issued under policies of marine insurance subscribed to respectively by each defendant under which the plaintiffs were insured on 100 barrels of turpentine valued at a sum insured for shipment by the steamship *Cape Town Maru* at and from Jacksonville, Florida, to Rotterdam, Holland, against the ordinary marine perils and against leakage, by a clause in the following terms: "To pay leakage from any cause in excess of one per cent. on each invoice, or whole leakage without deduction if vessel or craft be stranded, sunk, burnt, on fire or in collision, or there be any forced discharge of cargo at a port of distress." The said barrels of turpentine were duly shipped on board the said vessel, but according to the contention of the plaintiffs they suffered from leakage during the voyage and on arrival at Rotterdam there was a shortage, in respect of which they claim.

Three points were taken for the defendants: (1) That there was not sufficient evidence that there had been such a loss. (2) That in any event the loss was not caused by leakage. (3) That in the policy of insurance there was a clause under which the defendants were not to

be liable unless the action were brought within a year of the loss.

The learned judge decided in favour of the plaintiffs and from his judgment the present appeal is brought.

It is necessary to state a few facts before dealing with the points. The turpentine was bought by the plaintiffs from the Columbia Naval Stores Company under a c.i.f. contract. As is usual in this trade in America, the vendors took out with the defendants what may be called general policies, which are the policies above referred to, and when they sold the goods under a c.i.f. contract they handed to the purchaser a certificate of insurance "under the general policy," which is the certificate above referred to. A difficulty in the trade is caused by the fact that the amount of the turpentine is ascertained in different ways at the port of shipment and the port of unloading. At the port of shipment it is measured and the result is expressed in gallons. At the port of discharge it is weighed and the result is expressed in kilograms. The certificate of insurance provided the method of converting the kilograms into gallons. At the port of shipment the number of gallons was found to be 5107. At the port of discharge by the above-mentioned method of calculation it was found to be 4992. The result was a shortage of 115 gallons.

The defendants claim that under the leakage clause they are entitled to 1 per cent. franchise, which would amount to 51 gallons. Further, that owing to the fact that the temperature at Jacksonville is 20 degrees higher than the temperature at Rotterdam, the turpentine at the former place expands and occupies a greater amount of space—that is to say, contains a greater number of gallons than it does in the cooler air of Rotterdam. There was evidence that on a cargo of the present sort the difference would represent 44 gallons. Adding this to the 51 gallons above referred to the defendants say that the real shortage or leakage is only a few gallons, in respect of which they have paid into court with a denial of liability a sum which is more than sufficient to discharge their liability.

I now deal with the three points: (1) That the evidence with regard to the weighing or measuring is unsatisfactory. It was suggested that the weighing and measuring were a rough-and-ready, and so an inaccurate, method of ascertaining the quantity, but in cases of this character meticulous accuracy is not demanded either in the city or in the courts. You do not weigh coal in apothecaries' scales nor measure turpentine in medicine glasses; neither common sense nor common law require such a method. Here, according to the affidavits, the measurement at Jacksonville, and the weighing at Rotterdam were done in the usual and ordinary way. The learned judge found that the result was substantially correct, and I see no reason to interfere with his decision. (2) That the greater part of the loss in question was not caused by leakage, but by a physical alteration in the volume due to the difference in tempera-

ture. It was said that in effect the plaintiffs, subject to the franchise of 1 per cent. and to the amount for which the payment into court was made, actually received at Rotterdam what was shipped at Jacksonville. The word "leakage" standing by itself might not perhaps include evaporation and might perhaps refer only to a loss of liquid caused by the liquid getting from inside to the outside of the cask. By custom, however, or by contract, a special and artificial meaning may be attached to the word and parties may agree upon a conventional method of ascertaining an amount, although the result may not be mathematically correct. In my view, that is what happened in this case. By the certificate of insurance the defendants agreed to pay for leakage from any cause in excess of 1 per cent., and they agreed that the number of gallons shipped at Jacksonville should be ascertained and the number of kilograms unloaded at Rotterdam ascertained and translated into gallons by means of a conventional calculation, and that the result of that conventional calculation should be compared with the result of the measurement at Jacksonville in order to ascertain the leakage. (3) That there was a time-limit for bringing the action. The defendants contend that the limitation clause of twelve months applies to and defeats the present action. That limitation clause does not occur in the certificate, which is the only document the plaintiffs ever had or saw. It only appears in the policy which, as above pointed out, was the general policy issued to and kept by the vendors. The clause is in the following terms: "It is agreed that no suit or action for the recovery of any claim arising under this policy shall be maintainable in any court unless such suit or action shall have been commenced within one year from the date of the happening of the loss out of which the said claim arose." It will be noticed that the clause does not contain the words "or any certificate issued thereunder." Indeed, the policy is a somewhat extraordinary document. It consists of an original with many addenda, some of which are stamped on the policy, in some cases over and above clauses already there, in other cases gummed on to it, and in the result it is an almost illegible and unintelligible jumble of stipulations.

The defendants contend that the policy is incorporated by the certificate and forms part of their contract. The plaintiffs, while admitting that some clauses of the policy are incorporated into the certificate, deny that so unusual a clause as this limitation clause ought to be read into it. The learned judge has accepted this view and I think he was right.

The certificates sued on certifies that the barrels in question were insured under certain policies, No. 524 of the Phoenix Company and No. 387 of the Great American Company; it adds: "This certificate represents and takes the place of the policy and conveys all the rights of the original policy-holder for the purpose of collecting any loss or claims as fully as if the property was covered by a special policy direct

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to the holder of this certificate and free from any liability for unpaid premiums."

It may be that in order to validate the certificate it is necessary to incorporate certain clauses of the policies and to provide thereby for necessary terms omitted from the certificate, but I do not think it is permissible to incorporate clauses which are not only not necessary to validate the certificate, but which have the effect of restricting it in the way the defendants desire to do.

In my view, if the defendants wish to rely upon a clause of this character they should give ample notice of it by placing it upon the certificate itself in order to show that the right of the assured is a strictly limited one, namely, a right which can only be enforceable within twelve months of the loss. The American decision of *Graham Brothers v. St. Paul Insurance Company* (1 American Maritime Cases 836) is to this effect: (see the judgment of Glennon, J., at p. 839).

For these reasons and for those given by MacKinnon, J. I am of opinion that this clause cannot be read into the certificate. In coming to this conclusion we are not in any way impugning the decision given by this court in *Scott v. Barclays Bank* (129 L. T. Rep. 108; (1923) 2 K. B. 1), where the real question was whether the certificate there was an approved policy within the meaning of the contract in the case and the Court of Appeal held it was not, or in *Koskas v. Standard Marine Insurance Company Limited* (17 Asp. Mar. Law Cas. 240; 137 L. T. Rep. 165), where this court held that they were not satisfied that the compliance with the clause therein referred to was a condition precedent to the plaintiffs' success.

In my opinion the appeal should be dismissed with costs.

RUSSELL, J.—I agree that this appeal should be dismissed and I only desire to express my views upon the question whether the one-year clause applies, so as to defeat the plaintiffs' claim.

For brevity's sake I propose dealing with that matter as if only one policy, namely, No. 924 of the Phoenix Company, had to be considered.

In order to defeat the plaintiffs' claim the defendants must establish that the plaintiffs are bound by the one-year clause as part of the contract under which they establish their claim to the insurance moneys.

The one-year clause may, with diligence, be found in the crazy patchwork of documents and clauses which constitute Policy No. 924. The argument that the one-year clause is part of the contract with the plaintiffs is based on the following matters: (1) The certificate states the insurance as being under Policy No. 924. (2) The certificate states only some of the risks insured: it does not mention perils of the sea. (3) The certificate provides in terms that claims are to be adjusted according to the usages of Lloyd's, but subject to the conditions of the policy and the contract of insurance. *Koskas'*

case (137 L. T. Rep. 165) is relied upon as establishing that, in these circumstances, you are bound to treat the policy and certificate as one document so that all the provisions contained in the policy are binding upon the holder of the certificate, except only such as are inconsistent with the provisions of the certificate. Hence it would follow that the certificate holder would be bound by the one-year clause, even though he never knew of its existence.

On the other side the contention is that the certificate is stated to represent and take the place of the policy, and that, throughout the certificate, claims by the assured are described as claims "under the certificate"; further, it is pointed out that in some respects and for some purposes the certificate specifically incorporates the terms of the policy, which would be unnecessary if the provisions of the policy were intended to be incorporated *en bloc*.

There is no doubt much to be said in support of each of these rival views. There is, however, in my opinion, one thing which is reasonably clear about these documents, namely, the intention of all parties that as far as is possible the certificates should be self-contained independent documents under which (without having recourse to any other document) insurance claims could be made and enforced by the endorsee against the Phoenix Company. In other words, that the terms of Policy No. 924 are not to be taken into account except to the extent that either the terms of the certificate or necessity may require. With those exceptions the rights of the endorsee are to be governed by the certificate and nothing else. To impute any other intention would be to impute an intention which would clog and hamper business, and which would be contrary to some of the express provisions of the certificate. There is nothing in *Koskas'* case (*sup.*) which is contrary to this view. The point for decision in that case was whether compliance with a clause printed on and forming part of the certificate of insurance was a condition precedent to the right of the assured to sue. The certificate was silent as to risks insured. The court held that in order to ascertain whether compliance was a condition precedent you must look at the whole contract, which in that case must necessarily include the policy which alone contained the risks insured. Upon a consideration of the policy and certificate they were unable to come to a conclusion that compliance with the clause was a condition precedent.

But for the purpose of making and enforcing their present claim against the Phoenix Company the plaintiffs have no need to refer to the policy at all except in regard to rates of exchange, the provision for which is contained in the policy and is specifically incorporated in the certificate as one of the conditions of the policy relating to adjustment. The risk in question in this action, namely, leakage, is specified in the certificate together with the machinery for comparing gallons with kilograms.

K.B.]

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[K.B.]

Why then, in this case should or need the one-year clause be imported into the certificate? It applies in terms only to "any claim arising under this policy." It does not in terms apply to a claim under the certificate; or a claim arising under the two documents jointly, or indeed to a claim arising by virtue of the policy. This may seem a narrow construction of the words used, but I see no reason for adopting, for the benefit of the underwriters, a more benevolent meaning of a clause inserted by them for the purpose of restricting the rights of their customers.

In my opinion where, as here, you have a claim under the certificate for loss in respect of a cargo specified in the certificate, by reason of a risk specified in the certificate, it would be wrong and contrary to the true intention of the parties to apply to such a claim a provision of the policy which relates to a claim made under the policy and does not refer to a claim made under a certificate.

This is, in my view, sufficient to dispose of this point in the present appeal.

I express no opinion as to what the position would be if the claim had been in respect of a risk not covered by the certificate, but covered by the provisions of the policy—where, of necessity, the policy must be referred to and read in conjunction with the certificate.

Appeal dismissed.

Solicitors for the appellants, *Windybank, Samuell, and Lawrence.*

Solicitors for the respondents, *William A. Crump and Son.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Jan. 11, 12, 13, 14, 17, and 26, 1928.

(Before WRIGHT, J.)

FOREMANS AND ELLAMS LIMITED v. FEDERAL STEAM NAVIGATION COMPANY LIMITED. (a)

"Deviation" — "Management of the ship" — Damage to cargo of beef due to insufficiently low temperature in refrigerating chambers—Error of judgment on part of the chief engineer—Australian Sea Carriage of Goods Act 1924.

A parcel of frozen beef from Australia was found to be damaged on arrival. The ship in which it was carried had visited several Queensland ports in the height of the Australian summer and the master decided to proceed to England by the south of Australia instead of the north. The voyage was considerably protracted owing chiefly to the effects of a recent strike and the "ca' canny" attitude adopted by the stokers. The ship had two refrigerating plants but only one was used throughout the voyage.

Held, that on the facts there had been no unreasonable deviation. The Act permitted "reasonable" deviation. Deviation would not be reasonable merely if it was convenient to the shipowner: it must be reasonable having regard to all the circumstances of the case.

Held, further, that on the facts the damage was due to an insufficiently low temperature being kept in the holds especially at time of shipment, an error of judgment on the part of the engineers. The words "default in the navigation or in the management of the ship" in art. IV., 2 (a) did not cover default in the management of the refrigerating machinery. The words in the exception referred to matters relating to a ship as a ship, and not to matters relating to refrigerating machinery which could not come under the head "navigation or management of a ship."

ACTION tried before Wright, J. without a jury.

The defendants were the owners of the steamship *Rimutaka*. The plaintiffs were endorsees of bills of lading of parcels of frozen beef shipped at Gladstone, Queensland, Australia, on the 24th Nov. 1925 for carriage to Liverpool. On arrival at Liverpool the meat was found to be seriously damaged, its condition being described as "mouldy, perished, broken, dirty and discoloured." The plaintiffs claimed damages for breach of contract of carriage. The defendants pleaded the protection of the Australian Sea Carriage of Goods Act 1924, the provisions of which were incorporated by clause paramount in the bills of lading. The usual voyage of the *Rimutaka* was from New Zealand to England via the Panama Canal carrying cargoes of frozen lamb. This voyage from Queensland was therefore an unusual one. Owing to the labour troubles, bad coal, and the necessity of calling at various ports the ship was much delayed and the actual passage to England was not commenced till Jan. 1926. The master then decided to proceed by the south of Australia and thus avoid the greater heat of the northern route. The vessel had two refrigerator plants but only one was used owing to the fact that it was difficult to keep up steam for the proper propulsion of the vessel because the stokers had adopted a "ca' canny" attitude during the whole of the voyage and while the vessel was picking up cargo at the Australian ports. The bills of lading contained very wide clauses regarding deviation and liability for damage to the cargo arising from breakdown or failure of the refrigerating plant, but as those were subject to the clause paramount incorporating the Australian Sea Carriage of Goods Act 1924, the plaintiffs' case was that there had been deviation which was unreasonable and as regards the damage the onus was placed on the carriers by the Act to show how the damage was caused and to prove that they were free from liability. The defence was that there had been no unreasonable deviation and the damage was due to the meat being bad on shipment. If in fact the temperatures of the refrigerating

(a) Reported by R. A. YULE, Esq., Barrister-at-Law.

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chambers had not been kept sufficiently low that was due to the "ca' canny" attitude of the men or to an error of judgment on the part of the engineers in not using the second refrigerating machine which was a default in the management of the ship and the defendants were therefore protected by art. IV., 2 (a) of the Act.

Miller, K.C. and David Davies for the plaintiffs.

Jowitt, K.C. and Pilcher for the defendants.

Cur. adv. vult.

Jan. 26.—WRIGHT, J. delivered the following considered judgment: In this case the plaintiffs claim as bill of lading holders under a bill of lading for refrigerated cargo dated Gladstone (which is a port in North Queensland) Nov. 24, 1925, in respect of 697 hindquarters of ox beef which were shipped by the steamship *Rimutaka* in good order and condition and are described as "hard frozen" to be delivered at Liverpool. The bill of lading which contained the elaborate series of clauses in small print which were previously common, contained also what is called the clause paramount in these terms: "This bill of lading is to be read and construed as if every clause therein contained which is rendered illegal or null and void by the Sea Carriage of Goods Act 1924, had never been inserted therein or had been cancelled and eliminated therefrom prior to the execution thereof, and is issued subject to all the terms and provisions of and to all the exemptions from liability contained in such Act." That clause paramount renders it unnecessary to consider in this action any of the small-print clauses except perhaps the deviation clause.

The goods were marked "I. C. E.," which is the third quality produced by the Gladstone works. On delivery at Liverpool they were found to be damaged to the extent of about 3 per cent. of the invoice value. The damage was small in amount and the proportion of damage was not large in itself, but it was made clear in the course of the action that this is only one claim, and that there are other claims of a similar character in respect of refrigerated goods shipped by different shippers and some at other loading ports and of different brands. These claims amount in all to a very considerable sum. The *Rimutaka* was owned by the New Zealand Shipping Company, but on the voyage in question was operated by the Federal Steam Navigation Company Limited, who are the actual defendants and who were putting this vessel as a cargo liner on their line which is known as the Federal Line. According to the cargo plan there are four insulated holds, of which Nos. 1, 2, and 3 are refrigerated by what is called the battery system, which means that dry cooled air is driven in at the bottom of the hold and sucked out at the top and in that way it removes part of the heat in the holds and reduces the temperature. The fourth hold, which is abaft the engine space, is refrigerated by a different system,

the brine system, but no question in connection with that hold arises in this action. I have noticed from the plan, though I was not referred to it at the trial, that there is a small ship's chamber which appears to be insulated, but no evidence has been given and no point has been taken as to that chamber which is obviously very small relatively to the refrigerated holds. The plaintiff's cargo was stowed at the bottom of Nos. 1 and 3 lower-holds.

The *Rimutaka* was generally employed on the New Zealand service, loading in New Zealand ports and going to Europe by means of the Panama Canal. The voyage on which she was engaged at the time in question was, therefore, somewhat unusual so far as she was concerned. It was also unusual in other and important respects. The original intention was that she should leave Sydney on the 22nd Aug. 1925, and she was then booked to proceed to various North Queensland ports and to return to Sydney after completing loading and start from Sydney to European ports of discharge by the 29th Sept. 1925. She left Sydney in fact on the 19th Aug. 1925, having taken there 557 tons of bunkers and, I think, some cargo, and she reached Brisbane on the 21st Aug. There she was held up by a strike which occurred and was actually detained until the 1st Nov. She then went to Newcastle, New South Wales, where she took 1385 tons of bunker coal and then sailed for Gladstone, where she arrived on the 15th Nov. She there took in a considerable quantity of refrigerated cargo, including the parcel in respect of which this action is brought, from the Gladstone works, who are a well-known freezing company at that port. On the 26th Nov. she went back to Brisbane, apparently to procure coal. She apparently only took 188 tons and that was of poor quality. She left Brisbane on the 5th Dec., went to Port Alma and loaded a refrigerated cargo there, being in that port from the 7th Dec. to the 11th Dec. She then proceeded to Cairns, which is the most northerly port of loading, to load further refrigerated cargo and remained there from the 14th Dec. to the 23rd Dec. At that time it was intended that she should proceed on her voyage by the northerly route which is by the Torres Straits and Batavia. She went to Cairns from Townsville, which was going back on her course but, as I see from the papers in this case, proceeding so was rendered necessary by questions relating to her draught. She was at Townsville from the 24th Dec. 1925 to the 7th Jan. 1926, where she loaded a considerable quantity of cargo and also took 705 tons' bunkers. At Townsville an important decision was taken on the advice of the master. His view was that it was necessary to change the vessel's route from the northerly route and, instead of that, to go south, that is to say round the south coast of Australia, which means down the Australian Bight, and then proceed to Colombo and so on to the Mediterranean through the Suez Canal. The reason for that

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decision was that there was very great heat at the loading ports and great difficulty was experienced in keeping the temperatures down in the refrigerating holds. These North Queensland ports are in the tropics and the season was mid-summer. The shipping season for frozen meat generally ends somewhere about September, though, indeed, as appears from a list put in on behalf of the defendants, it is not by any means unexampled to load frozen refrigerated cargoes in those North Queensland ports in December or January. From Townsville the vessel went south to Sydney where she arrived on the 13th Jan. and took in 1304 tons of coal. She then proceeded down south of the Australian coast, called at Albany, West Australia, on the 24th Jan. and took in 200 tons of coal. She then went to Colombo where she again coaled, and then to Port Said, where she took in further coal and discharged some cargo, and then discharged at Trieste, Genoa, London, Antwerp, and finally at Liverpool, where she arrived on the 12th April 1926.

The voyage included many ports of loading and discharge, but it is not suggested that in the main it was not such a voyage as would reasonably be expected in the case of a cargo liner engaged on this trade. Such a vessel would normally go to a considerable range of loading ports in order to fill up, and a considerable range of discharging ports in order to discharge her various parcels of cargo. There could be no idea, in the case of such a vessel, of proceeding from the port at which she loaded for a shipper a particular parcel to the discharging port for that particular parcel, and a shipper who demanded any such course would have to pay a freight which would be entirely prohibitive, and, indeed, in ordinary shipping business there is no idea of any such requirements. The plaintiffs, therefore, do not complain in general of the course which the voyage took, nor do they complain that the original intention to proceed north about was changed to a voyage round the south of Australia. They have, however, put forward a plea of deviation, and, as I understand it, all that remained of that plea at the end of the case were two matters. I disregard the fact that the voyage was very long because that depended on other circumstances, and, I think, constitutes, on the facts of this case, no deviation. They rely, I suppose, under that plea on two circumstances: one, that the vessel proceeded to Brisbane after the plaintiff's cargo was loaded. That, however, was not pleaded, and the pleadings have not been amended, the defendants saying that they had prepared no evidence on that point. The other complaint which, as I understand, remains under this head is that the vessel went to Cairns before she went to Townsville to load and did so at a time when she was intended to proceed by the northerly route. The captain was not called, being away on another voyage, but his letters were read in evidence, and I find in those letters, and particularly in the telegram

of the 25th Nov. 1925, the explanation of that course, and that is that, if she had loaded the substantial part of the cargo which she had booked to load at Townsville, it would not have enabled her to proceed to Cairns and to load. I find, therefore, that there was no unreasonable deviation under the Sea Carriage of Goods Act 1924, which deals with deviation by art. IV. (4). In fact, as it turned out, proceeding from Cairns to Townsville was on the line of her route when it was decided that she should go south. That decision, however, was only made at Townsville, but the fact of that decision would in any case, I think, prevent any damage being recovered in respect of that course being taken, even if I thought it was an unreasonable deviation. The words of the Act about deviation are far from clear, and many questions will no doubt some day have to be decided upon them. In particular the expression "reasonable deviation" may give rise to considerable difficulties. I think it is clear that a deviation would not be reasonable merely because it was convenient to the shipowner. Its reasonableness must depend upon what would be contemplated reasonably by both parties having regard to the well-known exigencies of the route, known, or assumed to be known, to both parties. And I think in this case that shippers on a cargo liner of this type must be deemed to have known the circumstances of mercantile geography such as the amount of water available at Cairns and the probable draught of a vessel of this type; and it is on that ground that I do not think the deviation here, the only deviation which I think is before me, can be regarded as unreasonable. In addition to that, account would have to be taken, I think, of the various terms in the deviation clause. The deviation clause here is very wide, and I think too wide to receive complete effect in every part, because every deviation clause must be construed with reference to the contemplated adventure. But I think that the language which gives "liberty to proceed to and stay at and (or) return to any ports or places whatsoever (although in a contrary direction to, or out of the route to or beyond the said port of discharge) once or oftener, in any order, backwards or forwards, for the purpose of dry-docking (even with cargo on board) or loading or discharging cargo, coal or passengers, or for any purpose whatsoever" ought to receive a reasonable construction in view of the ordinary methods of voyaging adopted by a cargo liner on an adventure of this character, and, quite apart from what I have said as to the reasonableness of calling at Townsville, I think calling at Townsville would also have been justified as reasonable having regard to the terms of the deviation clause which I have read. I hold, therefore, that there was no unreasonable deviation, and it is therefore unnecessary for me to consider what, under the provisions of the Act, "constituted an infringement or breach of the rules or of the contract of carriage." As I have said, the voyage here was very

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protracted : in the case of this particular parcel it lasted for four and a half months from the time of loading. But that was due to a series of difficulties and to the low speeds at which the vessel was proceeding, and, as I have said, such delay in my judgment did not constitute an unreasonable deviation. In any case the evidence is that with proper temperatures in the hold, the length of time during which the voyage continued would cause no damage to the cargo. It is not suggested by either side that the ship was unseaworthy in any respect, the plea which the plaintiffs had put on record having been definitely abandoned.

What then was the cause of the damage to this parcel of cargo? In the end there are two theories put forward. The plaintiffs say that the temperatures in the hold were too high and were not uniform enough for the safe carriage of this cargo. The defendants say that the damage was due to the character of the meat when it was shipped, namely, that it was of low grade, and they rely on inherent vice under art. IV. 2 (m) of the Act. The damage on arrival was mould, and by that is meant white mould. The meat was perished and discoloured, the lean portions being dark brown and spongy and the fat pale and rancid. I have heard a good deal of evidence on this point, but I find that the evidence relied upon by the plaintiffs is right. I accept in particular the evidence of Mr. Robert Clarke who surveyed the cargo on arrival and, as I find, made the survey in a reasonable and fair way and on a fair and customary sample. The mark "I. C. E." is a well-known brand of refrigerated meat. It is the third or lowest quality of the shippers. It is, however, a generally good class and to a large extent consists of good quality meat which has become bruised and therefore has had to be scraped or part cut off. It may be that some part of it is rather lean. The bill of lading says that the meat was shipped in apparent good order and condition or hard frozen. It is true that it was loaded in very hot weather and in that way perhaps there was some surface thawing. That, however, would not be extraordinary under such circumstances and is a matter which I think should be dealt with in the holds. The freezing certificates which accompanied the shipment referred to it as certifying that it was shipped "in good condition, properly dressed, cooled and frozen . . . and the period between the time the meat was received into the freezing-chambers and shipped per the *Rimutaka* did not exceed ninety days," and that the meat was dispatched direct from the works to the ship. There is also a Government certificate, but I disregard that because it seems to me rather to refer to the condition of the meat at the time when its preparation was completed than to its actual condition on shipment. I say no more about that. It appears on evidence put before me that such damage as was experienced as regards this parcel, was not peculiar to this parcel, but that similar damage was found in goods

loaded by different shippers at different ports in different holds and of different qualities. On the whole I accept the evidence that the damage was due to the meat being carried at excessive temperatures and with excessive variations of temperature, and I find that there is no ground for attack on the quality of the meat as responsible for the damage and no relation between the quality or condition of the meat on shipment and the damage ascertained on discharge. But excessive and irregular temperatures would, in the absence of unseaworthiness, which is not alleged, or some maritime casualty which is not suggested, *prima facie* indicate some negligence or default in the care of the cargo on the ship, because the primary duty in carrying refrigerated cargoes is to maintain proper temperatures. In fact, it is scarcely disputed that the temperatures on this voyage shown by the refrigerating logs were higher than customary, that is to say, up to Suez, where they first became normal. The captain wrote various letters from time to time which I think throw light on the feelings of those on board on this matter. The chief engineer, who gave evidence, gave some opinions somewhat at variance with these contemporaneous documents, but I think great weight must be given to the letters which were written at the time. No doubt the captain, writing about the temperatures in the holds, would do so on the intimation of the chief engineer and after consultation with him. He wrote: "The temperatures in all holds came down to about normal after leaving Port Said, the sea and air being colder." Before that they had not been normal but a source of great anxiety to the captain and engineer, at least whenever the sea temperatures were high, as appears from the captain's letters. Thus at Cairns on the 17th Dec. 1925 the captain wrote: "The refrigerating engine is only holding its own with the temperatures from 18 degrees Fahr. to 22 degrees Fahr." At Townsville the captain gives the temperatures, and adds: "The machine is just holding its own." That, no doubt, was in high temperatures, but the ship undertook to carry the cargo under the conditions which actually prevailed. At Townsville again the captain writes and presses to be allowed to go by the southerly route. He writes again from Sydney that "due to the very high temperature of sea water and air" they could not bring the temperature below an average of 20 degrees Fahr., "thereby running a great risk of the cargo going bad." Then he adds: "Refrigerator. This machine has done well. To time of ship sailing from Townsville it had been running for nearly five months," and then he says that but for the strike they would have loaded three months earlier, "and no doubt the refrigerator would have been able to contend with the work required." He further referred to the coal which, as I explain below, does not appear to me to be material. At Albany, on the 24th Jan. 1926, in cooler water, he says: "The temperatures of the frozen meat-holds are in a

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safe condition, being at an average of 16 degrees to 17 degrees Fahr." They rose again, however, to an average of 18 degrees, with certain temperatures of 20 degrees or 22 degrees in some holds when the ship was in the Indian Ocean. At Colombo it was reported that the refrigerator was working well and holding its own at an average temperature in the hold of 18 degrees Fahr. A careful chart of the temperatures during the voyage up to Suez, as shown in the refrigerating logs, has been prepared by the plaintiffs. It gives as the margin of safety 18 degrees Fahr. and takes a lower limit of 16 degrees Fahr. and shows that the lower thermometers in the holds were sometimes above these temperatures, and the upper thermometers were constantly considerably above that range of safety. It is agreed that this is the proper range. The chief engineer in the correspondence said that the thermometer readings at 22 degrees or 23 degrees Fahr. caused him anxiety, and he also said in evidence that 15 degrees Fahr. was the proper carrying temperature, and that he aimed at that or at 16 degrees, and that actual temperatures were generally higher than normal, and higher than what he would desire. It is, however, clear on the evidence that a piece of meat will be safe, if hard frozen to start with, if kept at 27 degrees Fahr. for lean meat, and 22 degrees Fahr. for fat. This may appear to be at variance with what I find to be the recognised requirement that the safe temperature should be about 15 or 16 degrees Fahr., with a danger limit of 18 degrees Fahr. Mr. Swainston says that this margin of safety is provided in case of a breakdown. That is to some extent true, but I think it is not the whole truth. I think the true explanation is that the temperatures shown on the thermometers cannot be relied on to show the temperatures throughout the hold or affecting large portions of meat in the hold, perhaps not even the correct temperatures at the bottom of the hold. In each hold there are twelve thermometers suspended, six at the top and six at the bottom. These thermometers are all 8ft. from the outer side of the ship, or rather, I should say, of the insulation, and they are about 1½ft. from the bottom of the holds, or bottom of the insulation, and 1½ft. from the top, and they are 15ft. or so apart. Between the thermometers and the bottom of the ship there is risk of greater heating because those parts are nearer the water, which may be at high temperatures. There is also the risk of hot pockets affecting pieces of cargo, and of varying air-currents and, further than that, as you go higher in the hold the temperatures will become higher. For instance, the temperature shown by a thermometer 1½ft. above the bottom of the hold may be lower than the temperature even 2ft. above that. It is, I think, because of these reasons that 16 degrees Fahr. or thereabouts is generally taken as the safe limit, because that ensures that no piece of cargo can be dangerously higher.

The main cause of damage was, as I find, that adequate steps were not at once taken, whenever the holds were closed down after loading, to reduce the temperatures or taken in proper time. The vessel had two refrigerating machines which were used alternatively or simultaneously, but, in the actual facts of the case only one was ever used on the voyage. It worked at full capacity, and it worked efficiently. That would, no doubt, have sufficed for the ordinary course of the voyage if the course, as I understand, recommended by Mr. Swainston as a wise precautionary measure had been taken, namely, to put on the second machine for a short period each time after loading, and after the hatch covers were put on until the temperatures came down. Mr. Williams, the plaintiffs' principal expert, also said that the second machine should have been put on along with the first at that time, and Mr. Daniels also agreed. The reason given is that during loading and especially in hot temperatures such as existed on this voyage on loading, the temperatures in the hold must rise. Indeed, the men will not work unless the temperature is brought up to, say, 20 degrees Fahr., and at the top of the hold it may rise to 30 degrees or more. Furthermore, in hot weather, meat, even if hard frozen in the proper sense of the term, may have superficial thawing and moisture due to temporary exposure to the atmosphere. If there is such moisture on the meat, pollen which is always present in the atmosphere, will settle upon it, and white mould will develop unless the surface moisture is frozen before the pollen can germinate, which would be in about twenty-four to forty-eight hours. Rapid freezing of this surface moisture will stop germination and prevent mould, and, once the temperatures are reduced quickly after closing the hold, a single machine will cope sufficiently with the situation, and, as I find, would have coped sufficiently with the situation on this ship. Mr. Williams thinks that in that way the two machines would sufficiently cool the air and freeze the surface moisture in twenty-four hours. Even if it took longer as Mr. Swainston seems to think (though his estimate of nine days refers to more complete cooling), and steam was not available in sufficient quantities both for driving the ship and working both refrigerating machines, the ship could have been kept in port, as indeed Mr. Swainston seems to think, until the temperatures were sufficiently down. She was not going at express speed, and a few days longer on such a voyage would not have made much difference. In any case the ship's duty was to preserve the cargo.

I hold that the chief engineer was guilty of an error of judgment in not taking these precautions, that is to say, in not putting on the second machine, as these precautions, I think, would have prevented the damage which the cargo suffered. The chief engineer impressed me as a capable and zealous officer, and he was a most fair and candid witness, though some of his opinions I do not accept. His error of

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judgment was, I think, considering all the circumstances, venial, especially considering the difficulties in which he had been placed by the strike, the heat due to the postponement of the voyage, and possibly troubles with the firemen and with bunker coal. He had been accustomed to the New Zealand trade, and found himself in conditions which were somewhat novel to him. All the same, I find that his error of judgment constituted a failure to exercise due care in the custody of the cargo.

Much was said about the firemen, who may have been rather slack by reason of discontent at having been worsted in the strike, though I feel that enthusiasm in firemen in the stokehold of the *Rimutaka* under the tropical conditions prevailing was very much to expect. I am sure the engineers did their best to keep them up to their work. As to the coal, the chief engineer said that he did not find fault with some of the coal, but the Brisbane coal which was bad, only consisted of 188 tons. Much of the other coal was excessive in ash, and none of it was so good as English or Welsh or even New Zealand coal. The chief engineer put the ship's speed with Australian coal at ten and a half knots, no doubt on the high side, not making allowances for head winds or difficulties of that type. The vessel's bottom at this time was very foul, and allowance has to be made for head winds and currents as well as for the usual cleaning of the furnaces in each watch which obviously reduces speed while it goes on. It was said that that source of delay was more than usual on this voyage owing to the high percentage of ash in the coal, but the chief engineer always had steam enough, though he was economising his steam, to work one refrigerating machine to its full capacity, and to put on the other if he did not stop in port until he got the temperatures down, as it only reduced the speed from one-half to one knot. His lowest speeds on the Australian coast after leaving Brisbane averaged for the day over 6.63 with three exceptions of 6 knots, 6.49, and 6.27. Apart from that, the average daily speeds up to Sydney were between 7.12 and 9.21. There are at most only about five days when, allowing even one knot loss of average speed for the second refrigerating machine, the ship, with the two refrigerating machines working, would not have done the six knots which the chief mate said he "pretty well" wanted in going down the Barrier Reef. It might have been necessary to wait a few hours to get the temperatures down by the second machine at Gladstone, Brisbane, or Port Alma, though I am not satisfied as to that, but not at any later port. However that may be, if it was necessary to wait, then I think it was a proper and necessary step to take for the preservation of the cargo. In truth, the chief engineer, as he candidly said, never thought of putting on the second refrigerating machine except when they contemplated going by the Torres Straits. Apart from that he said he did not put on another refrigerating machine because he did not think it necessary. I am

not disposed to blame him, but I hold that he committed an error of judgment, and that that error, in my opinion, caused the damage to the cargo. For that, in my judgment, the defendants are liable unless they succeed in their defence in law, and for that defence they rely on the exception contained in art. IV. 2 (a) of the Sea Carriage of Goods Act 1924:

It thus falls to be decided for the first time under the Sea Carriage of Goods Act 1924 (I treat the Australian Act as identical with the English Act) what is the extent of the shipowner's obligation where refrigerated cargo during its carriage on shipboard is damaged by the negligent management of the refrigerating machinery by the shipowner's servants. Art. III. (2) is in these terms: "Subject to the provisions of art. IV., the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." Art. III. (8) provides that: "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these rules, shall be null and void and of no effect." It is clear that the obligation to carry, keep and care for the goods between stowage and discharge is to be performed not by the carrier personally but by his servants, especially those on board the ship during the voyage. A refrigerated cargo depends for its preservation on being carried in insulated holds kept at the proper temperatures by the due and proper management of the refrigerating machinery. The putting into further insulated holds appertains to the loading and stowage. Until discharge practically the whole duty as regards the proper caring for the cargo as such is summed up in the due management of the refrigerating machinery so as to maintain correct temperatures.

Art. III. (2) is, however, subject to Art. IV., which is in the nature of an exception clause. The only relevant "exception" (to adopt the expression of art. IV., 2 (9)) is art. IV., 2 (a), which is in the following terms:—"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: (a) act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."

It is apparent that if "management of the ship" here includes "management of the refrigerating machinery resulting in improper temperatures in the hold to the detriment of the cargo," there is in effect nothing left of the obligation properly to care for such a cargo under art. III. (2). On that view, in effect, the exception is a general negligence exception, but in the absence of very clear words, where words of positive obligation are subject to words of exception, the presumption is that the exception is narrower than the obligation. Refrigerated cargoes are of sufficient importance to call for special reference in art. III.

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(1) (c), but indeed, the contention that management of refrigerating machinery is included in the phrase "navigation and management of the ship" is only part of a general contention that the phrase is a general exception of any negligence in the care of the cargo where such care depends on the "management" of any appliance or part of the ship provided for or adopted to the care of the cargo, such as pipelines and pumping appliances (in the case of liquid cargoes), ventilating appliances and any special appliances or parts of the ship such as ventilators, ventilating fans and pumps, the due handling of which is necessary for the proper care of the cargo. In many cases of particular cargoes the effect of the construction of the exception is entirely, and in other cases largely, to neutralise the positive obligation properly to care for the cargo. No doubt the obligation is "subject to" the exception, but it is necessary to construe the words of the obligation, and of the exception together, so as to decide if the words of the latter are explicit enough to justify the effect which is contended for. These questions are not limited to caring for the goods during carriage, but also arise in reference to loading and discharging operations which may be performed by means either of shore cranes or of the ship's derricks and winches. The wide meaning of "navigation and management of the ship" that is to include management of any part of the structure of the ship, even if only used for cargo purposes, would mean that the shipowner would be relieved of liability for damage to cargo caused by the negligent handling of ship's derricks and winches, and relieved of any obligation by his servants to care for the same, whereas if identically the same operation was carried out in loading or discharging with the same negligence by shore cranes he would be liable—a somewhat anomalous distinction. Apart from authority which I shall consider later, I do not think the scope of art. IV. (2) (a) is as wide as the defendants' contend, or is as wide as to cover negligence in the due performance of the obligation to care for the refrigerated cargo by keeping down the temperatures in the hold by means of the refrigerating machinery. A negligence or exception clause in a statute, as in a contract, ought, I think, to be strictly construed. The words of art. IV. (2) (a) appear to be connected with matters directly affecting the ship as a ship and not matters affecting exclusively, or even primarily, the cargo, even though such latter matters involve the user of parts of the ship. The word "navigation" is clearly only applicable to the ship as such, and I think the more general word "management" should be read *ejusdem generis*, and the word "ship" should receive the same connotation with each of the substantives on which it is dependent, the word "management" covering many acts directly affecting the ship, which could not well be covered by "navigation." The words of the exception are not "in the navigation or in the management of the ship or any part of the ship neces-

sary for the proper and due care of the cargo," nor are the words, to put it differently, "in the management of the cargo by the use of the ship's parts or appliances." I see no difficulty in the broad demarcation of the distinction I have just indicated though there may be borderline cases. The distinction is (to adopt the words of Stirling, L.J. in *Rowson v. Atlantic Transport Company* (9 Asp. Mar. Law Cas., at p. 462; 89 L. T. Rep., p. 204, at p. 208; (1903) 2 K. B. 666, at p. 682) between negligent acts which have to do with the general management of the vessel and negligent acts which have to do with the management of a portion of the vessel appropriated to the cargo. A modern steamship is not only a complicated steel structure of frames, girders and plates, but contains complicated machinery such as propelling engines and boilers which have supplant masts, sails and rigging, steam steering gear, ballast tanks, pumps and elaborate piping. Negligence in handling these directly affects the ship in its essential functions of floating, being watertight, being steered and of being navigated safely and correctly. If a ship is stranded or sunk, if the sea connections are improperly opened and so on, there is a fault in navigation and management which directly affects the ship; but there is this also, in so far as the cargo is thereby damaged by such negligence, a breach of the obligation to care for the cargo, and it is to such negligence, in my opinion, that the exception of art. IV. 2 (a) applies. On the other hand many modern steamships, like the *Rimutaka*, have holds which are insulated and which can be cooled by elaborate refrigerating machinery and apparatus. All this constitutes parts of the ship and of its equipment, but these are solely provided for the care of the special cargo. The ship can, as a seagoing vessel, be safely and efficiently navigated and managed even though the refrigerating equipment is in disorder and the cargo perishing. This equipment is not in use at all on voyages where no refrigerated cargo is being carried. The same is true of the elaborate system of tanks, pipes and pumps necessary for the carriage of fuel oil. I take these illustrations as sufficient to indicate the distinction between "navigation and management of the ship" on the one hand and "management of the cargo" on the other. There are also some parts of the ship which for this purpose may be regarded as *ancipitis usus*; for instance, the hatches may in one aspect be regarded as part of the outer skin of the vessel as when decks are actually or potentially swept by seas, so that the proper battening down of the hatches with tarpaulins and cleats is as much a part of the management of the ship as the closing of portholes. Under other circumstances, as in dock or in calm waters, the hatches belong to the management of the cargo either because they have to be removed for ventilation or kept tight to keep wet from perishable cargo. Similarly, ship's derricks and winches may be used for

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ship's purposes so as to appertain to the management of the ship.

The construction I have ventured to propound must depend on the precise words of this statute reading all parts together, but it is, I think, generally in accord with the cases decided on the words "navigation and management of the ship" contained in the American Act of Congress 1893, generally known as the Harter Act, which in the courts of the United States has been construed as a statute and in the courts of this country as having contractual force when embodied in a bill of lading. The distinction explained above has in such cases (with perhaps one exception) been drawn. The Harter Act contained two clauses prohibiting in contracts of affreightment the insertion of clauses relieving the shipowner from liability for proper care in regard to the cargo or lessening his liability to exercise due diligence to provide a seaworthy ship. In the third clause it gives a conditional statutory exception of (*inter alia*) "Faults or errors in navigation, or in the management of the said vessel." Of the English authorities I may refer to two decisions of Divisional Courts in Admiralty. In *The Glenochil* (8 Asp. Mar. Law Cas. 218; 73 L. T. Rep. 416; (1896) P. 10), goods were damaged by water getting into the hold through a broken pipe when the ballast tank was being pumped up to trim the vessel. That was held to be management of the vessel though not navigation. Gorell Barnes, J. said (73 L. T. Rep., at p. 419; (1896) P., at p. 19): "There will be found a strong and marked contrast in the provisions which deal with the care of the cargo and those which deal with the management of the ship herself." In *The Rodney* (9 Asp. Mar. Law Cas. 39; 82 L. T. Rep. 27; (1900) P. 112), the boatswain in order to rid the fore-castle of water during heavy weather, in clearing a pipe poked a hole by which sea-water got into the hold, and it was held to be an act in the management of the ship. Gorell Barnes, J., said (9 Asp. Mar. Law Cas., at p. 40; 82 L. T. Rep., at p. 28; (1900) P., at p. 117): "The words 'fault or errors in the management of the vessel' include improper handling of the ship, as a ship, which affects the safety of the cargo." In neither of these cases had the act done any direct or indirect reference to the cargo; in each case the continuity of the ship's defences against the inlet of sea-water was interfered with. Certain American decisions do exemplify cases where parts of the ship have been used solely or primarily for the care of the cargo, and where these acts have not been held to constitute acts in the management of the vessel but acts in the care and custody of the cargo. In the case of the *Andean Trading Company v. Pacific Steam Navigation Company* (263 Fed. Rep. 559), the Circuit Court of Appeals, 2nd Circuit, New York, held that damage to cargo due to hatches being improperly left open for ventilation was not an act primarily "connected with the

navigation or the management of the vessel and not with the cargo." They adopted this method of expressing the differentiation from the Supreme Court decision in the case of *Knott v. Botany Mills* (179 U. S. 69) where cargo stowed in the fore part of a hold was damaged by drainage from cargo stowed aft of it, the ship being put slightly down by the head so as in no way to affect her seaworthiness. That was held to be neglect in the care of the cargo and not in the navigation or management of the vessel. In the case of *The Jean Bart* (197 Fed. Rep. 1002) a failure to make during the voyage proper use of ventilating apparatus so that cargo was damaged, was held not to be an act in the management of the ship but a failure in the proper care of the cargo. In the case of *The Germanic* (196 U. S. 589) the Supreme Court again adopted the limitation of the exception of faults in the management of the ship to "faults primarily connected with the navigation or management of the vessel and not with the cargo." The application of that principle to the facts in that case was somewhat striking.

There are two earlier authorities dealing with the case of refrigerated cargoes, one in this country, *Rowson v. Atlantic Transport Company* (9 Asp. Mar. Law Cas. 347; 87 L. T. Rep. 717; (1903) 1 K. B. 114) and in the Court of Appeal (9 Asp. Mar. Law Cas. 458; 89 L. T. Rep. 204; (1903) 2 K. B. 666), and the other in America, *The Samland* (7 Fed. Rep. (2nd) 155). In *Rowson's* case, Kennedy, J. held that want of due diligence in the user of the refrigerating apparatus was "negligence in the management of the ship of which that machinery is a part" (9 Asp. Mar. Law Cas. at p. 351; 87 L. T. Rep., at p. 721; (1903) 1 K. B., at p. 117). He seems to arrive at that conclusion by considering that the original fitness of the refrigerating machinery is necessary to constitute the ship seaworthy in the artificial sense of being fit to carry the special cargo. In the Court of Appeal the gist of the argument on behalf of the owners of the goods may be found in the following passage from the report: "Attending to refrigerating machinery cannot be said to be included in the management of the ship merely because it happens to be bolted to the ship and is operated by the ship's engines. It may be that on a particular voyage the machinery may not be required to be used at all. It is essentially an arrangement for the care and custody of the cargo and the shipowner can only escape liability for his negligent default as regards such care and custody by clear, definite and express language, mere words of general exemption are insufficient to protect him. Here the successful carriage of these goods depended upon the refrigerating machinery being kept in good working order." The Court of Appeal while affirming the decision of Kennedy, J. in the result, did so on the limited ground that the refrigerating apparatus and machinery were not merely used for purposes of the cargo, but also for cooling the ship's

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provisions. The most careful judgment is that of Stirling, L.J., who quotes with approval the expressions of the court to be found in the judgment in *The Glenochil* (*sup.*) and in *The Rodney* (*sup.*). The learned Lord Justice draws a distinction between a negligent act which had nothing to do with the general management of the vessel but simply with the management of a portion of the vessel which was exclusively appropriated to the care of the cargo. Vaughan Williams, L.J., says, "What . . . is the meaning of the words 'in the management of the said vessel'? I say they mean 'in the management of the said vessel *qua* vessel.'" He adds, on the hypothesis that the refrigerating apparatus was solely for the cargo: "I should, I think, not have been able to persuade myself . . . that mismanagement of that special apparatus was a mismanagement of the vessel."

No such distinction arises in the *Rimutaka*. It is true that the plan shows a ship's chamber apparently insulated, but it is shown as empty and no point was taken or evidence given that it was refrigerated on the voyage or at all. The ground of distinction is, I venture to think, somewhat artificial and would enable ship-owners, by adding an insulated cool chamber for the ship's provisions and keeping them refrigerated, essentially to change the ambit of their obligation to care for refrigerated cargo and thus escape liability. I respectfully think that the matter should be dealt with on a broader ground. The limitation in question has not been approved in the United States: see the case of *The Samland* (*sup.*), where it was held that failure properly to control the refrigerating appliances was not a fault in the management of the vessel. The judge said of *Rownson's* case: "This case, however, was not followed by Judge Dietrich in *The Jean Bart* and the Circuit Court of Appeals in this (New York) Circuit, in *Andean Trading Company v. Pacific Steam Navigation Company*, has expressly approved and followed Judge Dietrich's decision. It is clearly established that sect. 3 of the Harter Act is limited in its application to faults "primarily connected with the navigation or the management of the vessel and not with the cargo." I may add that even if the provision of refrigerated food for the crew is equalled with the provision of fuel for the propulsion of the ship so that the refrigeration of the ship's chamber forms part of the management of the ship, and the same refrigerating machinery is used for the crew's food and for the cargo, these facts ought not to affect the conclusion that, *quoad* the refrigeration of the cargo holds, it is the management of the cargo and not of the ship which is involved. But the point does not arise in this case.

There remains to be considered two decisions of the English Court of Appeal under the Carriage of Goods by Sea Act 1924. In *Hourani v. T. and J. Harrison* (*ante*, p. 294; 137 L. T. Rep. 549; 32 Com. Cas. 305) goods had been stolen during discharge by stevedore men. It was contended for the shipowners that they were exempted from liability for the theft by

art. IV. (2) (a) of the Act as being a default in the management of the ship. Bankes, L.J. quotes and relies on the various English and American decisions under the Harter Act and applies their principles to the words of the statute in the case before him. Atkin, L.J., however, while agreeing with Bankes, L.J., adds this caution. He refers to the fact (*ante*, p. 302; 137 L. T. Rep., at p. 557) "that at the present day a part of the proper equipment of cargo-carrying ships is very largely concerned with appliances for the safe carrying of the cargo, appliances that have nothing to do with the navigation of the ship, but have everything to do with the safety of the cargo, and, among other things, one would mention in particular the refrigerating machinery." He adds in conclusion: "For my part, at the present moment I have a difficulty in seeing if there was a defect in the management of those appliances in the ship which are an essential part of the ship, that that would not be a defect in the management of the ship." It is, I think, clear that the learned Lord Justice is not committing himself to any final expression of opinion. The point was not before him, and I do not know what authorities were cited. I need not say how carefully I have considered even the tentative opinions or questioning of the Lord Justice, but I do not conceive that I am bound by it. The other case is the case of *Gosse Millard Limited v. Canadian Government Merchant Marine* (*ante*, p. 385; 138 L. T. Rep. 421). In that case the Court of Appeal by a majority reversed the decision of the trial judge, who had held that damage to perishable cargo in the ship's hold by rain water while the ship was in dock, through the hatches or tarpaulins not being properly attended to for the protection of the cargo, fell within art. III. (2), and did not fall within the exception of art. IV. (2) (a). There was some difference of opinion in the Court of Appeal. Greer, L.J. agreed with the judge in the view he had taken of the facts, whereas Sergeant, L.J. differed on the facts, but both seemed to assume that management of the hatches is not necessarily management of the vessel. Scrutton, L.J., however, who agreed with Sergeant, L.J. that the appeal should be allowed, did so on the express ground that any user of any part of the ship, even if solely directed to the benefit of the cargo, came within the exception of art. IV. (2) (a). He says: "Negligent management of the propelling machinery, which is hardly 'navigation,' and negligent management of the refrigerating or ventilating or pumping machinery, seem all to be equally management of the ship." The Lord Justice would clearly decide this case in a contrary sense to what I am now deciding. As his opinion is not necessary for the decision of the case before me, and as to the other Lords Justices do not express the same opinion, I cannot treat it as binding on me. I need hardly say with what anxiety and diffidence I have expressed a view

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different from that of the learned Lord Justice, but as the question is of vital importance for shippers and receivers of refrigerated cargo and for shipowners, and now arises for the first time under the Act, I have felt it my duty to form and express my own opinion.

In my opinion, the exception does not protect the shipowner in this case, and in the result the plaintiffs will recover the amount of their damages.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Thos. Cooper and Co.*, for *Hill, Dickinson, and Co.*, Liverpool.

Solicitors for the defendants, *William A. Crump and Son.*

Jan. 26, 27, and Feb. 17, 1928.

(Before WRIGHT, J.)

SMITH HOGG AND CO. LIMITED v. LOUIS BAMBERGER AND SON. (a)

"Alongside" — "Cargo to be taken from alongside the steamer at charterer's risk and expense as customary"—Cargo of timber discharged in part on to quay and in part into lighters—Respective liability of owners of cargo and owners of ship for cost of discharge.

Where a cargo of timber is discharged in part on to quay and in part into lighters, as regards the part discharged on to the quay the cargo is *"alongside"* when it is available for release from the ship's slings if discharged by the ship's tackle, or, if discharged by being handed from the vessel, when it is laid on the quay, and the subsequent cost of operations of discharge fall on the consignees; and as regards the part discharged into lighters the cargo is not *"alongside"* till the barge is loaded and trimmed in a seaworthy manner, and the obligation to so load and trim falls on the ship.

ACTION tried before Wright, J. without a jury.

The plaintiffs were the owners of the steamship *Fernhill*. The steamer had loaded a cargo of deal battens and discharged the same at the Surrey Commercial Docks. The defendants were holders of thirty-one bills of lading out of a total of sixty-three, and the quantity of cargo represented by those bills of lading was 569 standards, of which 326 standards were delivered on quay and 243 standards overside into barges. The mode of delivery of the remainder of the cargo was not explained. The plaintiffs claimed part of the expense of discharge which they alleged ought to have been borne by the defendants and which expense they had incurred under protest because the defendants had repudiated all liability. The claim was put as for damages for breach of contract or, alternatively, for money paid at the implied request of the defendants. The bills of lading incorporated the terms, relating

to discharge, of a charter-party dated the 13th Sept. 1926, clause 3 of which was as follows:—

The cargo to be discharged with customary steamship dispatch as fast as steamer can deliver during the ordinary working hours of the respective ports and according to the custom of the respective ports, the cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary.

The custom of discharge on to quay at the Surrey Commercial Docks was thus stated.

The goods are discharged from the steamer by the ship's stevedores with the ship's tackle, and stacked by the stevedores on to the quay without sorting to bill-of-lading sizes or marks. The first pieces discharged are used to make a stage projecting over the quay for about 6ft. towards the side of the steamer, and as the cargo is discharged a stack is made varying in size with the quantity discharged on to the quay but generally not exceeding the length of the steamer and extending back about 30ft. from the edge of the stage. The timber is later carried away by the Port of London Authority and by them sorted to bill-of-lading sizes and marks and piled in the usual place for storing timber. The ship's stevedores' charges for discharging the cargo and stacking it on the quay are paid by the shipowner, and the Port of London Authority's charges for carrying the cargo from the quay and sorting and piling are paid by the consignees.

As regards discharge into barges, the custom was stated to be as set out in *Glasgow Navigation Company Limited v. W. W. Howard Brothers and Co.* (102 L. T. Rep. 172): "By the custom and practice of the Port of London in the case of cargoes of lumber (including both Baltic and pitch pine lumber) the receiver is only liable to provide sufficient open craft alongside ready to receive the goods from the ship and is under no obligation to have any men on such open craft to receive the goods from the ship's tackle or to stow the goods therein. The shipowner is bound to do the whole work of delivering the goods into the craft and of stowing the goods therein in the reasonable and ordinary manner so that the goods may not be damaged or imperilled and so that the craft may be loaded to the usual and reasonable extent and may be properly and safely navigable." The plaintiffs contended that their liability in both cases ended when the deals were released or ready for release from the ship's tackle and that the subsequent expense of carrying, arranging, and piling in a rough stack on the quay, or of receiving, arranging, and stowing in barges fell on the defendants. As regards discharge into barges it was contended that the custom was inconsistent with the contract. For the defendants it was argued as regards discharge on to quay that the cargo should be treated as having been taken bodily from the ship and set down on the quay and the area so covered should be regarded as alongside. As regards discharge into barges *Glasgow Navigation Company v. W. W. Howard (sup.)* was an authority which showed that it was the shipowner's duty to trim the cargo so that it could be taken away with safety to itself and the barge containing it.

(a) Reported by R. A. YULE, Esq., Barrister-at-Law.

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Le Quesne, K.C. and Sir *Robert Aske* for the plaintiffs.

Jowitt, K.C. and *James Dickinson* for the defendants.

Cur. adv. vult.

Feb. 17, 1928.—WRIGHT, J.—This is a claim by the owners of the steamship *Fernhill* against the defendants, who were receivers of cargo under certain bills of lading. The *Fernhill* had loaded a cargo of deal battens or boards and delivered that cargo at the Surrey Commercial Docks. The cargo consisted of 1125 standards, and the planks measured between 10ft. and 20ft. or 25ft. in length. Of that cargo the defendants were receivers under thirty-one bills of lading out of a total number of sixty-three, and the quantity of cargo represented by those bills of lading was 569 standards. Of that quantity they took delivery of 326 standards on quay and 243 standards overside and into barges. The mode of delivery of the remainder of the cargo was not given in evidence, though probably the same proportions went over on to quay and overside.

The plaintiffs' claim is for certain expenses incurred in the operation of discharging the ship. They say that that part of the operation ought to have been performed by the defendants, and they accordingly claim that these expenses should be borne by the defendants as receivers under the terms of their bill of lading. The plaintiffs say they incurred these expenses under protest—the defendants having repudiated all liability—and under notice that they would claim repayment from the defendants. Their claim is put as for damages for breach of contract, or, alternatively, for money paid at the implied request of the defendants.

The bills of lading were issued under a charter-party dated the 13th Sept. 1926 under which the *Fernhill* was to load a full cargo and deliver the same within a range of ports as ordered. She was in fact ordered to the Surrey Commercial Docks to discharge. The material clause is clause 3, the material parts of which are as follows: "The cargo to be discharged with customary steamship dispatch as fast as steamer can deliver during the ordinary working hours of the respective ports and according to the custom of the respective ports, the cargo to be brought to and taken from alongside the steamer at charterer's risk and expense as customary." The bills of lading incorporated these terms and conditions of the charter-party so far as they related to discharge.

The method of discharging at the Surrey Commercial Docks has been described by a witness, Mr. Howes. The ship comes alongside the quay, and her rail is about 3ft. distant from the edge of the quay. The Port of London Authority allot a space on the quay appropriated to the cargo which is to be landed on the quay. That space is about the length of the ship with an open space in the middle about corresponding to the amidships area of the ship where there is no cargo, and extending

back over the quay for 30ft. or 32ft. from the side of the quay. The deck load is first discharged by hand. The discharge is conducted by a gang of thirteen men, nine on the ship and four on the quay, and, in addition, when there is discharge overside, there are four other men in the lighter. The pieces, so far as they are landed before the winches and derricks are brought into use, are handed separately over the ship's side and taken by the men on the quay. As the landing proceeds the pieces are laid on the quay so as to cover the whole allotted area with a single layer and so as to overlay over the quay edge for about 3ft. or 6ft. As soon as sufficient deck cargo is discharged to release the winches, the rest of the deck cargo and the cargo in the holds is discharged by means of the ship's derricks and slings, the derricks having a scope of swing of about 3ft. inshore over the quay edge. The planks in the sling descend on the quay, and are brought to rest with one end resting on the quay and the other end on the ship's rail. The men on the quay release the sling and pick up or lap the planks, building them into a pile which finally covers the whole allotted area to a height of 15ft. or 20ft. The pile is built by first building up the margins to seven or eight tiers, then filling in the middle space, and then repeating the process until all the cargo which is being put out on to the quay is discharged and piled. When the pile rises in height, what is called a fore-and-aft—that is to say, two uprights and a cross-piece—is built above the ship's rail, and is used for the planks as they come out of the slings to rest against in place of the ship's rail, because the ship's rail is no longer at a sufficient elevation above the level of the timber on the shore. Each derrick always put the planks down at the same place, and the men carry them away in order to do this operation of piling, which is only rough piling. The planks are discharged and piled without being separated according to the bill-of-lading sizes or marks. By a subsequent operation, which does not concern the ship on any view, the planks are carried away from the quay and measured and stowed or stacked in a place appropriate to the storage of timber. Such is the system with regard to cargo landed on the quay.

As to cargo landed overside into barges the position is somewhat different. Delivery overside is to bill-of-lading sizes and marks, if any. The receivers' barge comes alongside, and four men are provided by the ship to take delivery into the barge. At first the deck cargo has to be delivered by hand, and it is put over the ship's side into the barge, where the men receive it, getting the lengths, as far as possible, fore and aft of the barge, and then they lay in on to the bottom of the barge so as to fit in closely, otherwise the barge would become top heavy. The barges are about 10ft. beam and about 30ft. in length. When the derricks are working the pieces are slung over into the barges and are guided into a fore-and-aft direction, and

the sling is released so that the pieces fall with one end resting on the bottom of the barge, or the bottom layers of timber, and the other end against the central athwartships beam in the barge. As the discharge progresses the layers of timber rise in the barge, and a pair of uprights with a cross-beam is rigged up across the beam of the barge so that the upper ends of the deals, when released from the sling, may rest against it, and the other ends rest on the deals in the bottom. The planks have to be placed in position in the barge, and when they reach above the gunnel the tiers have to be bound by cross-tiers being interposed between the fore-and-aft tiers. This course is necessary in order to prevent the timber falling off. Indeed, the whole method of stowage of the timber which I have described, is necessary, not only to enable the barge to carry the full load but also to render her seaworthy and navigable. When the barge is loaded the receivers' men take her away from alongside.

The claim in the action was that by the contract the defendants, as receivers, had promised to bear all expenses "from alongside" because the contract is that the cargo is to be taken from alongside "at charterers'"—that is here the bill-of-lading holders—"risk and expense as customary." That involves two questions: What is meant by "alongside," and at what point does delivery by the ship cease and the taking by the receivers begin? The defendants relied on certain customs, the existence of which was not disputed by the plaintiffs, but their admissibility was disputed because the plaintiffs contended that they were inconsistent with the contract. It is necessary to distinguish delivery on to quay from delivery into barges, in respect of which a separate custom was alleged and admitted. As to the former the custom was thus stated and it is set out at some length: "The goods are discharged from the steamer by the ship's stevedores with the ship's tackle, and stacked by the stevedores on to the quay without sorting to bill-of-lading sizes or marks. The first pieces discharged are used to make a stage projecting over the quay for about 6ft. towards the side of the steamer and as the cargo is discharged a stack is made varying in size with the quantity discharged on to the quay, but generally not exceeding the length of the steamer and extending back about 30ft. from the edge of the stage. The timber is later carried away from the stack by the Port of London Authority and by them sorted to bill-of-lading sizes and marks and piled in the usual place for storing timber. The ship's stevedores' charges for discharging the cargo and stacking it on the quay are paid by the shipowner and the Port of London Authority's charges for carrying the cargo from the quay and sorting and piling are paid by the consignees." As to the later discharge into barges the custom was stated to be as set out in the case of *Glasgow Navigation Company Limited v. W. W. Howard Brothers and Co.* (11 Asp. Mar. Law Cas. 376; 107 L. T. Rep. 172) in these terms: "By the custom and practice of the Port

of London in the case of cargoes of lumber (including both Baltic and pitch pine lumber), the receiver is only liable to provide sufficient open craft alongside ready to receive the goods from the ship, and is under no obligation to have any men on such open craft to receive the goods from the ship's tackle or to stow the goods therein. The shipowner is bound to do the whole work of delivering the goods into the craft and of stowing the goods therein in the reasonable and ordinary manner so that the goods may not be damaged or imperilled, and so that the craft may be loaded to the usual and reasonable extent and may be properly and safely navigable." As was pointed out by the Court of Appeal in some of the cases to which I shall refer, the question at issue must now be considered in the light of the decisions with reference to similar customs at other ports. The leading case is that of *The Turid* (15 Asp. Mar. Law Cas. 538; 127 L. T. Rep. 42; (1922) 1 A. C. 397), which was a case of delivery on to quay. In the judgments the cases relating to delivery into lighters are also discussed as distinguishable. I shall revert to that discussion later when I deal with delivery over-side into barges. Clause 3 of the charter-party in that case was identical with the relevant clause now under consideration. It is, I think, clear from the judgments that the word "alongside" is to be construed in its natural and ordinary significance and that that meaning cannot be varied by a customary meaning inconsistent with the fact: (see also to the same effect the judgment of the Court of Appeal in *Mowbray Robinson and Co. v. Rosser*, 126 L. T. Rep. 748). Lord Birkenhead, whose judgment was concurred in by Lord Parmoor, and Lord Atkinson, said: "I myself am of opinion that the word 'alongside,' if it does not suggest actual contact, does at all events suggest close contiguity, and all the less so because the ordinary obligation of the shipowner is admittedly only to deliver to the consignee the cargo his ship carries at ship's rail. A contract which requires delivery elsewhere extends this legal obligation." Lord Sumner said: "Doubtless the words 'alongside the steamer' may be satisfied though the apparatus of reception, be it barge or cart, or what not, may not be in actual contact with the ship's side. It may well be that the ship can be required to deliver to the full reach of her tackle." In that case the steamer lay 13ft. out from the quay and staging was necessary to be erected between the steamer's side and the quay, and the timber was carried over that staging and across the quay and piled on to a dump commencing about 10ft. from the edge of the quay. The House of Lords held that the cost of erecting the staging and carrying the timber across it and piling it on the dump fell on the receivers and was not part of the shipowner's obligation to discharge alongside, and that a custom to the contrary was inconsistent with the charter-party. That case followed a decision in the case of *Holman v. Wade* (reported in *The Times* May 11, 1877)

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and a decision in *The Nifa* (7 Asp. Mar. Law Cas. 324; 69 L. T. Rep. 56; (1892) P. 411), where the steamer was moored 15ft. from the quay edge and the facts as to discharge were substantially similar. In the case of *Aktieselskabet Dampskibsselschaft Primula v. Horsley and Co.* (17 Ll. List Rep. 30) under similar words of contract, Greer, J. said: "It seems to me impossible to say that the cargo was not alongside when it was landed on the quay preparatory to the sling being taken off," and he refused to make the shipowners responsible for the cost of carrying away and piling on the quay on the ground of custom. Similar questions came before the President in the Admiralty Court in the case of *The Rensfjell and other vessels* (1924) 16 Asp. Mar. Law Cas. 438; 131 L. T. Rep. 764). The President said: "The stage of the operation at which the shipowner is properly to be held to have completed his part of the discharge of the cargo is that at which timber landed by means of the wire slings is put at the disposal of the receiver by the loosing of the sling." In some of the cases then in question the shipowners had acquiesced in the unloading from the ship of the timber by shore cranes which had a wider radius of swing than the ship's tackle. An attempt was made to distinguish these authorities in the case of *Rederi Aktiebolaget Aeolus v. W. N. Hillas and Co. Limited* (16 Asp. Mar. Law Cas. 565; 30 Com. Cas. 271, 31 Com. Cas. 59, and 32 Com. Cas. 69), where under similar words of contract it was sought to enforce against the shipowner a custom requiring him to pay the expense of carrying the timber cargo to bogies on rails 8ft. from the ship which was lying against the quay and of building for that purpose part of the cargo into a platform between the ship's side and the line of rails. Lord Cave, L.C. held that such claim failed. As further illustrating the meaning of the word "alongside," I may refer to the case of *Northmoor Steamship Company v. Harland and Wolff* (1903) 2 Ir. Rep. 657), where the court was clearly of opinion that the heavy logs of timber which had to be shoved into the water off the ship were "alongside" when at the place in the water into which they had been shoved from the ship.

I deduce from these authorities the conclusion that the cargo is "alongside" when it is available for release from the ship's slings if discharged by the ship's tackle, and if discharged, as was the first portion of the deck cargo in this case, by being handed from the vessel when it is laid with one end on the quay and the other resting against the ship. It is from this point, in the case of cargo landed on quay, that, in my judgment, the obligation of the receiver to "take from alongside" begins, and therefore all expense from that moment is expense which by the contract the receiver has agreed to bear.

Mr. Jowitt, for the defendants, however, has contended that that is not the true conclusion. He distinguishes the cases of *The Turid*, *The*

Nifa, and *Holman v. Wade* on the ground that in those cases the ship was some way from the quay, so that the intervening space of water had to be bridged, and, furthermore, that the edge of the pile nearest the ship was some distance away from the quay edge. He also seeks to distinguish the cases before the President of the Admiralty Court where the ship lay alongside on the ground that the pile began 4ft. from the edge of the quay, and the case of *Rederi Aktiebolaget Aeolus v. W. N. Hillas and Co. Limited*, on the ground that the bogie rails were 18ft. from the edge of the quay, and some cargo had to be laid on that intervening space. It is, however, clear from those cases that the mere fact that the ship is not alongside the quay is immaterial, and I think the whole area of the timber pile has to be taken into account and not merely the extreme edge nearest the ship. In this case the area extends at least 30ft. from the ship's side. I do not agree that the limit of the area remote from the ship is immaterial, and I do not accept Mr. Jowitt's contention that the cargo is to be visualised as if it were lifted from the ship in one piece and put down in one piece, so that the whole area is covered when so deposited could be regarded as alongside the ship, because it was as near as it could be. This argument is, I think, not in accordance with the facts. Nor can the result, in my judgment, be different where, as here, the defendants as receivers took, not the whole cargo, but only about one half. The customary mode of discharge on to quay is to discharge without sorting and the location of the defendants' portion is unascertained.

I think that in a question of general mercantile importance such as this which involves the application, to conditions which for practical purposes are similar, of a common form of words in a common shipping document, it is desirable to attain to a clear and uniform rule. Lord Cave, L.C. said in the case of *Rederi Aktiebolaget Aeolus v. W. N. Hillas and Co. Limited*: "Where the meaning of a commercial document in common use has been the subject of judicial decision it is plainly undesirable in construing a similar document to draw fine distinctions." I think that in such a case as the present of discharge on to quay the fair result of the authorities is that the shipowner has delivered alongside when the deals are released or are ready for release from the ship's tackle or are laid on the quay, and that the subsequent expense of carrying, arranging, and piling in the rough stack falls by contract on the defendants.

The question of delivery into barges is somewhat different, and has been the subject of a separate line of cases. Mr. Le Quesne, for the plaintiffs, has argued that on the principles which, he argues, should on the authorities be applied to discharge on quay, and which I have held should be so applied, the shipowner's obligation is completed when the deals have been handed down from the ship and put on the barge, or, if discharge is by the ship's

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tackle, once the sling is released so that the deals fall inside the barge, and that any arrangement, or, alternatively, any such stowage as the custom alleged here requires into the barge, is for the receiver's expense as a taking away from alongside, just as much as stowing in a truck or piling on the quay has been held in the cases referred to above to be for the receiver's account. It has, however, been held in the case of *Aktieselskabet Helios v. Ekman and Co.* (8 Asp. Mar. Law Cas. 244; 76 L. T. Rep. 537; (1897) 2 Q. B. 83), under the same words of contract, that a custom was binding which required the shipowner to place the timber into lighters.

Apart from custom, the placing into lighters would be a joint operation, requiring the receivers to have their men in the barge to take the goods as soon as they are within their reach. See the cases of *Peterson v. Freebody and Co.* (8 Asp. Mar. Law Cas. 55; 73 L. T. Rep. 163; (1895) 2 Q. B. 295) and *Brenda Steamship Company v. Green* (9 Asp. Mar. Law Cas. 55; 82 L. T. Rep. 66; (1901) 1 Q. B., p. 518). As Chitty, L.J. said in the *Aktieselskabet Helios v. Ekman and Co.* case of the facts in that case: "The custom merely diminishes the obligation of the merchants to this extent, namely, that the timber coming over the ship's side is to be put on board the lighter by the ship's crew. When that operation has been performed it is the duty of the merchants in accordance with the charter-party to take from alongside the cargo thus delivered." This is an authority binding me and fatal to Mr. Le Quesne's contention that the shipowner's part must cease when the timber is released from the sling. But the custom found in that case and said to be not inconsistent with the charter-party was to put the timber into lighters "in such a way and to such an extent as that the lighters may fairly be deemed to be loaded." In the case of the *Glasgow Navigation Company v. Howard* (11 Asp. Mar. Law Cas. 376; 102 L. T. Rep. 172), the custom now relied on was given effect to by Hamilton, J. But Mr. Le Quesne points out that in that case no point was raised such as he now raises, that such a custom is inconsistent with the contract as putting on the ship the obligation of stowing or trimming in the manner described, which he contended was an operation and expense after the ship's delivery had ceased and appertained to the receivers' obligation to take away. It is true that in that case it was not pleaded that the custom was inconsistent with the contract, nor is any direct reference made to the question in the judgment. Hamilton, J. points out the difficulty of having two sets of men in the barge, one set being the ship's men engaged in placing the deals in the barge, the other the receivers' men engaged in the extra nicety of trimming, and the evidence here shows that the operation of loading the barge is treated as a single operation done in the way necessary to render the barge seaworthy and able to carry the deals without capsizing or throwing them overboard. In

The Turid, Lord Sumner speaks of the barge as an apparatus of reception which is alongside, so also does Lord Birkenhead, who refers to the *Glasgow* case without disapproval, and thus explains it: "It is apparent therefore that the matter in controversy in the case was not that now under debate before your Lordships, but to a large extent, as the learned judge said, the controversy was what was included in the word 'discharging' used in the documents," and in the *Rederi Aktiebolaget Aeolus v. Hillas and Co.* (16 Asp. Mar. Law Cas. at p. 569; 31 Com. Cas. 64), Scrutton, L.J. seems to treat the decision of Hamilton, J. in the *Glasgow* case as a decision that the custom was binding under the charter-party. If the barge which is touching the steamer is treated as alongside, and the custom requires the steamer to discharge by placing the planks in the barge, and the receivers' duty is to take away the barge with the planks in it from alongside, the custom may properly define what constitutes the complete act of delivery into the barge, without contradicting the contract, because the custom then merely explains what is meant by delivery. This is, I think, the reason why, in *The Turid*, Lord Birkenhead describes this line of cases as easily distinguishable from *The Turid*, and I accept it as being the correct conclusion. I accordingly hold that as regards delivery into barges the receivers' contention is correct and that the shipowners fail.

I must refer to two other contentions of Mr. Jowitt's. He argued that the shipowner could not rely on the custom as to delivery on the quay, not according to bill-of-lading sizes and marks, unless they accepted the whole custom as alleged. But I think this is erroneous. The customary mode of discharge must not be confused with a custom as to the incidence of expense. He further contended that on any view the plaintiffs could not succeed because they had paid the full expenses with express knowledge that the defendants refused to pay, and could not recover either as for damages for breach of contract or as for money paid at the implied request of the defendants. I think this contention is ill-founded. I have referred in this judgment to numerous cases where such claims as are here made have succeeded. In *The Turid*, Lord Birkenhead states the claim there as being to recover damages for breach of charter-party, or, alternatively, as money paid at the defendants' request. Indeed, by the express terms of the contract the receivers have promised that the expense of taking from alongside shall fall on them, and *Fletcher v. Gillespie* (3 Bingham, 635) is an express authority for a claim in a similar case, as on an implied request "for money paid in ease and for the benefit of the defendant." Mr. Jowitt relied on the *Aktieselskabet Dampskibs Steinstad v. Pearson and Co.* (ante, p. 305; 137 L. T. Rep. 533), but there payment was purely voluntary, but here the documents show a protest by the plaintiffs, and there the shipowners did the extra work at their own cost, of their own volition, whereas here the plaintiffs did so

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because the defendants repudiated the obligation. Mr. Jowitt also relied on observations by Hamilton, J. in the *Glasgow* case (*sup.*). But I have carefully considered these observations, and find nothing in them adverse to my conclusion on this point.

In the result the plaintiffs will succeed in that part of their claim which relates to the expense of delivery on to quay, and fail on that part which relates to delivery into barges. It is not questioned that the expenses are apportionable, but I am relieved from deciding any question of figures.

Judgment accordingly.

Solicitors for the plaintiffs, *Botterell and Roche*.

Solicitors for the defendants, *William A. Crump and Son*.

Friday, Jan. 20, 1928.

(Before WRIGHT, J.)

FOREMANS AND ELLAMS LIMITED v.
BLACKBURN. (a)

Sale of goods—C.i.f. contract—Goods already shipped—Bills of lading not issued till return of steamer to port of loading and after an intermediate voyage—Refusal of buyer to take delivery.

By a contract dated the 2nd July 1926 the plaintiffs sold a consignment of frozen rabbits to be shipped in a named steamer in August from Sydney to Liverpool under c.i.f. terms. The consignment had already been shipped and the steamer was prosecuting an intermediate voyage. The bills of lading were not issued till the return of the steamer to Sydney and were dated the 17th Aug. 1926, on which date the steamer left for Liverpool. On ascertaining these facts the buyer refused to take delivery and the sellers claimed damages for breach of contract.

Held, on a case stated by an arbitrator, that the sellers were not entitled to recover inasmuch as they themselves had committed a breach of contract. Though a bill of lading must be issued on shipment and some latitude of time must be allowed, a bill of lading is not regular if issued seven weeks after loading and after the steamer has accomplished an intermediate voyage, even though the bill of lading is issued at the original port of loading.

SPECIAL case stated by an arbitrator.

By a contract in writing dated the 2nd July 1926, Messrs. Foremans and Ellams Limited, sold to Mr. Blackburn 1000 crates (5 per cent. more or less) of frozen furred rabbits. The contract was as follows: "Description: N.S.W. frozen furred rabbits packed not earlier than May, not later than July. Price 36s. per crate

c.i.f. Liverpool. Shipment: (With all liberties as per bill of lading) per *Suffolk*, due to sail during August to Liverpool. Payment: Nett cash against documents on steamer and (or) steamers . . . each shipment to be considered a separate contract." There was also an arbitration clause. It was the custom in the frozen-rabbit trade, as found by the arbitrator, that in addition to the usual c.i.f. documents, for the seller to tender a freezing certificate or its equivalent. The bill of lading which was dated the 17th Aug. 1926, stated that there had been shipped "in apparent good order and condition by the steamship *Suffolk*, now lying in Sydney," 1011 crates hard frozen rabbits. The freezing certificates showed that the goods were shipped per steamship *Suffolk* to Liverpool on the 25th June 1926, and the 17th Aug. 1926. On receiving the shipping documents the buyer was put on his inquiry and the true facts came to light which were as follows. The consignment of 1011 crates had been loaded on the 25th June 1926 and the *Suffolk* had proceeded to a Queensland port before the contract of sale. She returned to Sydney on the 17th Aug. 1926 when the bill of lading was issued, and sailed for Liverpool the same day. The buyer, the defendant, refused to take delivery and the frozen rabbits were sold at the best price obtainable, but at a loss of 534l. 15s. 8d. The sellers, the plaintiffs, claimed this sum as damages, but the buyer denied liability. On reference to arbitration, the arbitrator held, subject to the opinion of the court, that the buyer was guilty of default and that the sellers were entitled to the sum claimed as damages for breach of contract.

Raeburn, K.C. and N. J. Laski for the buyer.

G. J. Lynskey for the sellers.

WRIGHT, J.—This case is of a somewhat unusual character. The facts on which the dispute arises may be very shortly stated. [His Lordship stated the facts and continued:] The arbitrator has found in favour of the sellers. The buyer contends that the sellers did not fulfil their contract. I have to consider whether the sellers have fulfilled their contract. In my opinion they have not. I think the tender which they made was not good. In the first place it appears from the freezing certificate, which is a material document, that before the date of the contract the goods or part of them had already been shipped. Whether that is true of all the goods or only of some of them is immaterial, because on a sale of goods all the goods tendered must correspond with the contract description, and the fact that some do and others do not does not make the tender good. I consider that the word "shipment" in the contract must be understood to refer to a shipment in the future, and cannot refer to a shipment which had already taken place either in whole or in part. I have further to consider whether the bill of lading was in regular form and a good shipping document. It appears from the documents

(a) Reported by R. A. YULE, Esq., Barrister-at-Law.

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that as regards part of the goods shipment had taken place not less than seven weeks before the issue of the bill of lading, and that in itself was a fact which would properly lead to inquiry and call for explanation. It was not contested that in that interval of time the ship had proceeded from Sydney to a number of North Queensland ports and then had returned to Sydney, and that during this second stay the bill of lading was issued. It is true that a bill of lading must be issued on shipment, but still some latitude of time is to be allowed. I have never known a case such as the present. I am prepared to hold, and do hold, that a bill of lading is not regular if it is issued, even though at the original port of loading, seven weeks after the loading actually took place and after the vessel has proceeded on an intermediate voyage and has sailed some hundreds of miles to other ports and has then returned to the original port of loading. I think that a bill of lading issued in such circumstances is not a good bill of lading. I think that when it became apparent that those were the true facts, the buyer was entitled to reject.

Looking at the form of the bill of lading in this particular case, I see that it states: "shipment on *Suffolk*, now lying at Sydney," and I should have thought that meant, according to ordinary usage and understanding, that the shipment had taken place at Sydney during the then stay of the vessel at Sydney. I think that document, according to ordinary understanding, is not correctly applicable to a case where the shipment had not taken place during the then stay of the vessel at Sydney, but where a substantial part of the shipment had taken place during a previous stay. There appear to have been some earlier documents to represent shipment in the intermediate period but we have to deal with the final bill of lading and that is not, in my opinion, applicable to the earlier shipment. There is one further point. The arbitrator found that the *Suffolk* was due to sail in August for Liverpool and we know that she did sail on the 17th Aug. 1926, but there is no finding that at the date of the contract she was carrying goods of the contract description for Liverpool in August. I therefore think that the award of the arbitrator in favour of the sellers is wrong and ought not to stand. I direct that his alternative finding shall be the operative award between the parties.

Appeal allowed.

Solicitors: for the buyer, *Leonard Bingham and Sharp*, for *Harry T. Sales*, Manchester; for the sellers, *Edward Lloyd*, Liverpool.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Feb. 20 and March 8, 1928.

(Before BATESON, J.)

THE POINT BREEZE. (a)

Practice — Collision — Action in rem — Bail — Release of vessel — Judgment for plaintiff — Insufficiency of bail — Re-arrest.

A defendant in an action in rem, who has obtained the release of his vessel from arrest by providing bail, cannot, after judgment has been given against him in the action, be required by the plaintiff to furnish additional bail. The plaintiff has no right to re-arrest the vessel.

In a collision action in rem the defendants' solicitors gave the usual undertaking to provide bail, and a bail bond was in due course provided. Judgment was given in the action for the plaintiffs. Subsequently the plaintiffs, considering the amount of the bail bond was insufficient to cover the amount of their claim, demanded additional bail, and on this being refused proceeded to arrest the defendants' vessel.

Held, that the arrest ought to be set aside.

The Kalamazoo (1851, 15 Jur. 885) followed.

The Hero (2 Mar. Law Cas. (O. S.) 324; 1865, Brown & Lush, 44) and The Flora (14 L. T. Rep. 191; L. Rep. 1 A. & E. 45) distinguished.

MOTION to set aside a warrant of arrest. The plaintiffs, by a writ *in rem* issued the 6th Dec. 1927, claimed damages for injuries sustained by their steamship *Flamand* in a collision with the defendant's steamship *Point Breeze*. The defendants' solicitors accepted service and undertook to provide bail, and on the 19th Dec. 1927 a bail bond was provided in the sum of 3500*l.* demanded by the plaintiffs. On the 21st Dec. 1927 judgment was given for the plaintiffs, and the amount of the damages referred to the registrar. It then appeared that the damage to the *Flamand* might exceed the amount of 3500*l.* owing to additional damage caused by the *Flamand* grounding after the collision being disclosed when the vessel was surveyed in dry dock. Accordingly, on the 28th Dec. 1927, the plaintiffs demanded additional bail in the sum of 3000*l.*, and on this being refused by the defendants, proceeded to arrest the *Point Breeze*, which was then at Southampton. The plaintiffs made no application to the court before arresting the *Point Breeze*. On the 29th Dec. the defendants, under protest, gave an undertaking to provide additional bail in the sum of 3000*l.*

The defendants moved to set aside the arrest.

Dunlop, K.C. and Hayward for the defendants. — There is no right to re-arrest after bail has

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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been provided and judgment given in the action. The effect and purpose of giving bail is to release the vessel from arrest. The plaintiff's maritime lien is extinguished, and cannot be revived. In any case, after judgment has been given the plaintiff can enforce payment by a writ of *fi. fa.* and the usual methods of execution: (*The Kalamazoo*, 1851, 15 Jur. 885; *The Wild Ranger*, 1862, Bro. & Lush. 84; *The Dictator*, 7 Asp. Mar. Law Cas. 385; 67 L. T. Rep. 563; (1892) P. 304). The defendants also rely upon *The Joannes* (1870, 23 L. T. Rep. 26; L. Rep. 3 A. & E. 127) and *The Joannis Vatis* (No. 2) (16 Asp. Mar. Law Cas. 13; 127 L. T. Rep. 494; (1922) P. 213, 223).

A. T. Bucknill for the plaintiffs.—What was said by Dr. Lushington in *The Kalamazoo* (1851, 15 Jur. 885) was afterwards qualified in *The Hero* (1865, Bro. & Lush. 447) and *The Flora* (2 Mar. Law Cas. (O. S.) 324; 14 L. T. Rep. 191; L. Rep. 1 A. & E. 45). The plaintiffs are entitled to arrest the vessel and demand bail up to the full value of the *res*, and there is no ground for depriving the plaintiff of this right merely because, in the first place, bail was asked for by mistake in too small a sum. So long as bail is not demanded in excess of the value of the *res*, and the plaintiffs act reasonably, there is no reason why the vessel should not be re-arrested a second time. Reliance was placed upon *The Miriam* (2 Asp. Mar. Law Cas. 259; 1874, 30 L. T. Rep. 537), *The Freir* (2 Asp. Mar. Law Cas. 589; 1874, 32 L. T. Rep. 752), and *The Temiscuata* (2 Spinks, 208).

BATESON, J.—I think this motion must succeed. The collision happened on the 26th Nov. 1927, between the *Flamand*, a French ship, and the *Point Breeze*, an American ship. I held the *Point Breeze* alone to blame. Bail was asked for on the 28th Nov. in 3500*l.* On the 2nd Dec. the vessel was surveyed in Dunkirk for damage, and all the damage that was found was damage to her stem. On the 6th Dec. a writ was issued against the *Point Breeze*. The defendants' solicitors accepted service and gave the usual undertaking to put in bail. On the 19th Dec. the bail bond was completed in the sum of 3500*l.* as demanded by the plaintiffs. On the 21st Dec. judgment was given, and on the 28th Dec.—that is seven days after the judgment—the plaintiffs asked for additional bail of 3000*l.*, and they arrested the *Point Breeze* at Southampton for that amount in this action. On the 29th Dec. the defendants' solicitors gave an undertaking to give the additional bail, but they gave it under protest. Now they move before me to set aside that arrest. The case seems to be covered by the clear expression of opinion of Dr. Lushington in *The Kalamazoo* (1851, 15 Jur. 885, at p. 886): "But the effect of taking bail is to release the ship in that action altogether. It would be perfectly absurd to contend that you could arrest a ship, take bail to any amount, and afterwards arrest her again for the same cause of action. The bail represents the ship,

and when a ship is once released upon bail she is altogether released from that action." True, he goes on to say there is no way of making the defendants pay—that is putting it in quite general language—except through the bail or the *res*. That part of the judgment has since been overruled in *The Gemma* (8 Asp. Mar. Law Cas. 385; 81 L. T. Rep. 379; (1899) P. 285), *The Dictator* (7 Asp. Mar. Law Cas. 251; 67 L. T. Rep. 563; (1892) P. 304), and other cases, whereby it is made plain that anybody getting judgment in an action *in rem* is entitled to issue execution for any balance against the parties who have appeared to defend in such an action. But the earlier part of the judgment that I have read does not seem to me to have been qualified except possibly by Dr. Lushington himself, which I will deal with later. In *The Wild Ranger* (Bro. & Lush. 84, at p. 87), Dr. Lushington repeats: "Now bail given for a ship in any action is a substitute for the ship; and whenever bail is given, the ship is wholly released from the cause of action, and cannot be arrested again for that cause of action." It is true that the facts of *The Wild Ranger* were these—the owners of the ship and the cargo each arrested the ship. The shipowners obtained bail for the sum of 92*l.* less than their claim turned out to be. The cargo-owners had the ship sold and their claim was satisfied out of the proceeds, leaving a balance in court. The shipowners sought to get the balance out of the proceeds in court and that was refused. That, of course, nowadays would not be so, but the statement of Dr. Lushington that I have read is a repetition of what he said in *The Kalamazoo* (*sup.*), and as I say, as far as I know, has not been directly overruled. That was in 1863. It is quite true that in 1865 and 1866 he decided two cases, *The Hero* (1865 Bro. & Lush. 447), and *The Flora* (2 Mar. Law Cas. (O. S.) 324; 1866, 14 L. T. Rep. 191, L. Rep. 1 A. & E. 45), which seem to throw some doubt on this general statement that I have referred to. *The Hero* is in Browning and Lushington's Reports at p. 447. Dr. Lushington, at p. 448 says: "In *The Kalamazoo* (*sup.*), and *The Wild Ranger* (*sup.*), are expressions which, literally interpreted, would indicate that I have no power to grant a re-arrest for the same cause of action after the property has been released on bail; but those expressions must be read subject to the fact which formed the ground of the decision in each of those cases, that the cause of action had passed into *res judicata*. I am of opinion that where application to increase the amount of the action is made before judgment has been pronounced, the court has power to direct measures to be taken to do full justice to the plaintiffs." But he limits any power to re-arrest or arrest after bail to applications made before judgment has been pronounced. Therefore it does not help Mr. Bucknill here because judgment pronouncing for liability had been given before he attempted to arrest.

ADM.]

THE POINT BREEZE.

[ADM.]

It is also to be noted that application was made to the court apparently for leave to arrest the ship. The other case was *The Flora* (*sup.*), and I confess that *The Flora* is a difficult case to follow from the report in L. Rep. 1 A. & E. 45. It seems from the headnote that the defendant there had consented to have the amount in the action increased, and the court made an equitable order allowing the re-arrest to stand, but cancelled the bail-bond already given. Nothing of that is said in the judgment or in the argument, and although Mr. Vernon Lushington—as he then was—relied on *The Kalamazoo* (*sup.*) and *The Wild Ranger* (*sup.*) as to there being no power to re-arrest without leave of the court, Dr. Lushington said “It was the practice to arrest the cargo whether freight was due or not, and held the re-arrest to be valid.” But on what ground exactly that was done, and how far the headnote which speaks of the amount in the action being increased by consent, and so forth, affected it does not appear, and I do not think, in the face of the distinct expression in *The Kalamazoo* (*sup.*) and *The Wild Ranger* (*sup.*) that you cannot arrest a vessel after she has been once released on bail in the same action for the same cause of action, that ruling should be departed from. One other case which seems to support my view to some extent is *The Johannes* (1870, 23 L. T. Rep. 26; L. Rep. 3 A. & E. 127). That was a case before Dr. Phillimore. The only significance of that is that the claim to re-arrest was abandoned by the eminent counsel who was conducting the case for the plaintiff. The other cases where re-arrest has been allowed are cases with regard to costs which started with *The Freedom* 1 Asp. Mar. Law Cas. 136; (25 L. T. Rep. 392; (1870) L. Rep. 3 A. & E. 495). I am not at all sure that *The Freedom* really decided that there was power to re-arrest for costs except in the sense that it was the method of execution most convenient in the Admiralty Court, although it has always been treated, I think, as being a re-arrest for costs. That course has been followed in the case of *The Lorena* (unreported)—a case noted at p. 340 of Mr. Roscoe's book (Roscoe: Admiralty Practice, 4th edit.), and *The Falk* (4 Asp. Mar. Law Cas. 592; 1882, 47 L. T. Rep. 308). Those, of course, are re-arrests for costs after judgment given, and after costs have been ascertained. If bail were given after such an arrest as contemplated in this case or a re-arrest after judgment, there is no judgment against such bail nor any means of obtaining one in the action that I know of.

In this case what the plaintiffs have been trying to do is to arrest the ship after they have got bail for their claim and have released the ship, and have got judgment, but before the amount of their claim is ascertained. They got judgment referring the matter to the registrar, but he has not ascertained what amount is due, and it may well be that it will be some time before he does ascertain it. If the plaintiffs are right in their contention that they

are entitled to arrest this ship, it seems to me that it will open the door to the re-arrest of vessels or arrest after getting bail, whenever a party thinks that his claim might be bigger than it is. No immunity from arrest will be obtained by giving bail, and the result of it on maritime liens might be very serious. If there is a right to arrest it is the right to arrest in a damage case, and the only right to arrest in a damage case is that which the party claiming has got by a maritime lien, and a maritime lien follows the ship into other people's hands. The position of people who have ships that have been released on bail (if I were to allow this arrest to stand) would be very unfortunate. So far as I know, what is being attempted in this case has never been attempted before. I have dealt with *The Hero* (*sup.*) and *The Flora* (*sup.*), and I have also dealt with *The Freedom* (*sup.*) class of case, which do not seem to me to be this case at all. I do not think, in these days, at any rate, it is desirable to extend the power of arresting the property of a defendant. It may be hard in the sense that Mr. Bucknill's clients may be defeated by the owners of the *Point Breeze* from prosecuting part of a just claim which they may be able to substantiate because the *Point Breeze* may never come back to this country. I should hope that that would not be the result, but I cannot help it if it is. I have not referred to *The Zephyr* (2 Mar. Law Cas. (O. S.) 146; 1864, 11 L. T. Rep. 351) or to *The Joannis Vatis* (No. 2) (16 Asp. Mar. Law Cas. 13; 127 L. T. Rep. 494; (1922) P. 213), because I do not think they carry the case any further, but I think I have referred to all the others that have been mentioned.

Of course there is the point, I suppose, that if application for leave to arrest had been made before this arrest was actually made to try and bring the case within *The Hero* (*sup.*), I think leave would have had to be refused upon the same grounds as those which I have indicated for allowing this motion with costs.

Motion allowed with costs.

Solicitors for the defendants, *Thomas Cooper and Co.*

Solicitors for the plaintiffs, *Stokes and Stokes.*

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 24, 27, 28, and March 22, 1928.

(Before SCRUTTON and SANKEY, L.JJ., and
RUSSELL, J.)

AKTIESELSKABET OCEAN v. B. HARDING AND
SONS LIMITED AND HENRY ARNOLD AND
Co. (a)

APPEAL FROM THE KING'S BENCH DIVISION

Charter-party—Signature by "agent" on behalf of charterers—No authority to "agent" to sign on behalf of charterers—Effect on validity of charter-party—Knowledge of shipowners—"Agent" acting as charterer—Ship sent by owners on chartered voyage with knowledge—Incorporation of terms of charter in bill of lading—Claim for lien on goods carried in respect of demurrage and dead freight—Circuity of actions—When a defence to claim.

The plaintiffs were the owners of the steamship D., and they claimed a declaration that certain wood goods carried by that steamship under bills of lading of which the defendants were endorsees, were subject to a lien: (1) for dead freight in respect of failure to load the steamship with a full cargo at Danzig; and (2) for demurrage at Danzig, the port of loading. The defendants had purchased certain wood goods from S. and Co. of Danzig, at a price c.i.f. London, the freight to be paid by buyers as per charter, balance by acceptances or cash against shipping documents. Under this contract of sale, S. and Co. tendered to the buyers three bills of lading all dated the 26th Aug. 1926, and all signed "Hagen Jorgensen for and on behalf of and with the authority of the master." The buyers took the endorsed bills, and when the goods were deposited with the Port of London Authority to secure the ship's alleged lien for dead freight and demurrage, the buyers presented the bills, and got the goods in exchange for deposit of the sum claimed. The bill of lading described the goods as shipped by S. and Co. on the steamship D. bound for London as per charter, dated the 9th Aug. 1926, and provided: "All the terms, conditions, clauses, and exceptions contained in the said charter-party apply to this bill of lading, and are deemed to be incorporated herein." The charter-party, which gave the shipowners a lien for dead freight and demurrage, was described as made between brokers as agents for the owners, and Messrs. H., F., G., and others of Danzig as charterers. It was signed for the shipowners by "Hagen Jorgensen as agent only," by telegraphic authority from the owners' agents; it was signed for the alleged charterers by H. J. "on behalf of charterers as per separate chartering notes." In fact J. was using the charter as a private

speculation of his own, meaning by separate berthing notes to book portions of cargo at a higher freight than the charter, and so make a profit. He had no authority from H., F., G., to make them parties to the contract. They knew nothing about the charter, and shipped no goods by the ship. He had not at the time of the charter-party signed any separate chartering notes. He did, after the date, sign some chartering notes, at lower rates of freight than the charter, but not enough to provide a full cargo. He signed two berthing notes in favour of S. and Co. for 250/350 standards at 44s. 6d., and 100 standards at 42s., "conditions as per new Scanfin," referring to the agreed form of charter of that name. He signed these documents "by order of," or "on behalf of" the owners. He had no authority from the owners to sign these chartering notes, and did so on his own account and for his own benefit. He only got the goods on board by paying the difference of freight between the above rates and the charter rate to the captain. He signed on behalf of the ship bills of lading incorporating not the Scanfin form, but the specific charter form of the 9th Aug., but at the bill of lading, and not the charter rate of freight. When the shipowners discovered that J. was acting as the charterer, they sent the ship on the chartered voyage. They carried the goods which J. had no right to put on board except as a charterer, and they claimed in this action on the basis of an existing and valid charter.

Held, (1) that the charter-party was a valid charter-party, and (2) that the defendants, as consignees were liable to the liens claimed on their goods, and (3) that the doctrine of circuity of actions was not a good defence to the present claim because the supposed cross-claim did not arise directly between the parties to the proceedings, but involved determining the rights and liabilities of S. and Co., who were not parties to the action.

APPEAL from a judgment of MacKinnon, J.

The plaintiffs who were the owners of the steamship *Dagali*, claimed a declaration that certain wood goods carried by the steamship *Dagali* under bills of lading of which the defendants were endorsees, were subject to a lien (1) for dead freight in respect of failure to load the steamship *Dagali* with a full cargo at Danzig; (2) for demurrage at Danzig, the port of loading.

The defendants had purchased a quantity of wood goods from Steppat and Co., at Danzig, at a price c.i.f. London. Under this contract of sale Steppat and Co. tendered to the buyers bills of lading all dated the 26th Aug. 1926 and all signed "Hagen Jorgensen for and on behalf of and with the authority of the Master." Jorgensen chartered the steamship *Dagali*, at Danzig under a Chamber of Shipping "Scanfin" charter-party 1924, in which the charterer was named as Danziger Holzexport Isidor Goldberger, and others, of Danzig. Jorgensen sold cargo space to Steppat and Co., of Danzig.

(a) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

The charter-party provided (*inter alia*) :

(1) That the said vessel being tight, staunch and strong, and in every way fitted for the voyage, shall, with all convenient speed (having liberty to take cargo for owners' benefit, to any port or ports in the Baltic or North Sea . . .) . . . proceed to Danzig . . . and there load, always afloat, from the agents of the said charterers, a full and complete cargo of . . . deals and/or battens . . . and being so loaded shall therewith proceed to London . . . and deliver the same, always afloat, upon being paid freight. . . .

(5) At loading port the cargo shall be brought alongside the vessel at charterers' risk and expense at the average of ninety standards per weather working day. The cargo shall be loaded with customary steamship despatch as fast as the vessel can receive during ordinary working hours of the port, but according to the custom of the port, Sundays and general or local holidays excepted (unless used). Any dispute arising at the port of loading shall be settled before signing bills of lading, otherwise claim shall be endorsed on bills of lading, and if for any reason the master is prevented from so doing he shall telegraph notice of the claim and the amount thereof to the charterers.

(15) Should the vessel not be loaded or discharged in the manner hereinbefore provided whereby the vessel is detained demurrage shall be paid at 30l. sterling per day and *pro rata* for any part of a day.

(18) The master or owners shall have an absolute lien upon the cargo for all freight, dead freight, demurrage, average and charges. . . .

The bills of lading contained a clause which provided that "all the terms, conditions, clauses and exceptions contained in the said charter-party apply to this bill of lading and are deemed to be incorporated herein. . . ."

The shipowners claimed to exercise a lien for dead freight and demurrage against the bills of lading holders, in London, because a full cargo was not loaded at Danzig. To secure release of the cargo the defendants deposited sums of money with the Port of London Authority.

The defendants pleaded (1) that there was no valid and binding charter-party, and therefore, there was no lien; (2) that if the terms and conditions of the charter-party were incorporated in the bills of lading, disputes had to be settled at the port of loading before signature of the bills of lading, or the bills of lading had to be endorsed, and as the bills of lading were not so endorsed, the shipowners were estopped from relying on their lien. MacKinnon, J. decided against the defendants on these points. He took the view that the defendants would be liable but for the fact that if they paid, they could in his view, by a roundabout process, ultimately recover the same amounts from the plaintiffs. He therefore held that the defence of "circuity of action" freed the defendants, and he accordingly dismissed the plaintiffs' claim.

The plaintiffs, the shipowners, appealed.

A. T. Miller, K.C. and Sir Robert Aske for the plaintiffs.

C. T. Le Quesne, K.C. and James Dickinson for the defendants, B. Harding and Sons.

C. T. Le Quesne, K.C. and Harold Stranger for the defendants, Henry Arnold and Co.

Cur. adv. vult.

March 22, 1928.—The following judgments were read :—

SCRUTTON, L.J.—This appeal raises some troublesome and intricate points on shipping law. The plaintiffs are the owners of the steamship *Dagali*, and their claim is for a declaration that certain wood goods carried by the steamship *Dagali*, under bills of lading of which the defendants are endorsees, are subject to a lien (1) for dead freight in respect of failure to load the steamship *Dagali* with a full cargo at Danzig; (2) for demurrage at Danzig, the port of loading. The statement of claim is a little obscure, but I think it also claims the amounts in a personal liability apart from the lien. MacKinnon, J. has taken the view that the defendants would be liable, but for the fact that if they paid, they could, in his view, by a rather roundabout process ultimately recover the same amounts from the plaintiffs, and he has, therefore, held that the defence of "circuity of action" frees the defendants. The shipowners appeal.

The defendants' connection with the matter is that they purchased certain wood goods from Steppat and Co., of Danzig, at a price c.i.f. London, the freight to be paid by buyers as per charter, balance by acceptances on cash against shipping documents. Under this contract of sale Steppat's tendered to the two buyers three bills of lading all dated the 26th Aug. 1926, and all signed "Hagen Jorgensen for and on behalf of and with the authority of the Master." The buyers took these endorsed bills, and when the goods were deposited with the Port of London Authority to secure the ship's alleged lien for dead freight and demurrage, the buyers presented the bills, and got the goods in exchange for deposit of the sum claimed. This, as explained in *W. N. White and Co., Limited v. Furness, Withy, and Co. Limited* (72 L. T. Rep. 157; (1895) A. C. 40) does not make the receiver liable on the bill of lading unless he is an endorsee to whom the property passes, in which case he is liable under the Bills of Lading Act. The defendants were in this position.

The bill of lading describes the goods as shipped by Steppat and Co., on the steamship *Dagali* bound for London as per charter dated the 9th Aug. 1926, at a freight of 44s. 6d. per standard (the freight in the charter being 46s.). "All the terms, conditions, clauses and exceptions contained in the said charter-party apply to this bill of lading and are deemed to be incorporated herein."

Turning to the charter, first as to its parties. It is described as made between brokers as agents for owners, and "Messrs. Holzexport Isidor Goldberger and others of Danzig as charterers." It is signed for the shipowners by "Hagen Jorgensen as agent only," by telegraphic authority from owners' agents; it is signed for the alleged charterers by Hagen Jorgensen "on behalf of charterers as per

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separate chartering notes." In fact Jorgensen was using this charter as a private speculation of his own, meaning by separate berthing notes to book portions of cargo at a higher freight than the charter and so make a profit. He had no authority whatever from Holzexport to make them parties to the contract; they knew nothing about the charter and shipped no goods by the ship. There were no "others" at the time of signing the charter, unless Jorgensen could be treated as "others." He had not at the time of the charter signed any "Separate chartering notes." He did, after the date, sign some chartering notes, at lower rates of freight than the charter, but not enough to provide a full cargo. In particular, on the 14th Aug. and the 19th Sept., he signed two berthing notes in favour of Steppat and Co. for 250/350 standards at 44s. 6d., and 100 standards at 42s. "Conditions as per new Scanfin," referring to the agreed form of charter of that name. He signed these documents "By order of" or "on behalf of the owners, Hagen Jorgensen." He had no authority from the owners to sign these chartering notes, and did so on his own account and for his own benefit. He only got the goods on board by paying the difference of freight between the above rates and the charter rate to the captain. He signed on behalf of the ship bills of lading incorporating not the Scanfin form, but the specific charter form of the 9th Aug., but at the bill of lading and not at the charter, rate of freight.

What is the result of this tangle? The question was argued at great length whether there was any valid charter; and, if not, whether the bill of lading could be treated as incorporating nothing, or as incorporating the same terms as were to be found in the actual charter form of the 9th Aug., as terms of the bill of lading, binding shippers and receivers.

A cardinal fact of the situation is that Jorgensen is not merely producing himself as a principal charterer, though he has signed as agent for charterers, but is also, being agent for owners, saying "I have contracted with you as charterer." An agent employed by his principal to find a purchaser or charterer cannot himself purchase a charter unless he makes full disclosure of his position to the owner. As soon as the owner discovers the true position he may declare himself not bound, or he may adopt the charter or purchase. In my view he is not bound till with knowledge he adopts, and if he is not bound neither is the agent-charterer. The legal bond cannot be tied at one end and loose at the other. In the present case the owners did not know till they received the letter of the 7th Sept., probably about the 13th Sept., that Jorgensen was acting as charterer, bearing the profit or loss himself, though when they received the telegram of the 8th Sept. they would have considerable information on the subject. What action did the owners take then? They sent the ship on the chartered voyage; they carried the goods which Jorgensen had no right to put on board except as a

charterer, and they claimed in this action on the basis of an existing and valid charter, which could only be if they treated Jorgensen as "the others" who are described as charterers in the document of the 9th Aug. It would, I think, be different if the shippers or endorsees knew who were described as charterers in the charter, and shipped goods in reliance on those names. But this did not happen. Steppat's, who had bound themselves by Scanfin terms in their berthing notes, got them, and accepted without protest bills of lading incorporating the dated charter; the receivers never saw the charter and did not rely on its parties, and had their goods carried under its terms, which they had incorporated.

This view relieves me from discussing whether against unwilling owners Jorgensen could have claimed to be a party under the charter, or whether owners repudiating the charter against Jorgensen could yet have claimed the charter terms against the shippers or endorsees.

If the receiver is not able to object to the incorporation in the bill of lading of the terms of the charter, because of the alleged invalidity of the charter, after it has been adopted by the owners as a charter with Jorgensen, how much of the charter is incorporated by the bill of lading. The words of incorporation have gradually become wider and wider since *Serraino and Sons v. Campbell and others* (7 Asp. Mar. Law Cas. 48; 64 L. T. Rep. 615; (1891) 1 Q. B. 283). Originally they were "he (the consignee) paying freight and (performing) all other conditions of the charter," in which form they were limited to conditions to be performed by the consignee, and did not incorporate exceptions. The present words "all terms, conditions, clauses, and exceptions" are very wide, but similar words have been limited to exclude obligations of the charter inconsistent with express obligations of the bill of lading. Thus the obligation of the charterer to pay lump sum freight on a full or part cargo delivered has not been held incorporated in a bill of lading to pay a named freight per ton delivered: (see *Fry and others v. The Chartered Mercantile Bank of India, London, and China*, 14 L. T. Rep. 709; L. Rep. 1 C. P. 689; *Gardner and Sons v. Trechmann*, 5 Asp. Mar. Law Cas. 558; 53 L. T. Rep. 518; 15 Q. B. Div. 154; and *The Red "R" Steamship Company Limited v. Allatine Bros. and others*, 11 Asp. Mar. Law Cas. 192, 317, 434; 100 L. T. Rep. 268; affirmed 101 L. T. Rep. 510). The bill of lading binds the receiver to pay freight only on his cargo and at the bill of lading rate, and the lien is only for that amount.

I should have been disposed to extend this principle to liens for dead freight claimed against a shipper of part of the cargo, who has shipped all the cargo he contracted to ship, but I am prevented from doing so by the decision of the House of Lords in *Kish v. Taylor* (12 Asp. Mar. Law Cas. 217; 106 L. T. Rep. 900; (1912) A. C. 604, at pp. 621 and

622), where a similar point was argued and the contention negatived.

In the same way the decision in this court in *Porteous v. Watney* (4 Asp. Mar. Law Cas. 34; 39 L. T. Rep. 195; 3 Q. B. Div. 534) prevents any apportionment of demurrage claims among consignees of part cargo.

I should, therefore, arrive at the same result as MacKinnon, J. that the consignees were liable in the present case to the liens claimed on their goods.

But the learned judge freed them from their liability on a ground not pleaded, and, in the form stated by him, of his own suggestion. It was that if the shipowner recovered from the consignees here, the consignees would be entitled to recover the amount from Steppat's, and Steppat's would be entitled to recover the amount from the shipowners, and this as avoiding circuity of action would be a good defence to the shipowners' claim. This involved determining the rights and liabilities of Steppat's, who were no parties to the proceedings. I know of no case, and counsel could refer me to none, where avoiding circuity of action has been held good as a defence, except where the supposed cross-claim arose directly between the parties to the proceedings in which it was used as a defence. The defence had to be used at a time when it was not possible to counterclaim, in a proceeding in which a claim was made, and it was strictly limited to cases where, if the plaintiff recovered against the defendant, the defendant could recover exactly the same sum, or if damages, exactly the same measure of damages against the plaintiff: (See *Turner v. Davies*, 2 Williams' Saunders, 150, especially note (2) and Bullen and Leake, 3rd edit., p. 558). Here the defendants could not recover the sum claimed directly from the plaintiff. It is suggested that as they had bought c.i.f. from Steppat's, if the contract of carriage tendered them included a liability for liens for dead freight and demurrage, they could recover the amount from Steppat's. How is this court to determine this in the absence of Steppat's, and without it being pleaded. It is then suggested that Steppat's, who primarily make a contract with Jorgensen in different terms from the charter-party, a contract which Jorgensen had no authority from the shipowners to make, could recover from the shipowners any sums claimed by liens, which were inconsistent with, or not warranted by, the terms of their contract with Jorgensen. But the terms of Steppat's contract with the shipowners are determined by the bills of lading, and the shipowners are not bound to Steppat's by any contract made by Jorgensen in the chartering notes. In my opinion there is no foundation for the defence based on avoiding circuity of action suggested by the judge.

Apparently feeling this difficulty, a suggestion was made at the hearing of the appeal that there was really a direct claim by consignees against shipowners on the ground of an

implied warranty by the shipowner that the named charterer Holzexport was a party to the charter. It is perhaps sufficient to say that this was never pleaded or considered by the judge, and I decline to consider it for the first time in the Court of Appeal. It was also said that the defendants by letters just before trial had given notice that they intended to apply for leave to counterclaim and that the counterclaim was something like that above suggested. As read from the transcript, when put forward by Mr. Dickinson, it was not the same cause of action as above suggested; and no application was made for leave to counterclaim, or leave given. Again I decline to consider the matter for the first time in the Court of Appeal. The result is that while agreeing with the result of the first part of the learned judge's judgment, I cannot accept his negating that result on the basis of avoiding circuity of action.

The appeal must, therefore, be allowed, and judgment entered for the plaintiffs with costs for a declaration in the terms of the statement of claim, except that 270*l.* is the amount for which the lien is sustainable, which sum once paid by either defendant the lien is discharged. The plaintiffs must have the costs of the appeal.

SANKEY, L.J.—The plaintiffs in this case claimed against the defendants as endorsees of bills of lading certain sums for dead freight and demurrage in respect of a consignment of wood carried by them in the steamship *Dagali* from Danzig to London.

The vessel left Danzig on the 8th Sept., and on arrival with the wood in question at the Surrey Commercial Docks, the plaintiffs claimed to exercise their lien for the amount due to them. The defendants deposited a sufficient sum to answer the claim when the cargo was released, and the question for determination in the action was to what part, if any, of the sum deposited the plaintiffs were entitled.

The facts are as follows: A man of the name of Jorgensen signed a charter party at Danzig on the 9th Aug. 1926 in the following terms: "By telegraphic authority from Messrs. Evensen Oslo as owners' agents. (Signed) Hagen Jorgensen, as agent only." "On behalf of charterers as per separate chartering notes, (signed) Hagen Jorgensen." The charter was expressed to be between Hagen Jorgensen, as agent to the owners, and Messrs. Holzexport Isidor Goldberger and others, of Danzig, as charterers. [His Lordship read clauses 1, 5, 15, and 18 of the charter-party. These clauses are set out above.] In fact Jorgensen had no authority at all on behalf of Holzexport. He was speculating in freights, and he hoped to make a profit by getting persons to ship wood at rates higher than the charter-party rates. He did induce some people to ship, amongst others Messrs. Steppat and Co., to whom he gave shipping notes subsequent to the date of the signing of the charter-party confirming

that he had reserved space for them in the above-mentioned steamship.

These shipping notes were as follows :

Danzig, August 14, 1926.—Messrs. George Steppat & Co. G.m.b.H., Danzig.—I herewith confirm that I have reserved a space for you in the steamship *Dagalia*, which will probably be ready to load about August 20 (the act of God, &c., excepted) for 250/350 stds. deal/battens shipper's option, from Danzig to London S.C.D. Freight rate: 44/6 per delivered St. Petersburg standard.

Remark: Conditions as per New Scanfin ex notice ex clause ten, to be loaded Bergford Althof.—By order of the owners. HAGEN JORGENSEN. Signed NEANDER.

Danzig, Sept. 2 1926.—Messrs. George Steppat & Co., G.m.b.H., Danzig.—I herewith confirm that I have reserved a space in steamship *Dagali* which is already loading (the act of God, &c., excepted) for about 100 standards deals/battens from Danzig to London S.C.D. Freight rate: 42/- per delivered St. Petersburg Standard. Remark: Conditions as per New Scanfin ex ten and notice to load Bergford Althof. By order of the owners. HAGEN JORGENSEN. Signed NEANDER.

Steppat's loaded the wood referred to in those notes, and the master gave them bills of lading dated the 26th Aug., which contained the following words: "All the terms, conditions, clauses, and exceptions contained in the said charter-party apply to this bill of lading and are deemed to be incorporated herein. . . ." Owing to Jorgensen's failure to provide a cargo, not only was the vessel delayed, but she sailed short of her full equipment. The defendants are the endorsees of these bills of lading, and the plaintiffs seek to make them liable for the dead freight and demurrage at the port of loading. Three points were taken for the defendants: (1) That under the circumstances the charter-party had no effect in law because Jorgensen had no authority to make it, as alleged. It was a non-existent document, and that, therefore, the bills of lading did not incorporate it, and the only protection afforded to the vessel was that accorded her by the law of her flag. (2) That if the charter-party had any effect in law and does incorporate the bills of lading, it also incorporates the shipping notes, and that as Messrs. Steppat shipped the full amount for which they reserved space on the said vessel, no liability can remain on them or upon the defendants for either dead freight or demurrage. (3) That the plaintiffs were estopped from bringing their claim by reason of the fact that if the charter-party is to be incorporated in the bills of lading, it provided that any dispute arising thereon should be settled before signing bills of lading, otherwise claims should be endorsed upon the bills, and as this was not done, the plaintiffs represented there were no such claims.

The learned judge apparently decided against the defences pleaded, but held that if the plaintiffs were entitled to anything, the amount for dead freight was 150*l.* and the amount for demurrage 120*l.* He, however, took a point, which is not to be found upon the pleadings

in any shape or form, of the following nature. He said that if the plaintiffs could recover against the defendants, the defendants could recover from Steppat, and Steppat, in their turn, could recover against the plaintiffs, or, as it was put in the alternative that there was an implied warranty by the plaintiffs that Holzexport was a party to the charter-party, and, therefore, the defendants could sue the plaintiffs for breach of implied warranty, that in either case the defendants could recover from the plaintiffs any sum which the plaintiffs might obtain from them, and in order to avoid circuity of action he gave effect to this contention and decided in favour of the defendants.

We were invited to walk along many interesting avenues of shipping law, and the arguments necessarily had to be conducted on different hypotheses of fact. Difficult questions were suggested as to how far evidence could be given to show Jorgensen was or was not a principal under the peculiar circumstances of the case. Equally difficult questions arose as to whether there would be a defence in incorporating into the bills of lading a document which might be a valid charter or might not be. In my view many of these difficulties do not fall for determination when once the true facts are ascertained. The most important fact is, was the charter a valid and binding document. In my view it was. The date of the charter-party is the 9th Aug. The vessel arrived at Danzig on the 24th and was in all respects ready to load by noon of that day. Long before the loading was completed the master became aware of the unsatisfactory character of Jorgensen's position. By a letter dated the 7th Sept. and another of the 10th Sept. he wrote a lengthy account of the situation to his owners, although neither of those letters would have been received at Oslo for several days after their date; but in addition to these letters he sent a telegram on the 8th Sept. to his owners, which presumably reached them on the same day. In my view, there is abundant evidence that with a knowledge of the facts the owners ratified the charter, and that in law Jorgensen must be presumed to be one of the others on whose behalf the charter was made. The owners allowed the loading to proceed, they never objected, they carried out the voyage, and assumed that Jorgensen was the charterer. In these circumstances, I am of opinion that the charter-party was a valid contractual document, and I turn to a consideration of the points raised. It will be convenient to deal with them in the reverse order. No. 3 was as to estoppel. I agree with the learned judge. He finds the defendants were not induced to take up the bills of lading by reason of any such supposed representation, and even if they had this claim in mind, they would not be justified in assuming from the cleanness of the bill of lading that there could be no claim for demurrage or dead freight, because *non constat* the master having been prevented from endorsing, had not telegraphed notice of his claim to the charterers.

As to (2), the incorporation of the shipping notes, I am unable to agree that those notes were incorporated into the contract between plaintiffs and defendants. Jorgensen had no authority to make those notes on behalf of the plaintiffs; the master was in fact issuing bills of lading, namely, those sued upon, and it was not possible for Jorgensen to issue shipping notes which were in conflict with them. He was making such notes for himself and on his own account.

As to (1), what was incorporated in the bill of lading now, it will be observed that the words of incorporation are very wide. [Here the Lord Justice is to be taken as having read the clause]. In my view these words incorporated the loading and demurrage clauses (clauses 1, 5, and 15) and the lien for dead freight and demurrage clause (clause 18). See *Kish v. Taylor* (12 Asp. Mar. Law Cas. 217; 106 L. T. Rep. 900; (1912) A. C. 604, 614), where the bill of lading holder was bound by a clause in the charter-party giving a lien for dead freight; *Gray v. Carr* (1871, 25 L. T. Rep. 215; L. Rep. 6 Q. B. 522), where the bill of lading holder was held liable for charter-party demurrage at port of loading; and *Porteus v. Watney* (1878, 4 Asp. Mar. Law Cas. 34; 39 L. T. Rep. 195; 3 Q. B. 534), where the bill of lading holder was held liable for demurrage at port of discharge. In my view the plaintiffs were entitled to succeed in the claim.

So far I am in agreement with the learned judge, and I now proceed to the circuity of action point which induced him to decide in favour of the defendants. Since the Judicature Acts gave facilities for counterclaim and third-party procedure, the doctrine of circuity of action had neither been as necessary nor as frequently resorted to as in former years: (*Stooke v. Taylor*, 1880, 43 L. T. Rep. 200; 5 Q. B. 569, at p. 576; *Stumore v. Campbell and Co.*, 1892, 66 L. T. Rep. 218; 1 Q. B. 314, at p. 316); *McCheane v. Gyles*, 86 L. T. Rep. 1; (1902) 1 Ch. 287). In the third edition of Bullen and Leake's *Precedents of Pleadings*, published in 1868, the law is on p. 558 accurately stated as follows: "Wherever the rights of the litigant parties are such that the defendants would be entitled to recover back from the plaintiffs the same amount of damages which the plaintiff seeks to recover, the defendant may plead the facts which constitute such right as a defence, for the purpose of avoiding circuity of action. A claim for unliquidated damages cannot be so pleaded where the measure of damages is not necessarily identical in both cases, nor can a mere cross-claim for unliquidated damages be pleaded as a defence on equitable grounds": (*Walmesley v. Cooper*, 1839, 11 Ad. & E. 216). It must clearly be shown that the same sum which the plaintiff sued for can in turn be recovered from him. The most familiar application of the doctrine is to be seen in certain actions on bills of exchange. In recent times an example is *The Glenfruin* (1885, 5 Asp. Mar.

Law Cas. 413; 52 L. T. Rep. 769; 10 Prob. Div. 103), where, however, the point was expressly taken in the counterclaim and was maintainable on the facts.

In the present case neither of the pleas relied upon to bring into operation the doctrine appeared on the pleadings. One was taken by the learned judge, the other, which involved the breach of warranty of authority, was put forward for the first time in this court. In my view, as to the first plea, it is not clear that the doctrine applies on the facts, and it is doubtful whether the damages recovered by the plaintiffs are such damages as are recoverable from them, without knowing the rights and position of the other parties affected. Jorgensen had no authority from the plaintiffs to grant the shipping notes to Steppat, and as between Steppat and the plaintiffs, the bills of lading are the governing documents.

As to the second plea, the case against it is even stronger when it is remembered that it was not taken in the court below. I think that the judgment of the learned judge on the facts and pleadings presented to him by the parties was correct, that the point of circuity of action was not open on the pleadings or justified by the facts, and that the appeal should be allowed, with costs.

RUSSELL, J.—I do not propose in this judgment to deal with the question whether the charter-party was a document binding on the shipowners. I am content to follow the views expressed on this point by the other members of the court. Neither do I wish to add anything as regards the point upon which the learned judge in the court below decided this case. I desire, however, to make some observations as to other aspects of the case.

The action is founded on three bills of lading, of two of which the defendants, B. Harding and Sons Limited, were endorsees; the defendants, Henry Arnold and Co., were endorsees of the third bill of lading. The bills of lading were issued by the plaintiffs to the shippers, Steppat and Co., and under or by virtue of their provisions the plaintiffs claim to be entitled to a lien on the cargo covered thereby for (a) demurrage at port of loading, and (b) dead freight. For the sake of simplicity I will deal with the bill of lading for 4098 pieces of redwood, of which the first defendants are endorsees. "Shipped at Danzig in good order and condition by Steppat and Co. G.m.b.H. of Danzig in and upon the good steamship called the *Dagali* whereof is master for this present voyage, now lying in Danzig and bound for London, S.C.Dk., via other loading ports, as per charter dated the 9th Aug. 1926." Then follows a deviation clause, and then follows a description of the cargo covered by the bill of lading: "And to be delivered in the like good order and condition at the foresaid port of London unto order or assigns, he or they paying freight for the same at 44s. 6d. p. std. of 165 cb. ft. Engl. All the terms, conditions, clauses and exceptions contained in the said charter-party apply

to this bill of lading and are deemed to be incorporated herein, including the liberties under clauses 7 (c) and (d), 8 (d), 11 and 12 (b) thereof." The bill of lading thus in express terms incorporates all the terms, conditions, clauses and exceptions contained in "the said charter-party," that is to say, the charter dated the 9th Aug. 1926, "as per" which the *Dagali* then lying in Danzig was bound for London. There would, therefore, normally be incorporated into the bill of lading (so as to create rights and liabilities as between the shipowner and the shipper) all conditions in the charter-party not inconsistent with the bill of lading which are relevant to the right to take delivery of the cargo. *Primâ facie*, therefore, there would arise as between the shipowners and the shipper by virtue of the bill of lading (which is to be read as containing clauses in the terms of clauses 15 and 18 of the charter-party) a lien in favour of the shipowner for demurrage and dead freight against the goods covered by the bill of lading. The endorsee of the bill of lading becomes, under sect. 1 of the Bills of Lading Act 1855, subject to that liability in respect of such goods as if the contract in the bill of lading had been made with himself.

It was, however, contended on behalf of the defendants that there was no effective incorporation into the bill of lading of any provisions of the charter-party because that which was referred to as a charter-party was in truth no charter-party at all; and this for the reason that upon the facts of this case no rights or liabilities were created or arose thereunder. This contention seems based upon the view that the incorporation into the bill of lading of the provisions of a particular document is in some way dependent or contingent upon that document being an effective document as between the parties to it. This contention is, in my opinion, unsound. The incorporation of the provisions of a document executed between A. and B. into a document executed between B. and C. does not (unless the incorporation or the document between B. and C. is expressly made conditional on that event) depend upon the existence of rights and liabilities as between A. and B. The incorporation of the terms is merely a shorthand method of expression and creating rights and liabilities as between B. and C. by reference to the language of some other document. The document which contains the reference is to be read as if the wording of the document referred to were repeated therein, so as to create rights and liabilities as between the parties thereto. The document referred to need not even be a document which purported to create rights or liabilities; it may be merely a printed form.

The next contention by the defendants was that if you incorporate the terms of the charter-party, you must also incorporate the signatures to it. I confess that this contention puzzles me. The incorporation of the terms of the charter-party is not done for the purpose of introducing into the bill of lading rights and obligations as between the parties to the charter, but for the

purpose of creating rights and obligations as between the parties to the bill of lading by reference to language in another document. I do not see what the signatures of the parties to the charter-party have to do with this. It is true that in *Hutchinson v. Tatham* (29 L. T. Rep. 103; L. Rep. 8 C. P. 482 at p. 487) Brett, J. uses language which at first sight seems to treat the signature to a contract as part of its terms, but the point to which he was directing attention in that case was the words or terms in the particular contract which showed that the defendants had only purported to contract as agents. These were to be found both in the body of the documents (it being expressed to be made by the defendants "as agents to merchants") and in the signature by the defendants which was also expressed to be by them "as agents to merchants." The passage in no way authorises or warrants the incorporation of signatures in the present case. Notwithstanding that passage, I have no doubt that where document B provides that "all the terms, conditions, clauses, and exceptions" contained in document A shall apply to document B and are deemed to be incorporated in document B, the signatures to document A are not incorporated. How can they "apply" to document B? They have nothing to do with it. Let me assume, however, that the signatures to the charter-party are incorporated in the bill of lading. Then, say the defendants, you must incorporate the shipping notes. The charter-party is signed on behalf of the charterers thus: "On behalf of the charterers as per separate chartering notes, signed, Hagen Jorgensen." The defendants contend that this must be read as meaning that the charter-party is subject to the provisions of separate notes, and such separate notes must be incorporated in the bill of lading accordingly. I should have thought that the more natural meaning of the signature is that Jorgensen's authority to sign the charter on behalf of the charterers is to be found in separate chartering notes. I will, however, assume defendants' interpretation to be correct. At this stage it is necessary to recall a few facts. The charter-party is dated the 9th Aug. 1926. As we know, Jorgensen had got no charterer except himself. He was hoping to make a profit out of his speculation in freights. At that date no separate notes had, so far as we know, been issued; certainly the separate notes relied on here had not been issued. On the 14th Aug. 1926 Jorgensen purported to sign and issue to Steppat and Co. a separate note in terms of which the following is a translation: "I herewith confirm that I have reserved a space for you in the steamship *Dagali*, which will probably be ready to load about the 20th Aug. (the act of God, &c., excepted) for 250/350 standards deal/battens shipper's option from Danzig to London S.C.D. Freight rate: 44/6 delivered St. Petersburg standard. Remark: Conditions as per New Scanfin ex notice"—that means without clause 2—"ex clause 10, to be loaded Bergford Althof." Jorgensen had no authority

to sign or issue such a document on behalf of the shipowners. But it should be observed that the separate note incorporates the conditions of "New Scanfin," that is, the printed form which forms the basis of the document of the 9th Aug. 1926. This was followed by the bill of lading which was issued by the plaintiffs to Steppat and Co. on the 26th Aug. 1926. The contention of the defendants is that Steppat can have been under no liability to the shipowner which was inconsistent with the provisions of the separate notes; that Steppat's liability to provide cargo being limited by the separate notes and having been discharged, they can have been under no liability for dead freight. Incidentally this argument does not touch liability for demurrage.

In my opinion, one answer to this contention is, even assuming the contract between the shipowner and Steppat to include the provisions of the separate notes, there is nothing inconsistent in those provisions with the shippers' cargo being subject to a lien for dead freight; I see no reason why the two liabilities should not exist together, namely, a liability to supply only a portion of the cargo and a liability of the cargo so supplied to be subject to a lien for dead freight. In any event, the contention affords no answer to the claim in respect of demurrage.

In my opinion, however, the separate notes form no part of the contract between the shipowner and Steppat and Co. Still less do they form any part of the contract between the plaintiffs and the defendants. The only contract is the bill of lading which, by its express terms (those terms being incorporated by reference), makes the bill of lading holder liable to supply a full cargo, and imposes upon his cargo a lien to secure both dead freight and demurrage: (*Kish v. Taylor*, 12 Asp. Mar. Law Cas. 217; 106 L. T. Rep. 900; (1912) A. C. p. 604; *Porteus v. Watney*, 4 Asp. Mar. Law Cas. 34; 39 L. T. Rep. 195; 3 Q. B. Div. p. 223). The appeal must accordingly be allowed and judgment entered for the plaintiffs, as indicated by Scrutton, L.J.

Appeal allowed.

Solicitors for the appellants, the shipowners, *Botterell and Roche*.

Solicitors for the first respondents, *Thomas Cooper and Co.*

Solicitors for the second respondents, *Trinder, Kekewich, and Co.*

Tuesday, March 27, 1928.

(Before Lord HANWORTH, M.R., SARGANT and LAWRENCE, L.JJ.)

ENSIGN SHIPPING COMPANY v. COMMISSIONERS OF INLAND REVENUE. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Revenue — Excess profits duty — Compensation — Sum received by shipowner for detention of ship — Whether profits of trade.

A sum paid by the Government to a shipowner as compensation for the detention of a ship during a strike in the coal industry is assessable to excess profits duty as part of the profits of the shipowner's business.

Decision of Rowlatt, J. (ante. p. 340; 138 L. T. Rep. 180) affirmed.

APPEAL by the Ensign Shipping Company from a decision of Rowlatt, J. (138 L. T. Rep. 180) confirming a decision of the commissioners that a sum of 1078*l.* which was paid to the company in April 1924 in respect of the detention of their ships *Webburn* and *Charlus* by the Government constituted a trade receipt of the year ending the 31st Dec. 1920, and was assessable to excess profits duty.

The facts are stated by the Master of the Rolls in his judgment.

A. M. Latter, K.C. and Raymond Needham for the appellant company.

Sir Thomas Inskip, K.C. (S.-G.) and R. P. Hills for the respondents.

LORD HANWORTH, M.R.—In this case I think Rowlatt, J. was quite right, and that the appeal fails.

The question which arises is a short one, but it raises two points. The Ensign Shipping Company, who are the appellants, are the owners of two vessels, the *Charlus* and the *Webburn*. At the time when the coal strike was on in the autumn of 1920 these two vessels were apparently under charter, and they were lying at Llanelly, the *Charlus* with a full cargo of 311 tons of steam coal, under a charter under which she was to proceed to Granville. On the morning of the 15th Oct., when she was on the point of sailing, one of the officers of His Majesty's Customs boarded the vessel, withdrew the clearance which had been given to her on the previous day, and she was therefore prevented from clearing from the port. Ultimately, after repeated requests for release, she was released on the 30th Oct., having been detained for fifteen days and one and three-quarter hours. In the case of the *Webburn* she had completed the loading of a full cargo of 970 tons of coal at Newport for transit to Rouen under a charter-party, and the company had applied for clearance on the 15th Oct., and this was refused. Ultimately, in spite of repeated requests, the vessel was told that the

(a) Reported by GEOFFREY P. LANGWORTHY, Esq., Barrister-at-Law.

crew was to be retained, and the fires kept banked, in order that the vessel might be ready to proceed to sea. After repeated requests had been made to the Ministry of Shipping and to His Majesty's Customs, this vessel was ultimately allowed to clear on the 4th Nov., that is to say, she suffered a period of detention of nineteen days, during which time, in the case of both these vessels, there was a crew kept on board, and the fires were kept banked, and they were ready to proceed to sea at short notice. Pausing there for a moment, what had happened? It is clear that the refusal of the clearance was because these two vessels were equipped as vessels able to sail, that they had been loaded with coal which at short notice could be deflected to any place where it was desired, and they were kept under steam, and the crews on board were kept in being in order that they might receive instructions to proceed wherever they were ordered to go with as little delay as possible, being sea-going ships containing cargoes of coal. Ultimately a claim was made in respect of the detention of both these vessels.

It is interesting to look at the claim which was made: It was a claim in the War Compensation Court, and we have particulars of the claim, which was "for payment out of public funds in respect of direct loss incurred and damage sustained by the claimant by reason of interference with the claimant's property or business in the United Kingdom through the exercise, or purported exercise, during and for the purposes of the war, of any prerogative right of His Majesty or of any power under any enactment relating to the defence of the Realm, or any regulation or order made thereunder." Those words are precisely the words of the Indemnity Act, s. 2 (1) (b). Notwithstanding the general restrictions or taking legal proceedings which had been enforced under sect. 1 by sect. 2, there was a right to compensation for acts done in pursuance of prerogative and other powers: (a) gives the right to the owner of a ship which had been requisitioned at any time during the war in exercise or purported exercise of any prerogative right or under any enactment relating to the defence of the realm, or regulation or order made, and so on; and (b) gives the right to any person "who has otherwise incurred or sustained any direct loss or damage by reason of interference with his property or business in the United Kingdom through the exercise or purported exercise, during the war, of any prerogative right of His Majesty or of any power under any enactment relating to the Defence of the Realm," and so on. So we find that the Ensign company, in consequence of this detention, set up a claim in respect of both these vessels; they set out the place where the detention took place, the period of detention, the loss of the use of the steamer is turned into a money claim, and the cost of the bunkers consumed by the fires being banked up during those days is claimed, and also the wages of the crew between those dates are separately set out, and the total is

reached. That happens in both cases. When these claims had been made, the matter was apparently taken in charge by the Solicitor to the Board of Trade, and he agreed that in respect of the various claims made by the owners of other vessels as well as the Ensign company, a sum of 66,241*l.* should be the figure to be given by the Government, and that was accepted in settlement of all the claims of all the shipowners and time-charterers who had lodged claims before the War Compensation Court, and out of that 66,241*l.* the amount which was lodged to meet the two claims of the Ensign Shipping Company was the sum of 1078*l.*, and that money has been paid.

It is said that the 1078*l.* was a sum which reached the Ensign company as a sort of wind-fall, that it had nothing to do with their trade or business, that it lay outside their business, that it was an *ex gratia* payment, and that one ought not to test the nature of the payment by the measure of what is given to one. But when one looks at the facts, and asks oneself: How and under what circumstances does this payment fall outside the ordinary business of the insurance company as shipowners?, one finds great difficulty in answering that difficulty in a manner favourable to the appellants. Their business is to make use of the vessels that they own, to hire out the vessels to charterers, and to make profits from the earnings of the ships. If one treats the ships as being capable of being hired out under freight for every day of the year, it is then, I think, plain that if you hold up a ship for fifteen days, as in the case of the *Charlus*, or nineteen days, as in the case of the *Webburn*, you have prevented the vessel from earning money. The result of each case was this, that the *Charlus* arrived fifteen days late at Granville, and the *Webburn* arrived nineteen days late at Rouen, and they had respectively lost that number of days by the fact that they had been held up at Llanelly and Newport respectively.

Mr. Needham puts his argument in this way: He goes so far as to say that this was (so to speak) a number of days' charter cut out of the life of the vessel—that the vessel was sterilised for that period of days; but those are rather metaphorical words to use, and I prefer to look at the nature of the undertaking which the Ensign company was carrying on, that it was to make use of their vessels day by day, and to make use of the earnings which they secured, to make a profit. The reason why the word "sterilised" is used, or that you "take a bite out of the life of the ship," is to try to bring the case within the *Glenboig* case (1921) S. C. 400, where, as we all know, it was decided that a sum which was paid to prevent the company from working clay close to the railway was a capital sum, because it was said that the activities of the clay company in respect of part of their capital asset was sterilised *pro tanto*. But in the present case it seems to me that, looked at from a business point of view, all that has happened is that the two vessels arrived much later at the ports to which they were consigned

than they would have done, with the consequent result that for the certain number of days which they were late they could not possibly make any earnings, and it is in respect of that direct loss by reason of the interference with the rights exercised on behalf of His Majesty that they made a claim and have been paid compensation.

The evidence which is set out in the case is not accepted to the full by the commissioners. The auditor of the company suggested that this 1078*l.* was paid as a temporary sterilisation of capital assets. It appears to me that perhaps the facts of the *Glenboig* case are widely apart from those of the present case, which really connote that the payment to be made by the Government is in respect of what might be called a further temporary charter by the Government for the fifteen and the nineteen days respectively of these vessels, which were always afloat, with fires up, with crews on board, and ready to sail under orders as vessels complete and equipped in their ordinary course of trade to any port to which they might be sent by the Government. We find from the auditor that all these trading expenses, which included the wages of the crew, insurance, and so on, had been placed in the accounts, and that no claim had been made for the *Charlus* and the *Webburn* with regard to rebate for insurance, and that in fact no claim was made by the charterers of the *Charlus* and the *Webburn* against the company. The result is that in fact the company have received money by way of payment for the fifteen days and the nineteen days respectively during which the vessels were detained at the service of his Majesty in case they were needed. The commissioners, having considered the evidence, held that the 1078*l.* constituted a trading receipt for the year, and confirmed the assessment. Rowlatt, J. has supported the commissioners, and he says this: "I think I ought to regard this sum, as the commissioners have obviously regarded it, as a sum paid which to the shipowners stands in lieu of the receipts of the ship during the time of the interruption." That seems to me to be the right business-like way of looking at it, and it seems, therefore, that this sum falls into the trading receipts earned by these two ships, as would the receipts from a charter for the fifteen or the nineteen days if there had been separate charters for those respective periods entered into by the shipowners for the ships for that time.

I think the case before Wright, J. (*France, Fenwick, and Co. v. The King*, 136 L. T. Rep. 358; (1927) 1 K. B. 458), which was pressed upon us, has really no bearing upon this point. I think that the Solicitor-General was right in the way in which he pointed out that the case was decided, as to the larger bulk of days, on the ground that there was no requisition at all, but he also pointed out that if there has been a direction given that the ship should be at the disposal of the Government, Wright, J. thinks that would be a requisition. It appears

to me in the present case that this sum has been paid upon the basis of reimbursement to the shipowners for the time that was lost by the detention of the vessel, and that it was paid to them in the course of their vessels' being afloat and ready to earn as vessels under a charter, and the character and nature of the payment is one which falls within the ambit of their ordinary trading account.

For these reasons it appears to me that both the commissioners and Rowlatt, J. were right, and that the appeal must be dismissed with costs.

SARGANT, L.J.—I am of the same opinion. It appears to me that on the facts of this case the Government substantially had the use and control of these two vessels for the period in question, and that the sums paid to the company were sums paid in respect of that use and control, though arrived at by way of compromise of that claim and a number of other claims. The case seems to me to be one within the case of *Sutherland v. Commissioners of Inland Revenue* (12 Tax Cas. 63), and accordingly the sum in question is a trade receipt, as the commissioners have found, and is a trade receipt in respect of the period in question during which the vessel was under the control of the Government. I agree that the appeal should be dismissed.

LAWRENCE, L.J.—I agree, and the only remark I will add is on the one point about whether in this case the learned judge was right in saying that the decision in *France, Fenwick, and Co. v. The King* (136 L. T. Rep. 358; (1927) 1 K. B. 458) covered the present case. It seems to me the distinction between the two is this, that in the *France Fenwick* case the authorities had not done what they have done here, but they only gave instructions that in no circumstances was the vessel to discharge without permission; whereas in the present case, as appears from the case, the instructions received by the company went far beyond that, and amounted in fact, to my mind, to a requisition of the ship. With those remarks I am content to express my concurrence in the judgment delivered by the Master of the Rolls and Sargent, L.J.

Appeal dismissed.

Solicitors for the appellant company, *Botterell and Roche*, agents for *Botterell, Roche, and Temperley*, Newcastle-upon-Tyne.

Solicitor for the respondents, *Solicitor of Inland Revenue*.

MERCHANTS MARINE INSURANCE CO. LIM. v. LIVERPOOL MARINE & GENERAL INSURANCE CO. LIM.

April 20 and 23, 1928.

(Before SCRUTTON, GREER, and SANKEY, L.JJ.)

MERCHANTS MARINE INSURANCE COMPANY LIMITED v. LIVERPOOL MARINE AND GENERAL INSURANCE COMPANY LIMITED. (a)

Insurance (Marine)—Reinsurance—Continuation of risk if vessel at sea at date of expiration of original policy—Stranding during such continuance—Risk to continue for "immediate consequences" of damage—Temporary repairs to vessel—Continuation of voyage—Vessel beached to prevent sinking—Total loss—Liability of reinsurers.

The plaintiffs, who were reinsurers of a risk under a marine policy on the Norwegian steamship *M.*, reinsured that risk with the defendants. The policies covered the vessel from the 1st Jan. to the 31st. Dec. 1925, and they contained a continuation clause in the following terms: "In the event of the vessel not being at the place of destination on the date of the expiration of the policy the insurance shall continue in force till the end of the day when the vessel arrives at her first place of destination. If the insured object is in a damaged condition at the time when the insurance expires . . . the risk shall continue for the immediate consequences of such damage until the object without unnecessary delay has been repaired or sold."

While on a voyage to South African ports the time covered by the policy expired, but the risk continued under the continuation clause. Before reaching her first port of destination the *M.* grounded outside the harbour, but got off the reef and proceeded to her port of destination, where she was overhauled and was found to be seriously damaged. Temporary repairs having been effected the vessel proceeded on her voyage, but as she began to leak again she had to be beached in order to prevent sinking and was ultimately sold as a wreck.

Held, that the loss was an immediate consequence of the original damage done, and as the risk continued until the vessel without unnecessary delay had been repaired, the plaintiffs were entitled to recover.

Decision of Rowlatt, J. reversed.

APPEAL from the decision of Rowlatt, J.

A Norwegian steamer, the *Maridal*, was insured in Norway against marine perils for a period from the 1st Jan. to the 31st Dec. 1925. The insurers reinsured their risk with the plaintiffs, who in their turn reinsured their risk with the defendants. The policies were subject to conditions of which the two following were material: "In the event of the vessel not being at the place of destination on the date of the expiration of the policy the insurance shall continue in force till the end of the day when the vessel arrives at her first place of destination." And: "If the insured object is

in a damaged condition at the time when the insurance expires . . . the risk shall continue for the immediate consequences of such damage until the object without unnecessary delay has been repaired or sold." In Jan. 1926 the *Maridal* was on a voyage from Baltic ports to South African ports with a cargo of timber. Her first port of destination was Lüderitz. When entering the bay she ran on the Angra Rocks and bumped considerably, and then came off and proceeded to Lüderitz, when it was found that she was badly damaged. As there were no repair facilities the underwriters' representative at Cape Town sent a diver to the vessel. Temporary repairs were then effected and the vessel proceeded on her voyage to Cape Town. After she had been at sea about twelve hours or so water began to come in again, and in order to prevent sinking the vessel was beached on Possession Island and became a constructive total loss. She was subsequently sold as a wreck. In these circumstances the original Norwegian underwriters paid the owner for a total loss; the plaintiffs, as reinsurers, paid the original insurers and claimed over against the defendants their reinsurers, who refused to pay, hence the present action.

Rowlatt, J. held that the loss was not an "immediate consequence" of the damage caused by the original stranding, as the chain of causation was broken when the vessel reached her first place of destination, which was a place of safety, and that, therefore, the action failed.

The plaintiffs appealed.

W. N. Raeburn, K.C. and R. I. Simey for the appellants.

A. T. Miller, K.C. and H. Atkins for the respondents.

SCRUTTON, L.J.—This case raises a comparatively short point and one that is unusual, in this sense, in an English court, that it does not turn on the ordinary rules applied by English law as to the consequence of perils which can be recovered under a policy, but turns on the application to the facts of this case of a particular clause in Norwegian insurance, which does not exist in English law. It is a fight between two English reinsurers, the subject of insurance being a Norwegian ship which was insured with the plaintiffs in this case who reinsured their risk with the defendants in this case. In the original insurance was a time policy for a year, but there were provisions incorporated in all the policies for a continuation clause in case the ship was at sea at the expiration of the policy, and, therefore, it was not known what had happened to her. The continuation clause in this particular case is, "In the event of the vessel not being at the place of destination on the date of the expiration of the policy"—she was not; she was on a voyage from Europe to various ports on the South African coast beginning with Lüderitz Bay and ending with Beira—

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

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"the insurance shall continue in force till the end of the day when the vessel arrives at her first place of destination." The first place of destination was Lüderitz Bay, which is on the west coast of Africa, some 500 miles north of Cape Town. Then there was a further continuation clause, which is incorporated in the policy and in the reinsurance policies, and which is expressed in sect. 27 of what is called the Norwegian plan, which is something like the Institute clauses in English insurance policies, a set of clauses which may be included by referring to them as the Norwegian plan; and that clause, on the applicability of which to the facts in this case the whole question in this case arises, is this: "If the insured object is in a damaged condition at the time when the insurance expires and the damage comes within the underwriters' responsibility, the risk shall continue for the immediate consequences of such damage until the object without unnecessary delay has been repaired or sold."

That clause assumes that damage had resulted before the insurance expires from a risk insured by the policy. So far, of course, the damage would be recoverable, or the costs of repairing. But something is added. It is assumed that there may be further damage directly resulting from the damage which has already been caused after the date when the insurance expires, *i.e.*, after the date of arrival at the first point of destination. The further damage resulting from the original damage is to be covered by the policy until the object without unnecessary delay has been repaired. So that unless you can find that the vessel has been repaired or that there has been unnecessary delay in repairing her, further damage directly caused by the original damage which results from the original perils in the policy is covered.

That, of course, is quite a different question from considering the applicability of the maxim *Causa proxima non spectatur* to the damage caused by the insured peril. You begin here with damage caused by a peril; you assume that that damage may cause further damage before the vessel is repaired, and for that further damage directly caused by the original damage before the damage had been repaired the underwriters undertake to pay. Now apply that to the facts in this case. Approaching Lüderitz Bay, this particular vessel, the *Maridal*, grounded on the Angra Reef, and, grounding, was bumped for some considerable time on a rocky reef, with the result that her No. 5 after-tank was holed very considerably; there were large holes, and I should have thought that it was almost inevitable that a heavy vessel laden with timber bumping on a reef so as to make large holes in the bottom of her double tank would have strained herself and that it was extremely probable that her structure was weakened as well in addition to the damage caused by the specific holes which were made in the double bottom. She gets off and reaches Lüderitz Bay and lies in a place where she lies

safely to this extent, that the pumps can keep down the water which is leaking through various places, not clearly ascertained, between her double-bottom tank and the holds of the ship. But there she is, and what is she to do? She is on a voyage; she is insured on a voyage which the time covers, a voyage she is making to Beira. She has a lot of cargo in her for other ports. Lüderitz Bay, I am quite clear, has no facilities for the repair of a vessel damaged in this way. Is it to be said "She is now in a place of safety. If she goes on pumping she will keep safe. Let her stay there; she is in a place of safety"? A place of safety for a ship does not mean a place where she will be shut out for all time from any commercial operations, and, because she can lie safely there, that she shall lie safely there without endeavouring to proceed. Obviously the thing every one has to consider is, how can she be efficiently repaired in order that she may continue her operations as a freight-earning ship; and everybody concerned in the case, which did not include any efficient surveyors at Lüderitz Bay, because there were not any—everyone concerned in the case at Lüderitz Bay and the underwriters' representatives at Cape Town themselves who had been in communication with the original underwriters in Norway thought that the proper thing to do after the diver had patched her holes as best he could was to take the chance of her getting through to Cape Town, which is about 500 miles off. This court has not the advantage of being able to look at the log and see the weather in which she started, but she was tried outside Lüderitz Bay under steam, and everybody took the view that she could get through to Cape Town. The diver backed his opinion by proceeding to travel with her instead of travelling in a roundabout way by road. Again, not having the log, we do not know whether the weather got worse, and there was a controversy whether the wind she met with was force 8 by the Beaufort scale or force 4 by the Beaufort scale, because it is "4" in the log, and it is not known whether that refers to the Norwegian scale or the English Beaufort scale. She gets part of the way down and then she begins to leak badly. It seems to me quite clear that why she begins to leak badly is that she has been damaged by the original grounding, with her strength weakened, and that in that weakened condition she was not able to stand the strain of a sea voyage. In consequence she has to be beached at a very desolate island a little bit to the west of Lüderitz Bay, and, there is no doubt, being beached there, she was a constructive total loss. How does that fit in with the terms of sect. 27? When the insurance expired the ship was in a damaged condition. That damage came within the underwriters' responsibility because it was occasioned by perils of the sea. The risk is therefore to continue until the object without unnecessary delay has been repaired. She has not been repaired and there has been no unnecessary

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delay. What is the risk which is to continue? The risk which is to continue is for the immediate consequences of such a voyage. Was it an immediate consequence of the damage done by the stranding which was continuing and had not been repaired that she was unable to stand weather which any ordinary seaworthy ship undamaged would have stood, and had to be grounded? In my opinion it was.

The learned judge has come to an opposite conclusion for this reason, that he has imported into the clause a provision which is not there. He has said the clause shall read "till the object is in a place of safety." But that is just what the clause does not say. The clause says that the risk shall continue for the immediate consequences of such damage until the object without unnecessary delay has been repaired, and it assumes that, after the damage has been caused and before the ship has been repaired, further damage may be caused by the original damage. That seems to me just to be intended to meet the case where a ship, having been damaged, has to be brought to another port to be repaired. That provision does not cease to apply because, on the way to be repaired efficiently, the vessel is in a place where she can lie in safety so long as she is not repaired, and at a place where there are no facilities for repairing her. For these reasons I think the learned judge came to a wrong conclusion when he thought that the place of safety before the vessel was repaired was a matter to be considered under this clause. This view of the question which we have to determine, which seems to me to be the obvious and only question, having regard to sect. 27, turns on considering whether or not the English decisions of *Reischer v. Borwick* (7 Asp. Mar. Law Cas. 493; 71 L. T. Rep. 238; (1894) 2 Q. B. 548) and *Leyland Shipping Company Limited v. Norwich Union Fire Insurance Society Limited* (14 Asp. Mar. Law Cas. 258; 118 L. T. Rep. 120; (1918) A. C. 350), which do not deal with the same questions at all but deal with the question whether damage is a proximate result of an insured peril, which is quite a different question, apply to the facts of this present case or not. But I only say this, that whatever one may have thought, if one were brought up in the old school of considering proximate cause, was the conclusion which should have been arrived at in the case of *Reischer v. Borwick* (*sup.*) and the *Norwich Union* case (*sup.*), since the House of Lords has given its decision, those older views must be taken as erroneous, and the result of both cases, and particularly of the case of *Reischer v. Borwick* (*sup.*), seems to me to support the view I have arrived at as to the meaning of clause 27, although I think they are not decisions on the same question.

For these reasons I think the learned judge's view that the vessel had got to a place of safety, and therefore that liability had ceased under sect. 27, is erroneous. This view relieves one from expressing any final opinion about the

other point argued from the point of view of the appellants, which was this: the policies contain a provision to pay as may be paid thereon, and that the settlement of the original company shall be followed. The original company has paid and has settled, and the appellants desire to argue, as I understand, by their leader, one point, which is: here is a settlement of the original underwriters; by their junior, two points: that there is also a provision under the clause to pay as may be paid thereon. Now, on the second point, thirty-five years ago Mathew, J. in *Chippendale and others v. Holt* (8 Asp. Mar. Law Cas. 78; 73 L. T. Rep. 472) decided, with the assistance of the argument of Mr. Simey, who now says he was wrong, that to pay as may be paid thereon did not cover a case where the original person paying was not under any liability to pay. I think myself it would be difficult to disturb that thirty-five years' old decision which has been acted on repeatedly ever since, but I mention that it has been taken in order that the House of Lords, if it ever gets there, shall have the opportunity of saying whether it will treat *Chippendale and others v. Holt* (*sup.*) as standing in its venerable antiquity or whether it should be reversed. It is not necessary for us, in the view we take as to the main liability, to express any opinion upon it.

For these reasons I think the appeal should be allowed with costs.

GREER, L.J.—I agree. The appellants were the plaintiffs in an action on a marine policy of reinsurance, and they claim against the defendants under the circumstances that the other reinsurers have paid and the original insurers have paid. Rowlatt, J., in the court below, dismissed this action with costs, holding that they had not brought the case within the words of the policy.

The material facts may be quite shortly stated. The vessel (during the continuance of the policy by reason of the clause therein) stranded near the entrance to Lüderitz Bay. Lüderitz Bay was one of her ports of discharge. Under the terms of the policy the risk continued till she arrived at a port of discharge. There was an additional clause to the effect that "if the insured object is in a damaged condition at the time when the insurance expires and the damage comes within the underwriters' responsibility, the risk shall continue for the immediate consequences of such damage until the object without unnecessary delay has been repaired or sold." Now it is clear, as applying to this case, that the words are not "the immediate consequences of the stranding," but "the immediate consequences of the damage." The further facts that seem to me to be material for this case are these, that there is no finding by the learned judge that the shipowners, by her master, failed to take reasonable steps at Lüderitz to do such temporary repairs as might reasonably be supposed to be sufficient to enable the vessel to get to the nearest place, that is to say, Cape Town, where she could be

efficiently repaired. I do not understand it to be seriously suggested that they did in fact fail to take reasonable steps, though it was hinted at once or twice in Mr. Miller's argument. It seems to me impossible, having regard to the facts proved in this case, to find that they failed to take reasonable steps to do such temporary repairs as would enable them to continue what is for this purpose an insured voyage by going to a place where the vessel could be properly repaired. Now, the clause says that until she is repaired—that means at such a reasonable place as she ought to be repaired at—the responsibility for the immediate consequences of the damage caused by the stranding is to be covered, and she is to go there without unnecessary delay. One wonders whether, if they had waited and had brought up surveyors and more workmen and more divers from Cape Town and had done some more repairs, and then immediately the vessel had stranded at Lüderitz Bay, what the respondents would have said. I can imagine they would have said: "This was unnecessary delay on your part; you ought to have patched her up sufficiently to enable a reasonable navigator to take her to Cape Town, and as you have not done that you have been guilty of unnecessary delay. Therefore you are not covered by the policy." I think the vessel when she met with this accident was still suffering from the damage caused by the stranding, and the water coming into her and her consequent loss were the immediate consequences of the still existing damage caused by the stranding.

I only wish to refer to one authority, and that is the case of *Reischer v. Borwick* (*sup.*), which, though not a direct authority on this question, is an authority which affords some guidance how we should determine the question we have to decide in this case. Lopes, L.J., in giving his judgment, says this (7 Asp. Mar. Law Cas., at p. 494; 71 L. T. Rep., at p. 240; (1894) 2 Q. B., at p. 553): "It was contended that the towing the tug through the water after the collision was the proximate cause of the loss now sought to be recovered. It was, however, admitted that this was a reasonable and proper act in the circumstances." It is said that the cause of the damage in the present case was the decision to take the vessel with such repairs as she had had to Cape Town. It appears to me, and it is now admitted to be the fact, that this was a reasonable and proper act in the circumstances. I also refer to the words in Davey, L.J.'s, judgment (7 Asp. Mar. Law Cas. 495): "The failure of the attempt to mitigate or stop the damage arising from the breach in the condenser cannot in my opinion be justly described as the cause of the ultimate damage." It seems to me that, applying these words to this case, it cannot be said that the failure of the attempt to mitigate the damage when the vessel was in Lüderitz Bay can justly be described as the cause of the loss of this vessel.

I think it unnecessary to say anything about the other part of the case that may possibly be argued elsewhere. It does not arise on the view I have come to. I agree that the appeal must be allowed with costs.

SANKEY, L.J.—I agree. The only question which falls for determination in this appeal is whether the plaintiffs, on the facts of the case, have brought themselves within sect. 27 of the Norwegian plan of insurance, which reads: "If the insured object"—a ship in this case—"is in a damaged condition at the time when the insurance expires, and the damage comes within the underwriters' responsibility, the risk shall continue for the immediate consequences of such damage until the object, without unnecessary delay, has been repaired or sold." Now, no question arises, as there might arise under a clause of this character in certain circumstances, as to whether there has been any unnecessary delay in repairing her. The vessel was injured by taking the ground somewhat severely, if you look at the general average statement, at Angra Reef when she was making for Lüderitz Bay. Everything was done that could be done to get her to Lüderitz Bay, and when she got there the master immediately communicated with Cape Town, which was about 500 miles distant, and a diver and some four or five men with their equipment arrived and patched the vessel up. Personally, I do not think the question as to whether the vessel had arrived in a place of safety has very much to do with the case. Personally, I also doubt whether under the circumstances it could be said that the vessel had arrived at a place of safety. The real point for determination is whether the damage which was sustained by the vessel when she took the ground at Angra Reef was the immediate cause of her loss on Possession Island. I think that it was. Fortunately, we have not got to speculate here upon the meaning of the words "proximate cause" or to add anything to the numerous words which have been used to elucidate the meaning of it, such as "efficient" or "effective cause," "real cause," "proximate cause," "direct cause," "decisive cause," "immediate cause," "*causa causans*," all of which have been used in one or other of the cases to which our attention has been directed. All we have to decide is whether it was the immediate consequence of the damage. I am clearly of opinion that it was.

I also should like to refer, not because I think the construction of the words is important, but because of the facts, to the case of *Reischer v. Borwick* where Lindley, L.J., as he then was, says (71 L. T. Rep., at p. 239; (1894) 2 Q. B., at p. 551): "It appears to me, however, that an injury to a ship may fairly be said to cause its loss if, before that injury is or can be repaired, the ship is lost by reason of the existence of that injury, *i.e.*, under circumstances which, but for that injury, would not have affected her safety." Again,

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Davey, L.J. says, in his judgment (7 Asp. Mar. Law Cas., at p. 495; 71 L. T. Rep., at p. 240; (1894) 2 Q. B., at p. 553): "The collision"—in that case it was coming into collision with a snag—"made the hole in the condenser, and the broken condenser was a continuing source of risk and danger." Here, too, I think the damage that was sustained by the tank and in the various parts on the port side to which our attention was directed was a continuous source of danger, and so the damage which she sustained was in fact the immediate cause of the eventual beaching of the vessel.

Appeal allowed.

Solicitors for the appellants, *Waltons and Co.*

Solicitors for the respondents, *William A. Crump and Son.*

Tuesday, May 8, 1928.

(Before SCRUTTON, GREER, and SANKEY, L.JJ.)

FRENKEL v. MACANDREWS AND CO.
LIMITED. (a)

ON APPEAL FROM THE KING'S BENCH DIVISION.

Bill of lading—Deviation clause—Damage—Ship on agreed route—Usual route—Not on direct route—Exceptions clause—Claim by shipper of goods—Shipowners protected from liability for loss.

The plaintiff claimed to recover from the defendants, the shipowners, damages for loss of a parcel of oil shipped at M. under a bill of lading which described the shipment as a shipment in the defendants' ship to L. with liberty to touch at any ports whatsoever, though it might be outside the route, without being considered a deviation. The shipowners relied on the deviation clause and the exceptions clause in the bill of lading as protecting them from liability, but the plaintiff said that they were not so protected because when the loss occurred the defendants were not carrying the goods on the bill of lading voyage but were carrying them by means of an unauthorised deviation. For a considerable time the defendants had been pursuing from M. to L., or other ports of this country, two distinct routes for the ships of their line, one "via Levante," which meant going north-east up the coast of Spain calling at various ports and then coming back from the furthestmost port down the Mediterranean and through the Straits of Gibraltar to this country, and the other one, called "Directo," coming direct from M. to L. or other ports in this country. Both routes were well known to the representatives of the plaintiff at M. They knew that sometimes the route of the ship would be "via Levante," and sometimes it would be "Directo," and in this particular case, when they delivered their goods to the ship to be carried under this bill of lading, they knew

that the route of that ship would be "via Levante."

Held, that as between the parties in this case the bill of lading could be read as meaning that the goods were destined for L. by one of the usual routes and even if the plaintiff had not known which way the ship was going on this occasion, still, as the ship was taking one of the known and usual routes to L., it was not deviating at the time of the loss. The shipowners were therefore protected by the exceptions clause in the bill of lading.

Decision of Rowlatt, J. (44 Times L. Rep. 329) reversed.

APPEAL from a decision of Rowlatt, J. (44 Times L. Rep. 329).

The plaintiff claimed a sum of 2293l. in respect of the loss of olive oil sent from Malaga to Liverpool on a steamship, the *Cervantes*, belonging to the defendants.

The plaintiff was the owner of 134 barrels of olive oil shipped on the defendants' ship *Cervantes* at Malaga under two bills of lading dated the 11th April 1927, one for 110 barrels for delivery via Liverpool to Bradford and the other for twenty-four barrels for delivery at Liverpool. The plaintiff said that the goods were shipped in good order and condition and were not so delivered. Alternatively he said that the damage was due to negligent stowage, or to the unfitness of the ship.

The defendants did not admit that the goods were shipped in good order and condition. They also relied on the exceptions clauses in the bills of lading which they said protected them from liability. Further, they pleaded that the damage, if any, which was not admitted, was caused by perils of the sea, in that the defendants' ship *Cervantes*, after sailing from Malaga on the 11th April 1927, with the barrels of oil on board, met a gale on the 12th April, and owing to the violent motion of the vessel the barrels broke loose and could not be secured and some of the oil was lost, and they said that that loss was caused by perils of the sea, which was within the exceptions in the bills of lading. The plaintiff, however, pleaded that after loading the plaintiff's cargo, the *Cervantes*, without justification, deviated from the contract voyage and the perils of the sea were met with after the unauthorised deviation, and therefore the defendants could not rely on the provisions of the bills of lading.

The facts are fully stated in the judgments.

Rowlatt, J. held, following a decision of Hill, J. in *T. M. Duché and Sons v. Owners of the Steamship Maria* (3 Ll. L. 184), that the loss occurred after an unauthorised deviation on the part of the defendants' ship and that therefore the defendants were not protected. He accordingly gave judgment for the plaintiff.

The defendant appealed.

G. P. Langton, K.C. and Cyril Miller for the appellants.

Dunlop, K.C., Harold Stranger, and Geoffrey Hutchinson for the respondent.

(a) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

SCRUTTON, L.J.—This case raises an interesting question with regard to the effect of the knowledge by a shipper of the route by which it is intended to convey his goods on a ship. Mr. Frenkel, a merchant carrying on business in London and in Malaga, sues the MacAndrews Line, a very well known line which have carried on a trade between the British Isles and Spain and Portugal for over fifty years, for the loss of some oil which he shipped on a vessel of theirs at Malaga. It appears that the MacAndrews Line has for years run its out-and-home voyage in this way. It does not call at every port out and home. In the slack season, if it has cargo for a small port it may go in, and if there is cargo there to be taken it may take it for England, but by the route that it will go on, on its outward voyage as far as it goes, and then return, not calling at the port at which it has picked up the cargo for England. On the other hand, they may sometimes not call at the port on the outward half of the round voyage, but call at it as it comes home. There appears to be a perfectly well recognised way of advertising in the local papers and describing the voyage in the shipping card according to whether the cargo is taken on board on the outward half of the round voyage or on the inward half. If the steamer is then on the outward half of its round voyage and takes cargo for England, it will be described as “*via Levante*,” by the east coast of Spain, meaning that it is on its outward voyage and will turn round and bring the cargo home when it has got to the end of its outward half of the round voyage. On the other hand, if it picks up the cargo on the second half of the round voyage, the inward half of the round voyage, it will be said to be taking the cargo for England “*Directo*,” and in the present case the cargo was put on board at Malaga by Mr. Frenkel’s representatives, his son, his shipping clerk and his chief clerk, after a series of daily advertisements that the *Cervantes* was proceeding homewards “*via Levante*,” meaning that it was going on up the east coast of Spain before it turned round and came back. Sometimes in the same paper there were advertisements—the particular one that I have in mind I think is to Bristol—that such and such a boat was going to Bristol “*Directo*.”

The Malaga representative and the manager of the line were called and proved these facts, and proved that in Malaga, unlike many other ports, the representatives of the shipping firms called round on the regular shippers every day and left their shipping cards (with which one is very familiar) with them, stating the same thing as is stated in the advertisements, that in this case the *Cervantes* would take a cargo for England “*via Levante*.”

Nobody from the Malaga shipping office was called, and I unhesitatingly draw the inference that the facts stated by the Malaga representative of the MacAndrews Line were perfectly well known to the Malaga shipping office, who knew perfectly well that the goods that they put on board were going “*via*

Levante,” and they were quite content that they should go. Mr. Frenkel, who has been shipping goods on the MacAndrews Line for fifteen years has somehow remained in a state of blissful ignorance during the whole of that time of the fact that the MacAndrews Line does pursue this course of business. The learned judge has not made any finding as to whether he believes him or not. I did not see him, and make no similar finding; but if he has been ignorant during the fifteen years that he has been shipping of the course of business of the MacAndrews Line he must have been doing his business with his eyes shut tight.

What happened was that the *Cervantes* taking on board this non-perishable goods, that is to say, oil, proceeded on its ordinary voyage north; but before it got to its next port, it met with a very heavy gale. I see that the records of some of the ships in that gale are that the wind was Force 11, the highest force in the Beaufort Scale being 12, and there appears to have been undoubtedly a very heavy gale; and in that heavy gale the casks of oil, or one or more of them, broke loose, and were so strained that the oil ran out and perished.

Thereupon, Mr. Frenkel brings an action against the MacAndrews Line, alleging, first, that the ship was unseaworthy, in which he failed, because the learned judge has found that there is no evidence that the ship was unseaworthy either by itself or in stowing. Secondly, he says: “You were not on the route. You had deviated, because you were bound by your bill of lading to proceed direct homeward from Malaga to England, and you, in fact, were going the opposite way; you were going north along the east coast of Spain when you should have been going south to Gibraltar.” The learned judge has not himself expressed any opinion on the law, but he says that he is referred to a decision of Hill, J. in *T. M. Duché and Sons v. Owners of Steamship Maria* (3 Ll. L. 184), which is very shortly reported, upon a bill of lading which is said to be the same bill of lading, in which case Rowlatt, J. thinks that on similar facts Hill, J. has given a decision which would be in favour of the plaintiff in this case, and he thinks himself bound by judicial comity to follow that decision.

Now, first of all, I think that the decision of Hill, J. in *T. M. Duché and Sons v. Owners of Steamship Maria* (sup.), so far as we can gather it from the report, and from the statement made by Mr. Langton, who was counsel in the case, and has with him his old brief, is on quite dissimilar facts to this case. What appears to have happened in the case which Hill, J. decided, and upon which Rowlatt, J. relied, was this: Some goods were shipped at Tarragona, which is well to the north of the east coast of Spain, under a bill of lading which gave liberty to tranship in Valencia to a steamer of the same company. The goods were transhipped at Valencia and put on board a ship called the *Maria*, and the *Maria* then proceeded

north instead of going south. On that *Hill, J.* held that *Burriana*, which was the port to which the *Maria* went, was not on the route from Valencia to London, and that, therefore, there was a deviation, because, though there was a clause giving leave to call at ports, the port was not on the route.

Now there are a number of differences between that case and this case, and the most marked one is this: The plaintiffs in *T. M. Duché and Sons v. Owners of Steamship Maria (sup.)* were not the shippers, but were endorsees, and consequently under the decision in the case of *Leduc and Co. v. Ward* (1888, 58 L. T. Rep. 908; 20 Q. B. Div. 475) he was not bound by any knowledge which the shipper had which is not contained in the bill of lading, because the endorsee of the bill of lading only has the contract contained in the bill of lading, and has not any contract contained in an agreement with the shipper outside the bill of lading. In this case, the plaintiff is not an endorsee, but he is the original shipper. That alone is sufficient to make the case inapplicable; but further, this is not a case where there was any proof as to the ordinary route, neither the *Paulina* nor the *Maria* had anything to do with the MacAndrews Line, and there was no evidence of the ordinary route from Tarragona or of the route from Tarragona when you transhipped at Valencia; and in those circumstances it is not necessary for us to express any opinion on the validity of the judgment of *Hill, J.* in *T. M. Duché and Sons v. Owners of the Steamship Maria (sup.)*, because the facts are entirely different from the facts of this case.

This case is a case where the shipper, at the time he puts goods on board, knows that he is shipping by a line which from Malaga may have two ordinary routes. He may be shipping on a vessel of the line which is going to England "via Levante," or he may be shipping on a vessel of the line which is going from Malaga direct, and he is told before he ships, by advertisements and by shipping cards left at his office, that the vessel is going "via Levante," and she goes "via Levante," and a loss occurs while she is on her voyage "via Levante." That appears to me to be the simplest case of a vessel with a bill of lading destination London going by the ordinary routes by which that line goes to London, and going when the shipper has been told before he ships that she is going by that one of the ordinary routes.

It does not seem to me to be a question of deviation at all, but a case of evidence of the ordinary route of the well-known line by which the shipper ships with full knowledge of the ordinary route and the method in which this particular contract is to be performed.

For these reasons I think that the learned judge, who had not such full information as to *Hill, J.*'s judgment in *T. M. Duché and Sons v. Owners of the Steamship Maria (sup.)* as we have, was in error in thinking that he was bound by the decision of *Hill, J.* He did not address his mind to what the result would be if

he was not bound by the decision of *Hill, J.* in that case. We, addressing our mind to the evidence, come to the conclusion that the plaintiff fails in this case, the defendants being protected by the exception of perils of the sea. Therefore, the appeal will be allowed with costs.

GREER, L.J.—I agree. The plaintiff's claim in this action was for damages for loss of a parcel of oil shipped at Malaga under a bill of lading which describes the shipment as a shipment in the steamship *Cervantes* with destination to Liverpool, with liberty to touch at any ports whatsoever, though it may be outside the route, without being considered a deviation. The defendants, the shipowners, contended, and successively contended, that if the bills of lading applied, they were protected by the exception in the bill of lading. The plaintiff said: "No, you are not protected by the exception in the bills of lading, because when the loss occurred you were not carrying goods on the bills of lading voyage, but were carrying them by means of an unauthorised deviation; and what the learned judge had to decide was whether that contention was right on the facts of this case."

Now the material facts appear to me to be these: That for a considerable time—some years—the defendants have been pursuing from Malaga to Liverpool or other ports of this country, or to Hamburg, two distinct routes for the vessels of their line—one "via Levante," which means going north-east up the coast of Spain, calling at various ports, and then coming back from the furthestmost port down the Mediterranean and through the Straits to this country, and the other coming direct from Malaga after they have been up to the higher ports, direct from Malaga to ports in this country. Both these routes were well known to the representatives of the plaintiff at Malaga. They knew that sometimes the route of the vessel would be "via Levante," and sometimes it would be "Directo"; and I think one is entitled to conclude that in this particular case, when they delivered their goods to the ship to be carried, under these bills of lading, they knew that the route of that ship, the route for that particular ship, would be "via Levante." Yet it is said that because of the technical interpretation of the words of the bills of lading the vessel was deviating, and was not on the agreed route.

We are not here concerned with an action by a holder of a bill of lading, whose rights are to be determined solely by looking at the bill of lading; we are only dealing with a case where a claim is made by the shipper who had the knowledge, through his agents, that I have mentioned. It seems to me that it is possible, certainly as between these parties, to read these bills of lading as meaning that the goods are destined for Liverpool by one or other of the usual routes, and even if the plaintiff had not known which way the vessel was going on this occasion, still, inasmuch as the vessel was taking

one of those known and usual routes towards Liverpool, it was not deviating at the time of the loss. We have not got to consider the effect of the deviation clause until we have found out, first, what the route was. Then you may have to ask yourself the question as to whether from that agreed route there was a deviation. But I am satisfied here that the question of deviation never arose, because at the time of the loss the vessel was on the agreed route as between the plaintiff and the defendants, and I think that that is supported by the decision in the case of *Evans, Sons, and Co. v. Cunard Steamship Company Limited* (1902, 18 Times L. Rep. 374), which has been referred to in the course of the argument. I should only like to add that I congratulate myself and my brothers sitting here upon the fact that we have not had to investigate that large library of authorities which the industry of counsel has prepared for our assistance.

SANKEY, L.J.—I agree. The plaintiff was at all material times the owner of 134 barrels of olive oil which he shipped on the defendants' steamship *Cervantes* at Malaga under two bills of lading dated the 11th April 1927, one for 110 barrels, with destination for Bradford *via* Liverpool, and the other for twenty-four barrels with destination to Liverpool.

Now the vessel left Malaga and proceeded in an easterly direction on a voyage during which she encountered very severe weather, with the result that the barrels of oil were broached and the oil was spilt and lost. In those circumstances the plaintiff brings an action against the defendants for the loss which he has sustained. The defendants refer to the bills of lading and say: "We are excused. We are not liable to compensate you, because of the perils of the sea referred to in the exceptions in the bills of lading." To that defence the plaintiff puts in a special plea, and they say: "After loading the plaintiff's cargo, the *Cervantes*, without justification, deviated from the bills of lading voyage and the defendants are therefore not entitled to rely on the terms and exceptions in the bills of lading," and they say that the best particulars that they can give are that after leaving Malaga the *Cervantes* did not go towards Liverpool but proceeded in an easterly direction; she proceeded past Sabinal Point and towards Almeria Bay. In other words, what the plaintiff is saying is this: "You are not excused because your vessel did not proceed upon the agreed voyage."

Finally, the defendants put in a plea of rejoinder to that, in which they say that by proceeding, after leaving Malaga, towards Cartagena the said vessel was carrying out the voyage agreed upon in the bills of lading in a business sense, and (or) was carrying out the said voyage by a natural and usual or customary route by which the same always has been, and still is, carried out by the said vessel at all material times, and these matters were well known and understood by the plaintiff.

The real question as presented before us, therefore, is this: It is nothing to do with the terms of the deviation clause, but, was the vessel proceeding upon the agreed voyage? Looking at the bills of lading—and I will take the Liverpool one, which was the first one which was put before us—the words are these: "Shipped by Leon Frenkel"—that is the plaintiff—"in the steamship *Cervantes* with destination to Liverpool"—now what is the true meaning of that? In my view the meaning of it is this, that it is "With destination to Liverpool by one or other of the usual routes."

In this case there was abundant evidence that the vessel proceeding in a northerly direction towards Cartagena was proceeding upon one of the usual routes. There was the evidence first of all of Mr. Owen, who was the defendants' manager at Malaga. There was also the evidence of Mr. Thomas Bartlett, who was the superintendent of the defendants' line, and he stated the fact that for fifty years this particular route had been one of the usual routes of the line. On the other hand there was weak evidence given by the plaintiff, Mr. Frenkel, nobody being called from the Malaga office, and he was asked: "You spend most of your time in London?" and his answer was: "With the exception of that period last year when I was away in Malaga. (Q.) At this time, April 1927, you were in London?"—(A.) Yes, that is right." So on the first point there was really evidence all one way with regard to the route taken by the vessel being one of the usual routes, and therefore, in my view, she was proceeding upon the agreed voyage. But the matter does not stop there, because there was evidence not only that this vessel was proceeding upon her usual route to Liverpool, but the plaintiff well knew that she was going "*via* Levante." Why do I say that? Again I point out that no evidence from the plaintiff's Malaga office on the spot was called, but we have evidence showing that this vessel was advertised in the local papers as going "*via* Levante." There was further evidence that the defendants' agents in Malaga called on the plaintiff's agents at Malaga and showed them voyage cards, explaining to them that the vessel was going "*via* Levante." Therefore there was evidence that it was the usual route, or a usual route, and that the plaintiff well knew it.

The learned judge apparently did not exercise his own view upon the matter, but followed a rather imperfectly reported decision of Hill, J., to which our attention has been drawn, in the case of *T. M. Duché and Sons v. Owners of Steamship Maria* (3 Ll. L. 184). But with the fuller light that we have had shed upon the decision it appears to me to have nothing at all to do with the present facts. To begin with, there, it was an endorsee of the bill of lading who was the plaintiff and not the shipper, and the principles of *Leduc and Co. v. Ward* (6 Asp. Mar. Law Cas. 290; 58 L. T. Rep. 908; 20 Q. B. Div. 475) would apply. But over and above that,

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the facts there were of an entirely different character; the goods in question were transhipped, I think it was said, at Valencia, and when transhipped and packed upon another boat, instead of the voyage being continued the goods were sent out on a voyage in the reverse direction towards the port of Burriana, if I remember rightly, which would be in a northerly direction, the reverse direction from the homeward voyage upon which they had already started. Therefore, it appears to me that both in law and in fact *T. M. Duché and Sons v. Owners of Steamship Maria (sup.)* is entirely distinguishable; and really, with all deference, has nothing at all to do either in fact or in law with the present case.

I am of opinion that this appeal should be allowed.

Appeal allowed.

Solicitors for the appellants, *Richards and Butler.*

Solicitors for the respondent, *Middleton, Lewis, and Clarke.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

April 2, 3, and 4, 1928.

(Before BATESON, J., assisted by Elder Brethren.)

THE UNION. (a)

Collision — Fog — Steam vessel hearing fog signal forward of her beam—Stop and slow ahead—Duty to stop engines and navigate with caution—Regulations for Preventing Collisions at Sea, art. 16.

A steam vessel navigating in fog and hearing apparently forward of her beam the whistle of a steamship the position of which is not ascertained, does not comply with art. 16 of the Regulations for Preventing Collisions at Sea by stopping her engines for a moment and then proceeding at dead slow speed. The meaning of the rule is that the engines must be stopped, the way run off the ship, and the ship brought as nearly as possible to a standstill before going on.

The steamship V., navigating in a dense fog, heard the whistle of another vessel forward of her beam; she went dead slow by stopping the engines and then going slow ahead again.

Held, that the V. had failed to comply with art. 16.

DAMAGE ACTION.

The plaintiffs, owners of the Italian steamship *Vulcano* (5398 tons gross), claimed damages from the defendants, owners of the French

steamship *Union* (6388 tons gross), in respect of a collision between the *Vulcano* and the *Union* which took place in the river St. Lawrence on the 18th Oct. 1927 in a dense fog.

The case is reported upon the question whether the action taken by the *Vulcano* was compliance with the Regulations for Preventing Collisions at Sea, art. 16, which is as follows:

Every steam vessel shall, in a fog, mist, falling snow or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over.

The facts and arguments of counsel, so far as material, fully appear from the judgment.

Dunlop, K.C. and Bucknill for the plaintiffs.

Langton, K.C. and Noad for the defendants.

BATESON, J.—I am satisfied that both ships are equally to blame, but I do not believe that either side's witnesses have given me the real facts. Both these vessels were going too fast in a dense fog. Neither stopped when hearing the other, and I cannot find any difference in the degree of fault in either vessel. I believe that both vessels were going at about the same speed, if anything the *Vulcano* a little the faster, but so little that there is no possibility of finding any difference in the degree of fault.

The collision happened at about 11.45 a.m. in the river St. Lawrence, at about two miles N.W. of the No. 25 buoy below Father Point. The wind was easterly and moderate; the weather was very foggy with a visibility of about 600ft.; and the tide was flood with possibly a little drain up of about half a knot.

The *Vulcano* was coming down the river, in the vicinity of Father Point, where she had anchored on account of fog at about buoy No. 37. She started on a course of N.47 or 48 E. true, at full speed, which is eight or nine knots. She saw there was fog ahead, coming in thick again, and she started to sound her whistle; then she ran into dense fog at full speed. Shortly afterwards she heard the whistle of the *Union*, but she did not stop. The evidence from the *Vulcano* was that when those on board heard the whistle they went dead slow, and dead slow on that ship was accomplished by stopping the engines and then going on slow ahead again. It is said that the system of going dead slow is equivalent to a compliance with art. 16 of the Sea Rules, which provides that "a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over." I do not agree. I think the *Vulcano* intended to go on dead slow and not to stop, but even if that were the true case I do not think that such stopping and going on

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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again at slow is a compliance with the rule to stop and navigate with caution. In my view, the meaning of the rule is that the engines must be stopped and the way run off the ship. Perhaps, then, you may go on again if you have heard nothing else but the one whistle from the other ship, although, if nothing more has been heard at all, I doubt very much if you are justified in going on until you do, or can be reasonably sure that there is no risk. At any rate, the proper course is to bring the ship as nearly as possible to a standstill before going on. The *Vulcano* probably heard more than one whistle. She certainly ought to have done so, and her look-out was bad if she did not; but to get over the difficulty of not stopping she said that she only heard this one whistle in ten minutes and without any intermediate sound until the other vessel came in sight. Her times, in my view, are quite untrustworthy. I think that the *Vulcano* started at eight or nine knots and continued that speed until she heard the first whistle of the *Union*. She ought to have heard several, and there was no real reduction of her speed until the last, when the *Union* was sighted fine on the starboard bow and the *Vulcano* went full speed astern. [His Lordship then dealt with the navigation of the *Union*, and said that she was also to blame for excessive speed and for not stopping shortly after she got into the fog when she heard the whistle of the *Vulcano*.] I hold both ships to blame in equal degree.

Solicitors: *Thomas Cooper and Co.*; *William A. Crump and Sons*.

Wednesday, April 4, 1928.

(Before BATESON, J.)

THE CHANNEL QUEEN. (a)

Collision—Costs — Taxation — Action Discontinued after delivery of the defendants' preliminary act—Costs of taking statements from proposed witnesses and of obtaining depositions—R.S.C., Order LXV., r. 27 (29).

In a collision action the defendants duly filed their preliminary act, but the plaintiffs delayed doing so, and ultimately before any preliminary act had been filed they discontinued the action. Upon taxation the assistant registrar disallowed the cost of obtaining evidence from independent witnesses, upon the ground that the defendants could only recover such costs as were necessary to enable them to conduct their case at the stage which the proceedings had reached, and could not recover expenses incurred in anticipation of something which might never take place.

Held, that the assistant-registrar had acted upon a wrong principle, and that the reasonable costs of obtaining the evidence ought to be allowed.

DAMAGE ACTION.

Summons on appeal from an order of the Admiralty assistant registrar, adjourned into court at the request of the parties.

The plaintiffs claimed damages for alleged negligence of the defendants servants in charge of their steamship *Channel Queen*, whereby it was alleged that the *Channel Queen* had sunk the plaintiffs' barge in the River Thames, causing damage and loss of life.

The facts fully appear from the judgment of the learned judge.

No counsel appeared.

BATESON, J.—This is a summons to review taxation. I have already intimated to the parties that I would review it, and at their desire said I would give my reasons in court.

It arises out of a collision action. The collision was between a coaster and a barge in the Thames, which took place on the 30th Dec. 1927 near Horseferry Wharf. The coaster is a regular trader, and her owners are in London. One of the two men on the barge lost his life in consequence of the collision. On the 4th Jan. an inquest was held upon his body, at which the owners of the coaster and of the barge were represented. The main question on the collision between the parties was as to there being a proper light showing on the barge. On the 7th Jan., three days after the inquest, the owners of the barge issued their writ against the defendants. On the 16th Jan. the defendants appeared and on the 24th Jan. the defendants filed their preliminary act. The plaintiffs ought to have filed their preliminary act seven days after the writ but did not do so. On the 10th Feb. a final order to do so was made against the plaintiffs, and on the 11th Feb. they discontinued their action.

In the meantime, the defendants, on being sued, had naturally sought evidence outside their own crew so as to test whether they had a good or bad case and to be prepared to meet the plaintiffs' case. The defendants' solicitors found that two tugs had been in the vicinity and that their masters and the mate of one of them could give valuable evidence. They took statements; they paid the witnesses for their time and trouble in coming to give statements a not unreasonable sum according to my experience of days before the war; they copied out the statements for counsel in settling their preliminary act; and they took the statements while the facts were fresh in the minds of the witnesses. In addition they also got copies of the depositions before the coroner, and of a police report.

The learned assistant-registrar had disallowed all those items on the principle he states at the beginning of his answers to objections. He says: "It is a well-settled principle of taxation that a party is only entitled as against his opponent to incur such costs or expenses as will enable him to conduct his case at the stage which the proceedings have reached, and not incur expenses in anticipation of matters which, as events turned out, never arose. . . ."

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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THE CHANNEL QUEEN.

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I do not know where that principle comes from; and if it is limited in the way in which he has limited it in this case I think it is wrong. Order LXV., r. 27 (29), lays down what is to be allowed; and Atkin, L.J., in the case of the *Société Anonyme Pecheries Ostendaises v. Merchants' Marine Insurance Company Limited* (188 L. T. Rep. 532; (1928) 1 K. B. 750), dealing with this rule says: "It is intended to sum up generally the principles upon which costs are awarded, and I cannot help thinking that if that rule were really rigorously applied by everybody—and by 'rigorously applied' I mean applied in all cases, giving full effect to the width of its language—there would be many fewer complaints brought by successful litigants than are brought at the present moment, because it is a rule which is intended to give to the successful litigant a full indemnity for all costs reasonably incurred by him in relation to the action. I think it says so in terms, that it is to allow 'all such costs as shall appear to him to have been necessary or proper for the attainment of justice.' That is the whole principle that the taxing master has got to determine."

In my view, these costs were reasonably incurred in relation to the action. Further on, when dealing with the facts on that case and with Mr. Simey's argument, Atkin, L.J. says that Mr. Simey says: "That no costs can be incurred (that is to say, properly incurred at all, as I understand him) in the action, until the issues have been determined (that is to say, have been defined); and he says that these costs were incurred before the defendants had delivered their defence or indicated what their defence would be. All I can say is that that goes very much too far. That would mean this, that the litigant would never be entitled to recover any costs save the actual costs of proceedings, until the defendant had delivered his defence, because until then the issues are not defined. That again does not seem to me to be the right view. The question is, in every case, what is the reasonable thing to do?—and the taxing master is not bound by any such limit of time as is mentioned."

Mr. Roscoe, at p. 429 of his book (Roscoe: Admiralty Practice, 4th edit.), says much to the same effect. My view is that the learned assistant-registrar has felt himself bound in this case by a limit of time. What the learned assistant-registrar says in effect in his reasons is that these costs were incurred in premature preparations for the trial, and were not necessary at that stage of the proceedings.

In my view the trial is not the only thing to be looked at; the solicitors in dealing with the matter must be in a position to give proper advice, and if they can kill an action—as they did in this case—by collecting all the evidence that is necessary, I think it is quite proper that they should do so. The plaintiffs themselves saw one of the witnesses that the defendants saw (I think they saw him before the defendants had seen him), and they paid that witness the same as the defendants are charging

in their bill. That was, of course, before they discontinued their action.

Then the learned assistant-registrar quotes the case of *The Neck* (unreported) and the facts as to which I am told cannot now be ascertained. It was a salvage action in which the plaintiffs apparently had taken a good deal of evidence which might well not have been taken, and Lord Gorell—or Gorell Barnes, J., as I think he was then—disallowed the costs of that evidence saying, according to the assistant-registrar, that they were entitled, as against the defendants, to the costs of taking such evidence only as was required for the framing of the statement of claim. That case only refers to plaintiffs and not to defendants. It may very well be that in that case it was proper to disallow the costs.

The learned assistant-registrar goes on to say that all the defendants required was sufficient evidence to enable counsel to settle their preliminary act. That, again, I do not think is right. In the first place, I think this evidence was necessary to settle the preliminary act. The preliminary act in an Admiralty case embodies the party's case. He cannot change it. If it is drawn on half the evidence it very likely will land the party in difficulties. It is essential to get up a case in Admiralty at the beginning. It is of no use to have independent witnesses, as they are called, after the other party has defined his issues. He may delay that for months. I do not think that any self-respecting junior would settle a preliminary act unless he had all the evidence before him that could be obtained, if he could avoid it.

I gather that the learned assistant-registrar thinks that that is necessary for the solicitor against his own client, and for the life of me I cannot see why it is not equally necessary, and I think it is every-day practice for solicitors to get this evidence, and it agrees with such little knowledge as I have which dates back to work in a solicitor's office some thirty-seven odd years ago.

He has allowed in this taxation a fee to the surveyor, who was called in merely to attack the bill of the plaintiffs for their damage, if it ever came to consider that. Of course, in the early stages of this particular case that would never arise. Then he goes on to discuss the payments to these witnesses, and describes it as blackmail. But in my view witnesses of the class of those from whom statements were taken in this case were not overpaid at the figures which were put in the bill of costs. If exorbitant fees were asked for it would not be proper to pay them. In some cases this sort of payments are included in instructions for brief—whether it is done in one way or another does not seem to matter—or they are allowed as sums paid which I think would be the better way to do it, but they are the sort of payments that are generally made. Of course it may be done in instructions for brief.

What I have said covers the question of taking the statements and copying them for counsel and payments to the witnesses for their

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time; but one of the other matters that was dealt with was the report of the police officer, which I think ought to be allowed—it is a very small sum—and also the copy of the depositions before the coroner. That was a matter which I should have thought might well have been delayed until it was known whether or not the case was going on. The parties had attended the inquest, and, of course, a proper fee should be allowed for that, but having heard all the evidence, I doubt, myself, whether it would be necessary (I do not think it would) to get the details in full before the case was really coming on, or reasonably known to be coming on.

I think that deals with all the questions that were raised. For these reasons I think the matter must go back to the learned assistant-registrar to tax on the lines that I have indicated. I think that covers all the points.

Appeal allowed with costs.

Solicitors for the appellants, *Thomas Cooper and Co.*

Solicitors for the respondents, *J. A. and H. E. Farnfield.*

March 30, 31, and May 11, 1928.

(Before Lord MERRIVALE, P.)

THE PENELOPE. (a)

Charter-party—As many voyages as can be performed within twelve months from steamer giving notice of readiness to load—Charterers not to order ship to loading port where strike in progress—If strike in progress shipowners to interpose a substituted voyage—Coal strike 1926—Strike in progress at all loading ports—Charterers unable to give orders for about seven months—"Suspension" clause—Frustration.

A charter-party provided that the steamship P., expected ready to load between the 20th May and the 20th June 1926, "steamer giving charterers fourteen days' notice of readiness to load the first cargo," should proceed to one of certain named Welsh ports and load from the charterers in such dock as may be ordered by them on or before arrival in . . . Roads a cargo of coal for one of certain named ports in Italy as might be ordered on signing bills of lading." It was further provided that the charter-party was to be in force for twelve months "as and from the date of notice of readiness to load for first voyage. Steamer to run consecutive voyages that is out with cargo returning in ballast and to make as many voyages as she can on the said period." It was a term of the charter-party that the steamer should not be ordered to any port at which there was a strike in force; and if the charterers were unable forthwith to order the steamer to another port free from strike the steamer

should be free to interpose a similar substituted voyage.

The owners duly gave notice that the steamer was ready to proceed to the Roads for orders, but when such notice was given all the loading ports were closed owing to the coal strike of 1926, and to the Government embargo on the export of coal, and the charterers were unable to order her to a loading port free from strike. The steamer, with the consent of the charterers, did not proceed to the Roads, but performed two substituted voyages. She then performed two voyages which the charterers would not treat as substituted voyages. The charterers were unable to give orders until Dec. 1926. The owners then refused to send the steamer to the Roads, and claimed that the commercial object of the charter-party had been frustrated.

Held, that in the circumstances the defendant was not bound to perform the charter-party.

ACTION for damages for breach of charter-party.

The plaintiffs, *Cleeves Western Valleys Anthracite Collieries Limited* and *Luigi Monge*, claimed damages from the defendant, the owner of the Greek steamship *Penelope* for breach of a charter-party dated the 24th March 1926 by which the plaintiffs chartered the *Penelope* from the defendant.

The charter-party (Chamber of Shipping Welsh Coal Charter 1926) was expressed to be made between *S. Paramythiotis*, owner of the steamship *Penelope*, "now trading and expected ready to load between the 20th May and the 20th June, steamer giving charterers fourteen days' notice of readiness to load the first cargo," and *Cleeves Western Valleys Collieries* as agents for the charterers. The material provisions of the charter-party were as follows:—

1. The said vessel should proceed to Cardiff, Penarth, Barry, Port Talbot, or Swansea (one port only) and there load in such dock as may be ordered by charterers on or before arrival in — Roads a full and complete cargo of coals and (or) fuel; and being so loaded should proceed to Genoa, Savona, Spezia, Leghorn, Naples, Civita Vecchia, or a safe Sicilian port (one port only) as ordered on signing bills of lading.

15. The charter to be in force for twelve months as and from the date of notice of readiness to load for the first voyage. Steamer to run consecutive voyages, that is out with cargo, returning in ballast, and to make as many voyages as she can over the said period.

16. Steamer not to be ordered to any loading port at which there is a strike in force. Steamer to be free to interpose a substantially similar voyage if charterers unable forthwith.

The defendant's agents duly gave fourteen days' notice of readiness to load, but the coal strike of 1926 was then in progress, and the *Penelope*, with the consent of the plaintiffs, did not proceed to the Roads. Correspondence passed between the defendant's agents and the plaintiffs, the upshot of which was that on the 12th June the plaintiffs notified the defendant's agents that they could not name a loading port owing to the strike, and must

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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leave the defendant to make his own arrangements. The defendant accordingly chartered the *Penelope* for a voyage Tunis—London—Swansea. This voyage was agreed to be a substituted voyage. When in Swansea an interview took place between the defendant, who was master as well as owner of the *Penelope*, and the plaintiffs, at which the defendant invited the plaintiffs to agree to the *Penelope* performing a voyage to the United States. Upon the plaintiffs' refusing, the defendant chartered the *Penelope* for a voyage from Stettin to Manchester. This voyage was agreed to have been a substituted voyage. When the *Penelope* arrived in Manchester the defendant again called upon the plaintiffs to give orders, but on the 9th Sept. they informed him that they were still unable to give orders. The defendant thereupon chartered the *Penelope* for a voyage to Montreal. The defendant subsequently stated in his evidence that he considered at Manchester that the charter-party was void. The *Penelope* accordingly proceeded on a voyage to Montreal, and thence to Naples, Huelva, and Rouën. When the plaintiffs learned of this voyage they informed the defendant's agents that if the strike ended they expected the *Penelope* to be delivered to them within a reasonable time. In reply to this the defendant on the 29th Nov. claimed that the charter-party had become void. At the beginning of December the coal strike came to an end, and on the 17th Dec. the Government embargo on the export of coal was withdrawn. The plaintiffs then ordered the *Penelope* to Mumbles Roads, though they could not at that time have provided her with a cargo had she proceeded there. In reply the defendant's agents claimed that the commercial object of the charter-party had been frustrated, and that it was void. The *Penelope* did not proceed to Mumbles Roads or to any loading port. The plaintiffs accordingly claimed damages.

Langton, K.C. and Sir R. Aske for the plaintiffs.—Strikes have rarely been held to work a frustration of a charter-party, though it is not contended that it is impossible that they should do so. See judgment of Bray, J. in *Braemount Steamshipping Company Limited v. Andrew Weir Limited* (1910, 11 Asp. Mar. Law Cas. 345; 102 L. T. Rep. 73); *Ropner Steamshipping Company v. Ronnebeck* (1914, 13 Asp. Mar. Law Cas. 47; 112 L. T. Rep. 723). See also *Jackson v. Union Marine Insurance Company* (1874, 2 Asp. Mar. Law Cas. 453; 31 L. T. Rep. 789; L. Rep. 10 C. P. 125); and the judgment of Scrutton, L.J. in *Metropolitan Water Board v. Dick, Kerr, and Co. Limited* (116 L. T. Rep., at p. 209; (1917) 2 K. B. 1, at p. 35), where it is pointed out that "strikes are subject to such unexpected termination that they cannot be held to be frustrated." [Lord MERRIVALE, P. referred to the speech of Lord Haldane in *F. A. Tamplin and Co. Limited v. Anglo-Mexican Petroleum Products Company Limited* (13 Asp. Mar. Law Cas., at p. 469;

115 L. T. Rep., at p. 317; (1926) 2 A. C., at p. 406.] The high-water mark of "frustration cases" is reached in the decision of the House of Lords in *Bank Line Limited v. Arthur Capel and Co. Limited* (14 Asp. Mar. Law Cas. 370; 120 L. T. Rep. 129; (1919) A. C. 435). In *Larrinaga v. Société Anonyme Americaine de Phosphates de Medulla* (16 Asp. Mar. Law Cas. 133; 129 L. T. Rep. 65) there was a charter-party to perform a succession of voyages. Some of the voyages were prevented by requisition of vessel, but it was held that such prevention did not relieve the shipowners from performing the remaining voyages, and that there was, therefore, no frustration. Clause 16 does not extend the period of the charter-party by a voyage being interposed. The charter-party must be treated as having come into force on the date when the steamer would have been ready to load, *i.e.*, about the 12th June 1926, and the period of twelve months commences to run from this date.

O'Hagan (Dunlop, K.C. with him).—Upon the construction of the charter-party it is submitted that a voyage undertaken before the charter-party had come into operation cannot be "interposed" within the meaning of clause 16. The fact that the charter-party contains a clause, such as clause 16, dealing with a contingency of the sort which actually took place does not exclude the possibility of frustration: (*Scottish Navigation Company Limited v. W. A. Souler and Co.*, 13 Asp. Mar. Law Cas. 540; 115 L. T. Rep. 812; (1917) 1 K. B. 222; *Bank Line v. Capel and Co.*). Lord Finlay (14 Asp. Mar. Law Cas. 370; 120 L. T. Rep. 129; (1919) A. C. 438). Whether the contract is frustrated or not depends upon the nature of the event which happens. Thus if the vessel is chartered to strangers, as here, month after month, there comes a time when the court will hold that the adventure has been frustrated from outside. The question is whether the delay is such that reasonable men would not have contemplated performance of the charter-party in new circumstances. In *Metropolitan Water Board v. Dick, Kerr, and Co. Limited* (117 L. T. Rep. 776; (1918) A. C. 119) it was held that a "suspension" clause did not prevent frustration of contract upon the prosecution of the works becoming illegal under orders of the Ministry of Munitions. Assuming, therefore, that clause 16 could have been taken advantage of by the parties, and that the parties took advantage of it, it will still not exclude frustration if the change of circumstances is such as to frustrate the intended commercial adventure. In *Behn v. Burness* (1863, 1 Mar. Law Cas. (O.S.) 329; 8 L. T. Rep. 207) and *Ollive v. Booker* (1847, 1 Ex. 416) it was held that there was a breach of a condition precedent that the vessel was at a particular place at the time when the charter-party was entered into, *i.e.*, vessel was not "at Amsterdam," or was not "now at sea." The condition as to the position of the ship went to the root of the contract; that

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goes a long way towards saying that the court considered that a breach frustrated the contract.

Langton, K.C. replied.

Cur. adv. vult.

May 11. — Lord MERRIVALE, P. — The plaintiffs, a joint stock company having offices in South Wales, and an Italian coal importer, Signor Monge, are jointly interested in coal exports from the Bristol Channel ports to Italy. The defendants are sued as owners of a Greek steamship, the *Penelope*, and, so far as appears on the evidence, Speridian Paramythiotis, who was a witness in the case, is the owner. In this judgment he is described as the defendant.

The plaintiffs bring their action to recover damages for breach of contract under a charter of the *Penelope* made in March 1926. By the charter-party it was agreed that during twelve months from a date to be fixed, between the 20th May 1926 and the 20th June 1926, the ship should be employed in carrying successive cargoes of coal from one of the South Wales ports to one or other of the specified Italian or Sicilian ports.

The differences between the parties arose by reason of the interruption of industry in May 1926, known as the general strike, and the prolonged cessation of work in the collieries of the kingdom during 1926, known as the coal strike. The plaintiffs allege that in Dec. 1926, when performance of the agreement was practicable, it was wrongfully refused by the defendants, to the loss of the plaintiffs. The defendants, by their defence, allege that by reason of the coal strike "the commercial venture provided for by the charter-party was wholly destroyed and (or) its identity wholly altered," and that this contract between the parties thereby became null and void.

By the pleadings a question is raised with regard to an accidental stranding of the *Penelope* in the course of a voyage from Huelva to Rouen. It was little discussed during the hearing, and I may dismiss it as a suggested material element in the case by stating, as I find to have been the fact, that the stranding took place without default of the defendant and that the question on which the plaintiffs' action and the defendant's answer depend do not, in my opinion, depend upon any matter connected with or arising from the stranding or consequent detention at Rouen of the vessel.

The main issue at the hearing was whether the contract was put an end to by the coal strike, and counsel dealt with this matter on the footing of the principles of law which are illustrated in numerous cases in the House of Lords, mostly brought about by events of the Great War, in which there was discussed the frustration of contracts by unforeseen causes preventing their performance. This case is, however, complicated by the admitted fact that serious labour difficulties were foreseen when the charter was made, and that it contains a

clause relating to possible strikes. Moreover, for a considerable time after performance of the charter was due, and the coal strike prevented it, each party anticipated that the *Penelope* might sooner or later carry coal for the plaintiffs on the terms of the charter and acted on this supposition. There is a further complication by reason of disputes as to the authority by which the brokers who negotiated the charter gave information and made representations of various kinds during a period of many months after the charter-party had been signed and while it was impossible of fulfilment. The brokers had interests of their own in the matter, inasmuch as their remuneration for the negotiation of the contract was a commission on profits earned thereunder. The plaintiffs instructed Messrs. Petter and Co., of Cardiff, from time to time as to steps they should take with regard to the matter in dispute. The defendant was not shown to have given to any one any general authority to act for him, and except where his own letters show it I think he did not.

Before attempting to apply to the case the legal principles which are invoked by the parties it is essential to appreciate the terms of the contract, the situation which supervened upon it, and is said to have caused frustration, and the effect from time to time of the conduct of the parties, not only upon their original rights and duties, but upon their obligations as changed, if they were changed, by the various occurrences in the course of their mutual dealings. Under the charter-party the owners were to take the first step. They were to give to the charterers fourteen days' notice of expected readiness to load a cargo at one of the specified ports. Next the charterers were to specify a port. Then the vessel was to be brought to "Roads." Mr. Petters, of Swansea, took upon himself, without authority, to write into the contract a word which was to require the bringing of this ship into Mumbles Roads, but that does not affect the respective obligations of the parties, and has not added, as it might have done, to the necessary complications of the case. To the vessel on or before her arrival in the Roads the charterers were, therefore, to specify a dock at the specified Bristol Channel port to which they required the vessel to proceed. There the charterers were to produce, and the vessel was to receive, cargo of the agreed quantity and character. Such cargo the vessel was to convey to the specified Mediterranean port and there deliver to the consignees. Liability of the charterers for demurrage is prescribed and limited by the charter, and there are protective exceptions in favour of the charterers in special events arising in normal cases. Strikes of workmen during loading is one of the contemplated possibilities, and there are provisions that if a stoppage from a specified cause shall continue for six running days after the vessel is ready to load or commences then and continues for that period, then, provided no cargo shall have been shipped, the charter shall become

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null and void. There is an option to the charterers also in some cases of the same class to give to the owners the option of cancelling the charter, and in case they do not exercise their option the contract leaves the charterers free to determine the charter upon payment of accrued demurrage. The charter was not a mere time charter. It was expressed "To be in force for twelve months as and from notice of readiness to load for the first voyage, the steamer to run consecutive voyages, that is, out with cargo, returning in ballast, and to make as many voyages as she can over the said period." Added to the common form of clauses and the provisions contained in the clause last cited were terms—now of special importance—inserted by the parties to meet labour difficulties. These are worded as follows: "Steamer not to be ordered to any loading port at which there is a strike in force. Steamer to be free to interpose a substantially similar voyage if charterers unable forthwith to order steamer to another loading port stipulated in charter and free of strike."

It is necessary to observe and bear in mind which of the parties had the veto and the initiative under the two parts of this clause. On the question of agency which arose at the hearing, I have come to the conclusion that Messrs. Petters and Co. were not the defendant's agents to alter the charter by inserting the word "Mumbles," and that the defendant did not ratify the alteration; that they had no authority at any time to vary the terms of the charter. That they had no authority at any time after it had been executed to vary the terms of the charter; and that in the instance where they and the London brokers, Messrs. Stavroudis, differ to some extent in their version of the transactions in question, the account of Messrs. Stavroudis should be accepted. Messrs. Stavroudis, as defendant's brokers, kept them informed of facts material to be known by him, and had authority to inform the plaintiffs through Messrs. Petters, or directly, of the various matters of which they from time to time informed them, and on his behalf to require a specified action under the charter-party which they from time to time required, but no authority to agree upon any variation of the terms of the charter-party. Such variation as in fact occurred is that resulting from conduct, and not from express bargain. The charters for the steamer made after the conclusion of the contract between the parties in March 1926 were made on the direct instructions of the defendant, and he gave no general authority to a broker to conclude contracts. Having disposed of some preliminaries, I proceed to state the course of events under the contract.

The charter having been signed on the 26th March 1926 the outlook as to labour troubles became progressively worse. On the 1st May the coal strike began and involved a universal stoppage of work in the mines from which coal for the loading of the *Penelope* was to be obtained. On the 1st May Stavroudis wrote

to Petters for the information of the plaintiffs that the ship would proceed to the Mediterranean, and would return to Swansea in ballast, "provided, of course, the strike is settled," that the notice of readiness stipulated for in the charter-party would be formally handed to the charterers in due course, and that the vessel would be ready in Swansea "assuming the strike is ended" about the first week in June. After later correspondence to the same effect they at the end of May directed Petters to inquire of the charterers to what port they wished the *Penelope* to proceed, impressing on them at the same time the owners' rights under the special clauses of the charter. They directed notice of readiness to load to be given to the charterers, and emphasised as strongly as possible the fact that the charter required of them action which would bind them to load in due course, or to take the agreed consequences. They were entitled to expect an equally definite answer, but they did not get it. The substance of what was said was "until the strike is settled we cannot give you any information or orders." The plaintiff company, however, wrote to Signor Monge in Italy: "We fear they can insist upon our making a declaration." They apparently entertained at the same time an unwarranted notion that the charterers would be entitled to treat the charter as running for twelve months, not from her first notified readiness to load, but "from the date when the charterers are first able to load." Stavroudis insisted on the owners' right, and on the 12th June the plaintiffs wrote that they could not order the vessel to a port to load, and must "leave the owners to make their own arrangements." No orders being given, a substituted charter was arranged. In course of the substituted voyage, Tunis-London-Swansea, the defendant arrived in Swansea—he had by this time taken command of the *Penelope*—and he then saw the representatives of the plaintiff company. Stavroudis had suggested through Petters, that instead of voyages which defendant could make of right, there should be, without prejudice to the charters, an agreement for interposing a voyage to the United States. That substituted voyages such as the defendants were entitled at their choice to make could only be made with difficulty appears clearly on the evidence. Paramythiotis discussed the situation with the plaintiffs. They declared their inability to order the ship to a dock for loading. They rejected the suggestion of agreement upon a United States voyage; they dissented from a suggested chartering from Rotterdam. The defendant, left to his own resources, chartered the vessel for a voyage from Stettin to Manchester. This was a second voyage treated by consent of the parties as an interposed voyage under the special clause in this charter. During the discussions at Swansea a suggestion was made that the charter should be converted into a forward contract for voyages to be made during a period of twelve months to date from a time at which the defendant should be able

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to tender the ship for loading after the termination of the strike. The correspondence and the oral testimony create uncertainties as to the origin of this idea, and as to the extent to which the parties respectively then appreciated their relative positions. This is immaterial, however, as Signor Monge informed the plaintiff that he preferred to leave "things as they are," and nothing of the kind was agreed.

A critical period in the case was reached when the *Penelope* arrived at Manchester on the second substituted voyage. The defendant, with apparent appreciation of his rights, called for orders from the plaintiffs. They replied on the 9th Sept. through Petters: "We cannot give any instructions." Nearly three months had now elapsed since the defendant originally tendered the vessel to the plaintiffs. According to the evidence on both sides one-fourth of the series of voyages by which the defendant was to earn freights from the plaintiffs had been forgone. The coal strike showed no signs of probable early settlement. In this condition of affairs the defendant resolved upon independent action. Stavroudis wrote him on the 9th Sept. that he was entirely free to "interpolate another voyage as stipulated in your charter." He elected not to do so. Disregarding the objection of the plaintiffs in their conversation with him at Swansea he accepted an offer received by him from Stavroudis of a charter from a Dutch port to Montreal, and thence to Naples. Petters knew of this in due course. The plaintiffs were only directly informed later. The defendant's account of his reasons for accepting a charter in breach of the plaintiffs' charter-party was this: "Till I was at Manchester I had my mind for the strike to finish and then to deliver the ship to Cleeves. After Manchester as the strike was going on so long I thought the charter was void and chartered the ship for America. I avoided short voyages and chartered for America." The case would have been free of some of its perplexities if the defendant had explicitly told the plaintiffs what he was doing and intending to do. He made personally no communication to them. I do not find that he directed that any express statement as to the future should be made to them. He took his independent course and left the plaintiffs to learn of it through the brokers or the published lists of ships' movements. Stavroudis kept the plaintiffs informed through Petters. They notified the making by the defendant of a new charter for a voyage of the *Penelope* from Montreal to Huelva, and thence to Rouen, and they wrote on the subject of this voyage to that effect from Rouen: "If the strike is over she will, of course, proceed to Swansea." I see no reason for believing that the defendant authorised any promise to this effect, though he no doubt intended to make some offer to the plaintiffs at a convenient time if circumstances should admit of it. When the plaintiffs became aware of the intended Montreal voyage they complained to Stavroudis. When they were informed, through

Petters, of the Naples—Huelva—Rouen voyage they stated their position, threatened a claim for damages if the strike should end before this voyage was complete, and said: "The owners should be prepared to give us the steamship within a reasonable time after the settlement of the strike." On what footing it was supposed that the *Penelope* must be, or could be, kept at call for the plaintiffs in this way I do not understand.

The claim provisionally notified by the plaintiffs to the brokers was put forward by Petters to the defendant by a letter of the 29th Nov. 1926, which reached him at the beginning of December, and he thereupon set up to and through Stavroudis his contention that the charter of March was at an end.

It is material to realise the state of things which existed in December, when the parties respectively took conclusive action. The coal strike had become restricted in its operation during November. After it was at an end the Governmental embargo upon coal export remained operative. It had been in force while the strike was in progress, and it was a means of frustration probably identifiable under clause 3 of the charter-party and certainly effectual to prevent any utilisation of the charter. The embargo continued until the 17th Dec. A week earlier the plaintiffs purport, by a letter written by them to Petters and Co., to have arranged for another ship for loading on the 10th Dec. The plaintiffs' manager, however, said in the witness box that Messrs. Cleeves had no loading instructions, and at the end of the month, when they directed Petters and Co. to "order (the *Penelope*) to the Mumbles for orders," they added: "We cannot yet give you a dock or port as we are awaiting instructions." On the day of their so writing Signor Monge had telegraphed to them, "Impossible to load her for my account. Charter her elsewhere." It was while this singular state of affairs existed that on the 31st Dec. Messrs. Stavroudis wrote to the plaintiffs that "owing to the strike the commercial object of this charter which contemplated loading approximately in the month of May was frustrated." Laborious efforts made by the brokers in January and February to bring the matters to some amicable settlement were without success, and on the 4th March—after the period of accidental disablement due to the grounding of the *Penelope* was at an end—the plaintiffs issued their writ.

The difficulty of the case seems to me to arise rather from uncertainty due to the action of the parties—and of the respective brokers—at the successive stages of their relationship, than from any ambiguity in the law. The discussions in the House of Lords upon the variety of contests which arose during the Great War out of contracts frustrated by the incidents of the war did not, as I think, create new law. They illustrated and emphasised familiar principles of the common law.

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The judgment delivered in *Taylor v. Caldwell* (8 L. T. Rep. 365; 3 Best & Smith 826) by Lord Blackburn (then Blackburn, J.) formulates them: "Where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burthensome or even impossible. . . . But . . . where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, such continuing existence was the foundation of what there was to be done; there, in the absence of any express or implied warranty that this thing should exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties should be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

At an intermediate period between the decision of *Taylor v. Caldwell* (*sup.*) and the litigation which arose from the frustration of contracts by the war the principles stated by Lord Blackburn in *Taylor v. Caldwell* had been considered and applied in a series of cases which arose from the postponement of the Coronation of King Edward VII.: (*Krell v. Henry*, 89 L. T. Rep. 328; (1903) 2 K. B. 740; *Herne Bay Steam Boat Company v. Hutton*, 89 L. T. Rep. 422; (1903) 2 K. B. 683; *Elliott v. Crutchley* (94 L. T. Rep. 5; (1906) A. C. 7).

In the course of this litigation it was made clear that the principle which applies where there is "cessation of the existence of the thing which is the subject-matter of the contract," applies also where there is "cessation or non-existence of an express condition or state of things going to the root of the contract." This was reaffirmed in the House of Lords in *Horlock v. Beal* (13 Asp. Mar. Law Cas. 250; 114 L. T. Rep. 193; (1916) 1 A. C. 486, at p. 513), one of the frustration cases during the Great War which were principally discussed in the argument in the present case.

Whether the "doctrine of frustration" is applicable to a time charter or to the charter here in question, and whether the presence in this charter of express terms with regard to strikes or a strike operates to prevent the application of any implied conditions, were outstanding topics in the discussion. For my own part I find it difficult to conceive a contract which shall be free from implications, but it may be that by the use of apt words in the document the contracting parties could make this agreement proof against implication. Moreover the charter is not a time charter within the common meaning of the term. It is a charter for a series of voyages with limits of time as to commencement and continuance.

I may add that *Tamplin Steamship Company v. Anglo-Mexican Petroleum Products Company Limited* (13 Asp. Mar. Law Cas. 467; 115 L. T. Rep. 315; (1916) 2 A. C. 397) was a case of a time charter and a condition in respect of frustration was implied.

The presence of an express provision in favour of the owners giving them an option to accept substituted employment in certain specified circumstances, though it is an important fact, does not of itself determine that the contract may not be frustrated by the inability of the charterers to employ the ship. Suppose, for example, on the first failure of the charterers to nominate a port and dock at which they would undertake to load no employment was obtainable by the owners. It could hardly be suggested that in the event the owner had bound himself to have the ship ready for the charterers at some undetermined and indeterminate time when they might be ready. In the charter-party case of the *Bank Line Limited v. Capel* (14 Asp. Mar. Law Cas. 370; 120 L. T. Rep. 129; (1919) A. C. 458), there was a provision as to requisitioning by the brokers, but it was held not to exclude implication as to frustration when the vessel was requisitioned. Some implication must certainly be made in the present case. Otherwise the plaintiffs by their default in ordering the *Penelope* to a dock were liable in damages for breach of contract in June 1926, and again on each subsequent occasion when the ship was tendered and they declared they could not load her. The real difficulty in the case seems to me to be to find the implied condition or conditions by which the express terms of the charter are controlled. To quote some words from the opinion of Lord Parker of Waddington in the case of the *Tamplin Steamship Company* (*sup.*): "What condition is to be implied? Can you frame such a condition as the implied condition to be relied upon "without contradicting the express terms of the contract or defeating the intention these provisions disclose."

It was argued for the plaintiffs that inasmuch as strikes are not only repeatedly mentioned in the charter-party, but are matter of common occurrence, a strike of any nature or extent must be taken to be within the contemplation of the parties. I do not find myself able, though, to say that the coal strike of 1926 might not be an unforeseen event in the sense which involves frustration. Sickness is an every-day affair; but a contract for personal service may become null and void by reason of a physical or mental disability of the obligee which frustrates the object of the engagement: (*Robinson v. Davison*, 24 L. T. Rep. 755; L. Rep. 6 Ex. 269), *Storey v. Fulham Steel Works Company*, 24 Times L. Rep. 89, *Poussard v. Spiers and Pond*, 1876, 34 L. T. Rep. 572; 1 Q. B. Div. 410).

The facts must be examined to determine whether apart from the agreement of the parties after the occurrence, the coal strike was an event which frustrated the object of this contract. This being ascertained it will be proper

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to see what agreements, if any, were made during the strike, and how they affect this contract and the rights of the parties thereunder. The defendant agreed to employ his ship for twelve months in carrying coal to the Italian ports for the charterers. Of such voyages, conducted on the terms of the charter-party, he could reckon upon completing eight, about six weeks per voyage, and eight voyages at most was the estimation of the plaintiffs' witness, Mr. Ellis. Overhead expenses, running expenses, whatever the return was to be had from the use of the vessel are included in the earnings of this series of voyages. They were to extend from June to June. A series occupying six or eight months would be quite another affair. So would a series of six voyages running from December to June. So far as I can see neither party was entitled without agreement on the part of the other to require substitution for the agreed series of any other series, or any less series.

Cancellation of voyages except by agreement would in my opinion wholly and fundamentally change the conditions of the contract, and to quote the words of Lord Finlay in *Metropolitan Water Board v. Dick, Kerr, and Co.* (117 L. T. Rep. 766; (1918) A. C. 119), adopting a phrase from the judgment of Lord Dunedin in the same case, "would make the contract when resumed a really different contract from the contract when broken off." It was persuasively argued before me that as the coal strike was not unforeseen the principles expressed in the cases on frustration could not apply. What was unforeseen, however, was the total impossibility of any export of coal from the South Wales ports for a period of half a year and upwards. Was this a delay contemplated by the parties? I take into consideration what was said by Lord Sumner in the *Bank Line Limited* case (*Bank Line Limited v. Capel* (*sup.*): "Delay even of considerable length and of wholly uncertain duration is an incident of maritime adventure which is clearly within the contemplation of the parties, such as delay caused by ice or neaping . . . Delays such as these may very seriously affect the commercial objects of the adventure. . . . None the less this is not frustration; this delay is ordinary in character." The kind of interference which the parties in this case contemplated is that dealt with in the printed provisions of the charter-party and in the added clauses—an interruption of work by a local withdrawal of labour. Such an interruption is a trivial occurrence compared with the events in question. As to this actual event the plaintiffs' witness, Mr. Ellis, said: "No prudent man could have foreseen the state of things which arose." On the whole I come to this conclusion, that there was an unforeseen compulsory change of circumstances not contemplated by the parties, and that as soon as it manifestly prevented performance of the charter according to its true intent "the time had arrived at which the facts of the contract ought to be determined":

Per Lord Sumner in *Bank Line Limited v. Capel* (*sup.*).

What then was the effect upon the contract contained in this charter-party of the conduct of the parties? After considering the correspondence and the evidence of the witnesses, I find that the parties impliedly agreed that the voyage Tunis-London-Swansea, and later the Stettin-Manchester voyage, should be made as though they were voyages within the provisions of sect. 16 of the charter-party. They made no subsequent agreement. When the defendant was at Swansea in August plaintiffs declared themselves unable to fulfil their obligations to name a port for loading, and he took his own course by accepting the Montreal charter. Afterwards he determined without any consent of the charterers to make his Huelva-Rouen voyage. Probably he reckoned upon the plaintiffs' knowledge of these fixtures. In due course he learned that they did not consent to them. He did not ask their consent, or make any bargain about it. He intended, as he stated in the witness box, to offer them the vessel at a reasonable period after the end of the strike. No doubt he thought that he and the plaintiffs might agree upon some voyages on the terms on which the *Penelope* was to have been employed under the charter-party. There was, however, no bargain made to this effect. Each party from time to time made suggestions which the other would not accept. I find that the charter-party as varied by the understanding which was arrived at, first as to one, and then as to another substituted voyage, was not further varied or prolonged; that when the defendant refused to satisfy the demands of the plaintiff in and after Nov. 1926 they were rightfully refused: that the plaintiffs made no demand in this later period with which the defendant was bound to comply, and that when he declared through Messrs. Stavroudis that the contract was at an end he was entitled so to do. Using the words "ready and willing" in the sense in which they are properly used in matters of contract the plaintiffs were not ready and willing to perform the obligations of the charter-party at the material times to which the dispute relates.

The action fails, and must be dismissed with costs.

Solicitors: *Botterell and Roche*, agents for *Vaughan and Roche*, Cardiff; *Holman, Fenwick, and Willan*.

Supreme Court of Judicature.

COURT OF APPEAL.

June 8 and 11, 1928.

(Before SCRUTTON, GREER, and SANKEY, L.JJ.)

SYMINGTON AND CO. v. UNION INSURANCE SOCIETY OF CANTON LIMITED. (a)

Insurance (Marine)—Policy—Slip—Goods insured from warehouse to warehouse—Warranted free from restraint—Free from particular average—Fire at port of shipment—Goods destroyed by order of port authorities—Marginal note in policy that goods not covered if otherwise insured against fire—Condition not in slip.

The claimants were cork-growers and had a factory and warehouse some miles inland near Algeciras. There was no warehouse at Algeciras and the cork was accumulated on the jetty at that place. The claimants insured a quantity of cork from a port or place between Bordeaux and Nice to the United Kingdom with the defendants. A fire broke out near the jetty and the claimants' cork was seriously damaged by the action of the port authorities to prevent the fire spreading. The policy had not been issued, but the cork was covered by slips and cover-notes. When issued the policy contained a marginal clause that the policy was not to enure to the benefit of any fire insurance company. Loss reasonably attributable to fire was, however, covered and there was also a warehouse-to-warehouse clause. The marginal clause was not included or stipulated for in the slip and the arbitrator excluded it from the policy for that reason. He also held that the loss was one reasonably attributable to fire while the goods were in the ordinary course of transit. He made an award in favour of the claimants.

Held, on a case stated, (1) that at the time of the loss the goods were in the ordinary course of transit and were covered by the warehouse-to-warehouse clause; (2) that the goods while on the quay at Algeciras were lost by perils insured against; (3) that the action of the port authorities was not a matter which was contemplated by the warranty against restraint of princes; (4) and that the question whether the policy issued, so far as it contained a fire clause, was or was not contrary to the usual form of marine insurance on goods, must be referred back to the arbitrator.

Order of Roche, J. (infra) varied.

APPEAL from a decision of Roche, J., upon a special case stated by an arbitrator.

The respondents, who were cork-growers, had a factory and warehouse at San Roque, in Spain, a few miles inland from Algeciras and connected by railway with that port. There

was a jetty at Algeciras but no warehouse, and the respondents were accustomed to send their cork daily in small quantities down to the jetty, where it accumulated until there was a sufficient quantity to be shipped to the United Kingdom.

On the 25th Nov. 1919 the respondents insured their cork with the appellants at and from any port or ports, place or places, between Bordeaux and Nice, to the United Kingdom and until delivered at destinations inland. The policy contained the following clauses:

1. Warranted free of capture, seizure, arrest, restraint, or detention.

6. The insured goods are covered subject to the terms of this policy from the time of leaving the shipper's or manufacturer's warehouse during the ordinary course of transit until on board the vessel . . . and from the vessel whilst on quays, wharves, or in sheds during the ordinary course of transit until safely deposited in consignee's or other warehouse at destination named in policy.

9. Warranted free from particular average . . . but notwithstanding this warranty the insurers are to pay the insured value of any package or packages which may be totally lost in loading transhipment, or discharge, also for any loss which may reasonably be attributed to fire.

In the margin of the policy the following clause, which did not appear in the slip, was inserted:

This policy not to enure to the benefit of any fire insurance company. It is warranted and agreed by the assured that any shore risk against fire granted herein shall not cover when the assured or any carrier or other bailee has fire insurance which would attach if this policy had not been issued.

On the 9th Feb. 1920 the respondents had on the jetty awaiting shipment a large quantity of cork, some of which had been lying there since Aug. 1919, and the remainder of which had been sent down from the respondents' warehouse at San Roque in Nov. and Dec. 1919 and Jan. 1920. The respondents expected to ship this cork by a steamer which was expected to sail about the 20th Feb. 1920. On the 9th Feb. 1920 a fire broke out on the jetty at some distance from the respondents' cork, and the port authorities, in order to prevent the fire from spreading, jettisoned some of the cork and threw sea-water on the remainder. At the time of the fire occurring no declaration had been made under the insurance; no policy had been issued. The respondents claimed in arbitration against the appellants in respect of the goods so destroyed and damaged. The appellants contended that at the time of the fire the risk had not attached, as the goods were covered only from a place on the coastline, and the reference to warehouse meant from a warehouse at the port of loading; that the proximate cause of the loss was not the fire but the action of the authorities, and was excepted by the warranty free from restraint; and that the marginal note prevented the respondents from recovering, as they had insured the goods against fire with other insurers.

(a) Reported by EDWARD J. M. CHAPLIN and R. A. YULE, Esqrs., Barristers-at-Law.

CT. OF APP.] SYMINGTON AND CO. v. UNION INSURANCE SOCIETY OF CANTON. [CT. OF APP.]

The arbitrator awarded in favour of the respondents, and the insurance company appealed.

Le Quesne, K.C. and *Simey* for the Insurance Company.

Porter, K.C. and *Somervell* for the respondents.

ROCHE, J.—This is an award stated by an arbitrator in the form of a special case. The policy is on goods, which were bales of cork. On the 9th Feb. 1920 the goods in question were on the jetty at Algeciras. A fire broke out at some distance from the jetty, and in the course of dealing with the fire some of the cork was thrown into the sea or river, and seawater thrown on the remainder in order to prevent the fire spreading to it. The respondents' share of the loss sustained by the claimants amounted to 859*l.* 14*s.* 9*d.* The arbitrator has found, subject to the opinion of the court on matters of law, that the claimants are entitled to recover that loss from the respondents. The points taken against this decision are three in number, but I will deal with one short point which goes to the root of the matter. The point is that the policy contained a clause that the policy was not to enure to the benefit of any fire insurance company. It was left to the arbitrator to determine whether that clause ought to have been included in the policy, and, if necessary, to rectify the policy accordingly, and to give effect to the policy as so rectified. He has found that the clause ought not to have been in the policy on the ground that it was not included in the agreement made between the parties as expressed in the slip when the insurance was effected. I am of opinion that he was right in law. There is no evidence that this clause was included or stipulated for in the slip.

The first point argued on behalf of the insurance society is that the risk had never attached at the time when these goods were damaged. The ordinary words are contained in print in the policy, but it was not contended that that limitation of necessity applied to and governed this case, because this policy contained, among the Institute Cargo Clauses, a clause which is known as the "warehouse-to-warehouse" clause. It was, however, urged that, notwithstanding this clause and the printed words in the policy, the insurance was at and from any port or ports or place or places between Bordeaux and Nice and, on the facts found, the risk had not attached. The first ground on which that contention is based is that these goods had come from San Roque, eight miles distant from Algeciras, and that the arbitrator was wrong in holding San Roque to be a place within the meaning of the policy. I am not prepared to say that the arbitrator could not find as he did. For instance, Bordeaux is not on the seaboard. Whether or not San Roque be a port or a place, I decide the case on a different point. I am of opinion that the risk had attached at the time and place of

the loss. This, I think, is the result of the combined operation of the words "port or ports, place or places," and the "warehouse clause." Clause 6 provides that the assureds' goods are covered subject to the terms of the policy from the time of leaving the shippers' or manufacturers' warehouse during the ordinary course of transit, and for the purposes of this point the shippers' warehouse was at Algeciras. It has been found that the goods were in the ordinary course of transit and that they were at Algeciras. I do not accept the argument that the shippers' or manufacturers' warehouse must be at the port of shipment, but I do hold that when in the ordinary course of transit they had left the shippers' warehouse, and were at a place within the scope and ambit of the policy, they are covered by the policy. The next point is that there was no loss from a peril insured against. It is established by high authority, in the cases cited to me, that loss occasioned by apprehension of a peril is not a loss from that peril. But that principle has no application to the present case. The principle applicable is that of those decisions which deal with cases where the peril is actually in operation, and a loss is occasioned by acts done in dealing with the peril and not by the peril itself. Illustrations of this principle are to be found in the cases of *Butler v. Wildman* (1820, 3 B. & Ald. 398), and *The Knight of St. Michael* (8 Asp. Mar. Law Cas. 360; 78 L. T. Rep. 90; (1898) P. 30). Here the arbitrator has found that the loss was one which might "reasonably be attributed to fire." I hold that in the circumstances, and on the facts that he has found, he was right in law in so deciding.

The final point is whether this loss was due to restraint of princes. In my opinion it was not. A fireman putting out a fire is putting out a fire, and it would be absurd to say that it was a restraint of princes merely because the fireman was in the employment of the State. In my opinion the arbitrator has not gone wrong in law in that respect. I hold that the arbitrator has come to a right decision in law on all the points, and I affirm the award.

The insurance society appealed.

Le Quesne, K.C. and *Simey* for the appellants.

Porter, K.C. and *Somervell* for the respondents.

SCRUTTON, L.J.—On one of the points in this case the court is of opinion that further information is necessary, and they propose to send the case back to the arbitrator on that point; but as the court has made up its mind on the other questions which have been argued, it proposes to dispose of those questions, leaving the ultimate result to depend on its decision when it has had the further information from the arbitrator.

This appeal comes before us from a decision of Roche, J. on a special case stated by an arbitrator in a claim by owners of goods against

a marine insurance company. Messrs. Symington, who are the owners of the goods, are a firm who carry on the business of cork manufacturers and exporters. They grow the cork in Spain where they have a factory and warehouse at a place called San Roque, which is found by the arbitrator to be about eight miles to the north of a port on the coast, of Algeciras, and connected with that port by railway. They grow the cork; they then send it to their factory in order that it may go through some process to put it into a condition to be exported, and then bit by bit, because apparently they have not ready at one time in the factory enough to make a shipload, they send the cork down from their factory by the railway to Algeciras where it lies on the jetty, the amount getting larger and larger as further consignments come down until the ship that they have chartered arrives, there being enough cork then to make a shipload, and it is then shipped to the United Kingdom. They had been carrying on this business for some years, and not unnaturally they desired to insure their cork against risks; and it is pretty obvious to my mind that they desired to insure it from their factory, where it was put into an exportable condition, to various places in the interior of the United Kingdom, so that the insurance that they desire is not merely a marine insurance; it is a marine insurance with land transit at the beginning and at the end.

In those circumstances, a good many years ago I am sorry to say, in 1920, their broker in London took round a slip to marine companies stating the risk which he wanted to insure, and the particular slip I have in my hand was underwritten by five companies for, in all, 15,000*l*. A loss occurred while the cork was on the jetty at Algeciras waiting for shipment, and the loss was of this nature. A fire broke out, not in the cork but close to it and appeared likely to spread so that it would burn the stored cork. Persons described as the port and military authorities, desiring to stop the fire, came down and proposed to put a barrier in the way of the fire spreading (1) by throwing some of the cork into the water so that at a particular place there would be a gap in the goods which the fire would not get over, and, (2), by pouring water on some of the cork so that the fire would not be likely to light that cork by sparks, glowing cinders, or anything of that sort. The cork which was thrown into the water was, of course, damaged by sea-water. The part which was wetted by sea-water was also damaged. Thereupon the shippers claimed upon the underwriters for the loss as one which might reasonably be attributed to fire, or by jettison of the goods, or under the general words under which perils *ejusdem generis* with the named perils are covered. There was not at first a policy. The matter went to arbitration, and apparently the arbitrator stated a special case and it came, as special cases do come, before a judge of the High Court, and the judge, according to his duty, said: You are making a claim on a policy of marine insurance and there is not

one; I cannot hear this special case. Whereupon the proceedings had to start over again; and before they could be started over again there had to be a policy, and the views of the underwriter and the assured as to what should be the policy issued on the particular slip differed, and so the arrangement was made that the underwriters should issue a policy in the form that they say was the right form and that the arbitrator, amongst other things, should decide whether any clause in the policy issued by the company to which the assured objected should or should not be struck out of the policy as not being justified by the slip.

So there comes before us, as there came before the arbitrator and Roche, J., the question: (1) What should the policy be?; (2) When you have settled what form the policy is in, what are the rights of the parties on the true construction of the policy?

Now, I say at once, although I will deal with it later, that we are sending back to the arbitrator the question of rectification of the policy, to ask him to find the fact, and I proceed to deal with the case on the points which have been argued on the construction of the policy irrespective of the clause about fire insurance, which is the clause which is affected by the question whether there should be rectification or not.

The first point which was argued on which we propose to express an opinion is whether on the policy as drawn the risk had attached at the time that the loss occurred. Now the policy is the printed form by which the Union Insurance Society of Canton insure "At and from"; and then there is a blank to be filled in; "of and in the good ship or vessel called the"; then there is a blank to be filled in; "Beginning the Adventure upon the said Goods and Merchandises from the Loading thereof on board the said Ship, and so to continue and endure, until the said Goods and Merchandises shall be safely delivered from on board the said Ship." That was the printed form that the parties were starting from, and it is quite clear that that printed form did not express what the parties intended to cover; and it is a pity, though it is the invariable practice of underwriters, that when they did fill up the form they did not scratch out the words which were not applicable to the risk that they were going to cover, because there is no doubt, first of all, at the delivery end, that it was intended to cover the goods not only when they left the ship but until they were delivered at their destination inland in the United Kingdom; and, secondly, it was clear that before the goods got on to the ship it was intended to cover risks in transit by craft, raft and (or) lighter to the vessel, because that was clause 7 of the Institute Cargo Clauses which the slip stated were to be incorporated in the policy; and, further, by clause 6 of the Institute Cargo Clauses it was intended to cover the risk from the time of leaving the shipper's or manufacturer's warehouse during the ordinary course of transit until on board the vessel; so that both a water transit by craft

and a land transit from warehouse were intended to be covered before the loading thereof on board the ship which the printed form stated was the beginning of the adventure.

Now, what was done was to fill in "at and from" the words of the slip "any port or ports, place or places between Bordeaux and Nice (both inclusive)" and the first question which was argued was what those words meant; and whether San Roque (where the warehouse was) was a place between Bordeaux and Nice; so that on those words the risk would begin on leaving the warehouse. Now I do not take, I think, quite the view that either the arbitrator or the court below has taken of this point. "Any port or ports, place or places between Bordeaux and Nice" certainly does not mean as the crow flies or as an aeroplane would fly if it could; it does not mean anything like a straight line between Bordeaux and Nice. When it talks about port or ports, I think it is talking of the coast line, and I think it is talking of that for the reason that it is primarily talking about transit of goods in a steamer, and the goods get on the steamer on the coast lines; and I am disposed to read "place or places" as analogous to "port or ports," to restrict both of them to shipping places and to treat "between Bordeaux and Nice" as along the coast line, including, of course, the banks of rivers between Bordeaux and Nice, going round the coast of Spain until in France you get to Nice again. But it appears to me that to that shipping transit from the port or ports, place or places between Bordeaux and Nice there is added a land transit which is added by the words of clause 6 of the Institute Cargo Clauses which are expressly incorporated and which have nothing to do with the words "port or ports, place or places," except that the transit is from the warehouse to the port or ports, place or places where the ship is to take on board the goods. Therefore, I should see no difficulty whatever in covering the transit from San Roque to the ship under the warehouse clause. That clause, in my opinion, has been inserted because the shipper, the owner of the goods, wants to cover his goods for the whole transit, including both a period before they are on the ship, and a period after they are on the ship, whilst in each case they are completing the transit through on land. Therefore, I see no difficulty whatever in holding that the goods on the pier at Algeciras, having come in the ordinary course of transit from the shippers' manufactory at San Roque, were covered by the policy. That is not exactly the view that the learned judge has taken; but it is the view which appears to me to be the proper construction of the policy and it has the same result as the view which the learned judge has taken.

Then next, the goods being within the policy, and the risk having attached, while they lay on the quay at Algeciras waiting to be shipped, were they lost by peril insured against? Now, I leave out for the moment the question of the f.c. and s. clause. What happened to them?

Some of them were thrown into the sea to save the rest of them and to avoid their destruction by fire. In my view, that risk is covered subject to the point about the f.c. and s. clause by the general words as being a peril *ejusdem generis* with jettison. Jettison consists in throwing into the sea from the ship generally to save some part of the adventure; this jettison from the pier into the sea was also to save some part of the adventure. It was a jettison and appears to me to be covered, subject to the point about the f.c. and s. clause, by the general words as being a peril of the same character as jettison.

The rest of the goods on which the claim is made were damaged by water thrown on to them in order to prevent the fire spreading to them and to the other goods. Now, there has been considerable difficulty in English law about water used either to extinguish fire or to prevent fire from spreading. For a long time English average adjusters declined to admit any damage by water into general average. In cases to which I need not refer—*Schmidt v. Royal Mail Steamship Company* (45 L. J. Q. B. 646) is one of them—that view of English average adjusters was held to be erroneous; and it has now been determined that it is a subject-matter of general average when, there being a fire, goods are damaged, not by the fire but by the water used either to extinguish the fire or to prevent the fire from spreading, and that such damage can be claimed as a damage resulting from fire, and, in my view, can be claimed under a marine policy as a damage caused by fire. There will be found a long discussion—I do not refer to it—in Mr. Lowndes' book on General Average about the effect of that.

The test seems to be as is stated in *The Knight of St. Michael* (8 Asp. Mar. Law Cas. 360; 78 L. T. Rep. 90; (1898) P. 30) and in *Kacianoff and Co. v. China Traders' Insurance Company Limited* (12 Asp. Mar. Law Cas. 524; 111 L. T. Rep. 404; (1914) 3 K. B. 1121). Is it a fear of something that will happen in the future or has the peril already happened and is it so imminent that it is immediately necessary to avert the danger by action? Lord Reading, C.J. puts it in this way (12 Asp. Mar. Law Cas., at p. 525; 111 L. T. Rep., at p. 406; (1914) 3 K. B., at p. 1128): "Was there at the time such a condition of things that there was an actually existing peril of fire and not merely a fear that it might break out?" Barnes, J. in *The Knight of St. Michael* (sup.) puts it in very much the same way. I refer to it without reading it.

I therefore take the view on the facts found in this case that, there being an existing fire and an imminent peril, the damage caused by water either used to extinguish the fire or to prevent it from spreading was a proximate consequence of fire which could be recovered under the general words as being *ejusdem generis* with fire—it does not matter which for the purpose.

Then there is this further question. It is said that this jettison, and this pumping of water on the bales, was a restraint of princes. When I say "restraint of princes" I use it to cover the collocation of words which appear in the f.c. and s. clause. As is well known, the original Lloyd's policy contained the language, "Arrests, restraints, and detainerments of all kings, princes, and people of whatever nation, condition or nationality whatsoever," and when it was desired to exclude the loss covered by those words from the policy so that the underwriters were not liable for loss covered by those words for some reason which I have never understood, underwriters did not use those words, but they used a different set of words, and they framed the f.c. and s. clause, "Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof or any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations, whether before or after declaration of war." Like the Statute of Frauds, every word in that clause has been worth a ransom. I am bound to say that I think it would startle anyone if he were told that when a fire engine arrives and pumps water into a house that is a matter covered by the "free of capture, seizure, arrest, restraint or detainment and the consequences thereof" clause. It is difficult, I think, at first to conceive that that sort of operation can be contemplated either by the words arrest, restraint of kings, princes, and people, or by matters enumerated in the f.c. and s. clause. The action of the port authority in saving a man's property, they being responsible for the safety of the whole port, does not appear to me to be a matter which is at all contemplated either by "restraint of princes" or by the f.c. and s. clause. It would be, I think, going much further than any case on the meaning of those words has yet gone; and I certainly decline to extend those words to a subject-matter which appears to me to be not in the contemplation of the parties who framed those words or who have used them for centuries.

It follows, therefore, that we are deciding three points. We are deciding that the policy attached to the goods as they lay on the quay at Algeciras, and that while on the quay at Algeciras they were lost by perils insured against and that the underwriters were not relieved from liability by the f.c. and s. clause.

There remains the question on which we propose to send the matter back to the arbitrator. It is said by the underwriters, although this slip says nothing about it: Our (the Canton Company's) usual form of policy has got in the margin, "This policy not to enure to the benefit of any fire insurance company. It is warranted and agreed by the assured that any shore risk against fire granted herein shall not cover where the assured or any carrier or other bailee has fire insurance which would attach if this policy had not been issued"; and it said

that that marginal clause ought to be part of the policy granted under this slip. The assured has such a fire insurance; consequently though the policy attached and though but for that clause there would be a loss within the policy you, the assured, cannot recover. Now this is undoubtedly a point of some difficulty, and I do not propose to say anything about the view which I at present take on it; but it appears to the court material to know a fact which we might gather inferentially from some information that has been supplied to us but on which we think it desirable to have a finding of fact from the arbitrator, and the question which we want the arbitrator to answer is this: Whether the policy issued so far as it contains the fire policy clause is or is not contrary to the usual form of marine insurance on goods; that is to say, is it the usual form in a marine policy on goods to have this clause in it or a clause substantially similar? When we have heard that answer we shall then be in a position to discuss and to decide the view which we take on this particular point. I abstain from indicating what my view might be, or what the difficulties are, until we hear the answer to that question. The matter of costs will, of course, stand over until we finally decide the whole case.

GREER, L.J.—I agree with my Lord on the three points it has been proved desirable we should decide at present, leaving out of consideration the question which has just been mentioned.

The claim before the arbitrator was a claim upon a policy of insurance, and, with the exception of one clause in the margin of the policy which has been referred to as the fire-policy clause, it is not disputed that the policy, together with the clauses attached, is in accordance with the agreement of the parties of which the slip is evidence; and the questions we are now deciding depend upon the true interpretation and the right application of the words contained in this policy.

In the first place it is said that the risks covered by the policy do not begin, or, as it is usually expressed in marine insurance, the risks do not attach. At the time of the fire the goods were on the jetty at a port or place where it is conceded they would have been covered if they had come from a warehouse at that port or place, namely, Algeciras; but it is contended that as they came from a warehouse which is at a place called San Roque, which is eight miles away from Algeciras, the risk was not covered. Now, in my judgment, one has to read No. 6 of the Institute Cargo Clauses as an extension of the insurance beyond that which it would be if one had to read the policy only without the attached clause, and I read it as meaning that the further period to be covered in respect of fire, amongst other things, is the period of time, and also the operation which takes place, when the goods are coming from the shipper's or the manufacturer's warehouse during the ordinary

course of transit until on board the vessel; and it is conceded that if that warehouse were in the port of loading the transit, however far the distance might have been from the warehouse to the ship, would have been covered by this clause extending the insurance. Now it seems to me that there is nothing in the clause which limits that extended insurance to the distance between the warehouse which is in the port of loading and the warehouse some few miles distant from the port of loading; and I am of opinion that the learned arbitrator was not wrong in concluding that the insurance covered the goods while they were on a stage in the transit from the manufacturer's or shipper's warehouse to the ship. It may be that if the shipper's warehouse was so far away that no one would ever imagine that it was contemplated that the warehouse should be so far away and the transit should be so long that it would not be included, at any rate it seems to me to be included, provided it is not an unreasonable distance from the port, and provided it is a place where it is not unusual or not unreasonable, at any rate, for a shipper to hold his cargo in readiness for shipment. I cannot find that the arbitrator was wrong in law in finding that the risk had attached.

The next question is whether or not the loss was caused by fire within the policy; in my judgment, it is right to say that the cause of the loss was the fire. It is quite true that fire never touched the goods; they were touched by the enemy of fire, that is to say, by water, and were damaged by water. But it has long been decided, and for a long time acted upon in relation to fire insurance on land, that damage by water done to save the consequence of fire and damage by the destruction of property to save fire reaching that property, can be held to be the consequences of the fire and within a policy of fire insurance. This matter was dealt with in *Stanley v. Western Insurance Company Limited* (17 L. T. Rep. 513; L. R. 3 Ex. 71). At p. 74 Kelly, C.B. says: "I agree that any loss resulting from an apparently necessary and *bonâ fide* effort to put out a fire, whether it be by spoiling the goods by water, or throwing the articles of furniture out of window, or even the destroying of a neighbouring house by an explosion for the purposes of checking the progress of the flames, in a word, every loss that clearly and proximately results, whether directly or indirectly, from the fire, is within the policy"; and in expressing those views it was not necessary for the judgment he was giving to deal with the point raised in some of the cases to which our attention has been called. A similar question came up for decision in the case of *The Knight of St. Michael* before Barnes, J. That was a case in which the question was concerned with a loss of freight by reason of coal heating but not actually getting on fire. Fire had not taken place, but the loss of freight arose upon the master of the vessel taking a course which would enable him to prevent fire destroying the

ship and the goods on board, and the learned judge calls attention to the fact that though there was no actually existing fire there was an actually existing state of peril of fire. Those words apply to the present case. There was in the present case an actual peril of fire though no actual fire affected the claimant's goods. That view agrees also with what was said by Lord Reading, C.J., in the case of *Kacianoff and Co. v. China Traders' Insurance Company Limited (sup.)*. I think, therefore, that the true view on that part of this policy is that it is right to say, without considering the effect of the f.c. and s. clause, that this loss came within the insurance against fire.

The question is whether or not the insuring company, the respondents to the arbitration, have proved themselves on the facts to come within the warranty contained in the policy, "free of capture, seizure, arrest, restraint or detainment, and the consequences thereof." That must mean arrest or detainment of princes or people. It is not proved here that there was on the part of the Government, or of the executive, or of any public authority, an act of force contrary to the wishes of the owner of the goods, or of the captain of the ship; and I think, in order to bring the case within the restraint of princes, it must be shown somehow or another that force was exercised by the Government, or the officers of the Government, before it can be said there was any arrest, detainment, or restraint of princes or people. It might have been proved here; it is possible that there was a law or regulation that soldiers and port authorities should, immediately they saw a risk of fire, hurry to put into the water or to cover with water any goods which were likely to be damaged, or any property of their own which was likely to be damaged; but nothing of that sort has been proved here; and what has happened is consistent with the authorities, that is to say, the people who were there at the time, doing their best on their own motion for the benefit of all concerned to see that the fire did not do more damage than they could prevent. In those circumstances I think the restraint of princes does not apply.

With regard to the other question on which, as my Lord has said, we desire some further facts. The point put for the appellants may be put in one of two ways. It may be said, as it has been said, and said with considerable force in the argument, that the agreement which is contained in the slip means that the policy is to be issued in the form which is the usual form of the Union Insurance Society of Canton; and if the case had turned upon that, and turned upon that only, as it may have done, we have enough materials in the case as it stands to decide the point; but it may be considered that the slip means that there should be a policy or an insurance on the terms which are usual in the insurance world, if there are such terms, and it is in order that we may be able to decide that question that we desire

some further information from the arbitrator. There is some indication in what we have been told, but not in the arbitrator's finding, that it will be very difficult to find a policy which may be described, or a number of terms which can be described, as the usual form of insurance; and it seems to me if the arbitrator cannot find the usual form of insurance then he could not say that this policy was contrary to the usual form of insurance. Be that as it may, it is a matter on which the court desires some further information, and I agree that it should go back, though for my part I am not unwilling to consider anything which may be said by the parties or counsel as to what the right form of question should be.

SANKEY, L.J.—I agree, and I only desire to add a few words on each of the three points upon which I am in agreement with my Lord and Greer, L.J.

Three points are taken for the insurance company: (1) that the risk had not attached at the time of the loss, (2) that the loss was not due to a peril insured against; and (3), that the loss was due to restraint of princes. One has in approaching those three points to consider what is the contract between the parties. The contract is contained not only in the body of the policy which provides that it is "from any port or ports, place or places between Bordeaux and Nice (both inclusive) to the United Kingdom and until delivered at destination inland," but also contains stipulations in the body of the policy which are, in my view, extended by clause 6 of the Institute Cargo Clauses that the insured goods are covered subject to the terms of this policy from the time of leaving the shipper's or manufacturer's warehouse during the ordinary course of transit until on board the vessel. It is found that at the time of the loss these goods were in ordinary course of transit from the manufacturer's warehouse, and the distance from the manufacturer's warehouse at San Roque to Algeciras was not, in my view, an unreasonable distance. In this particular case I think there is material upon which the arbitrator could find, and indeed as I think ought to find, that the goods were in ordinary course of transit, that is, land transit.

With regard to the next point, that the loss was not due to perils insured against, I agree with my Lord in thinking that part of the loss comes under the word "jettison" in the words in the body of the insurance policy and part of it comes under the word "fire."

With regard to the last point, I will not repeat what Greer, L.J. has read from the judgment of Kelly, C.B. in *Stanley v. Western Insurance Company (sup.)*; but it is to be observed that in this case as in other cases similarly decided the peril had begun to operate. In *Kacianoff and Co. v. China Traders' Insurance Company (Limited) (sup.)*, Lord Reading, C.J., said (12 Asp. Mar. Law

Cas., at p. 526; 111 L. T. Rep., at p. 406; (1914) 3 K. B. on p. 1127): "It would have been a totally different state of things if the vessel had left and then, outside, had been met and threatened by a Japanese vessel, or if, approaching Nagasaki, she had been in some such danger. No doubt there may be circumstances in which judges may differ as to when the particular peril did begin to operate, but there must be the beginning before the judge can exercise his judgment upon it," and in discussing the case of *The Knight of St. Michael* (8 Asp. Mar. Law Cas. 360; 78 L. T. Rep. 90; (1898) P. 30) afterwards he says: "The danger was present, and if nothing had been done spontaneous combustion and fire would have followed in the natural course. That means that the peril had begun to operate." I think those remarks apply in this case; the peril had begun to operate, and the loss comes within the words which are expressed in the body of the policy.

With regard to the last point—namely, that the loss was really due to restraint of princes under the Institute Cargo Clauses, No. 1, "warranted free of capture, seizure, arrest, restraint, or detainment"—I desire to repeat the words used by the learned judge in the court below, with which I am in entire agreement. He says: "I am concerned to say in my judgment that this"—that is, the facts in this case—"is not a restraint of princes. It seems to me a very far-reaching use of language to say that a fireman when he is pouring water upon goods which are within the ambit of the fire is using restraint of princes or anyone else. He is putting out a fire; he is dealing with a fire, and he is, I think, no more within the capture or restraint clause if he happens to be employed by the State than if he happens to be employed by the district authority or if he happens to be a volunteer member of the fire brigade."

For these reasons I am in agreement on the three points, and with regard to the point which we are sending back to the arbitrator I desire to say nothing until we know what the exact facts of the case are.

Order varied.

Solicitors for the appellants, *Waltons and Co.*

Solicitors for the respondents, *Parker, Garrett, and Co.*

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JAMES FINLAY AND CO. v. N. V. KWIK HOO TONG HANDEL MAATSCHAPPIJ.

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HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

June 12 to 15 and 20, 1928.

(Before WRIGHT, J.)

JAMES FINLAY AND CO. LIMITED v. N. V. KWIK HOO TONG HANDEL MAATSCHAPPIJ. (a)

Sale of goods—C.i.f. contract—September shipments Java sugar—Bill of lading—Dates of shipment incorrectly stated—Right of buyers to repudiate contract—Measure of damages—Sale of Goods Act 1893, s. 53, sub-s. (2).

A c.i.f. contract is not only a contract for the sale of goods which must be shipped as called for by the contract description, but is also a sale of documented goods. The c.i.f. seller is bound to procure and tender the shipping documents; in particular a bill of lading which would, among other things, show the date of shipment, that being a condition of the contract. An implied condition of the contract is that the bill of lading so tendered shall be a true and accurate document and correctly state the date of shipment. It is on the faith of the bill of lading that the buyer is called upon to pay the price and accept the goods, and he has the right, under such a contract, to reject the goods and to refuse to pay the price if shipment is not made in the contract month. The effect of mis-dating the bill of lading is to deprive him of that right, and in such a case, the incorrectness of the date of shipment is not a mere technical breach. The measure of damages falls within sect. 53, sub-sect. (2), of the Sale of Goods Act 1893: "the estimated loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract." It is not necessary for the buyer to bring actions against his sub-buyers as a condition precedent to an action for damages for breach of contract.

ACTION tried before Wright, J. without a jury.

The following statement of facts is taken substantially from the judgment of his Lordship.

The plaintiffs were a company carrying on business as merchants in India and elsewhere having a house in London, and the defendants were Java merchants engaged in the sale and shipment of sugar. The plaintiffs claimed damages as buyers against the defendants as sellers under three contracts made in Jan. and Feb. 1920 for 300 tons of Java sugar for each of the months July, Aug., and Sept. 1920, c.i.f. Bombay. The contracts were made through brokers at Samarang, and shipments were to be made at the rate of 100 tons a month under each contract. There was no dispute regarding the July and August shipments; the dispute related to the September shipment. The contracts contained the following provision regarding payment: "Buyers are to open a credit (or credits) on Messrs. James Finlay and

Co. Limited, London, which credit is to be confirmed by the bank at buyer's expense, by cable if necessary, and the sellers or their agents are to draw thereunder in three months' sight drafts, for the due payment of which drafts at maturity the buyers remain responsible." The plaintiffs in the ordinary course of their business made three sub-contracts with certain buyers in Bombay at various prices slightly higher than the prices in the contract between themselves and the defendants. These sub-contracts were also c.i.f. contracts and provided for equal shipments in July, August, and September of a certain quantity of sugar, and it was provided by clause 7 in each of the sub-contracts that "the bill or bills of lading shall be conclusive evidence of the date of shipment. The defendants duly delivered the July and August instalments and arranged to ship the September instalment (the one in dispute) in the British India Steam Navigation Company's steamship *Sealdah*, from the port of Cheribon, in Java. The *Sealdah* arrived at Cheribon at 1.30 p.m. on the 30th Sept. 1920, and though ready to receive cargo, received none on that day. Loading commenced at 7 a.m. on the 1st Oct., continued on the 2nd Oct., and the *Sealdah* sailed for Bombay on the 3rd Oct. 1920, arriving there on the 9th Nov. and completing discharge on the 15th Nov. 1920. The price of sugar in Bombay had fallen, and the buyers under the sub-contracts began to raise objections, alleging that the goods tendered were not a September shipment, and refused to take delivery. The plaintiffs, therefore, had to sell the sugar by auction at a price considerably less than the contract price with the defendants, and suffered a loss of over 9400l.

The bills of lading were signed by the ship's agents, Messrs. McNeill, at Samarang, there being no branch at Cheribon, the actual port of shipment. They were "shipped" bills of lading bearing date Samarang, the 30th Sept. 1920, and purported to show the goods as "Shipped in good order and condition (by the defendants) on board the steamship *Sealdah* lying in the port of Cheribon for carriage to Bombay." No goods, however, were shipped on that date.

Though the contract between the plaintiffs and defendants provided for the opening of a credit, none was in fact opened in respect of the first two shipments. It was not till the end of Sept. 1920 that the plaintiffs were asked to do so by cable, and this they did by a cable sent on the 30th Sept. and addressed to the brokers at Samarang. Drafts dated the 30th Sept. 1920 were accordingly drawn by the defendants payable to the Hong-Kong and Shanghai Banking Corporation, whose agents at Samarang were also Messrs. McNeill, and purported to be drawn under a telegraphic credit dated London, the 30th Sept. 1920. There was no question of any delay in cabling the credit, and it was certain that the cabled credit was not received at Samarang till the 2nd Oct. The drafts, therefore, could not have been drawn on the 30th Sept.

(a) Reported by R. A. YULE, Esq., Barrister-at-Law.

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After making careful and lengthy inquiries the plaintiffs came to the conclusion that the shipment in question was not a September shipment, and in 1922 served a notice of arbitration upon the defendants under the arbitration clause of the contracts. This clause read as follows: "Any dispute arising out of this contract is to be settled by arbitration of London brokers in the usual manner, and this submission may be made a rule of the High Court of Justice or any division thereof." Prolonged litigation followed: an award was made in Jan. 1923: the award was set aside by a divisional court in Nov. 1923: the parties then agreed to waive the arbitration clause and have the questions, whether the defendants had fulfilled their contracts and whether the plaintiffs were not entitled to damages for breach of contract, determined by action in the courts. In the course of the proceedings the matter went before the House of Lords, where it was decided that the contract was one which was to be construed by English law: (137 L. T. Rep. 458: (1927) A. C. 604).

Further delay arose because the defendants obtained an order for a commission to Java to take the evidence regarding a custom alleged by the defendants that though the shipment was not made in September, they were still entitled to maintain that they had fulfilled their contract. That custom was thus stated in the amended pleadings: "Further or in the alternative, by the custom of the port of loading, should a steamer which has contracted to take cargo for shipment during a particular month arrive at the loading port, at which such cargo has been declared ready for shipment by the shippers, at any date during the month, and the cargo to be loaded on such steamers is ready in lighters during the month and loading takes place within a reasonable time after the vessel's arrival, then, notwithstanding that such cargo may not be loaded during the contracted month, it is accepted that the shipper fulfils his engagement in respect of the shipment period, and, therefore, all bills of lading for the cargo may bear the date of the month on the contract, notwithstanding the fact that the steamer may not have loaded during such month. It appeared, however, that this practice or custom was abolished or discontinued some time in 1921, apparently because the banks, or the American banks, had become aware of it, and had protested with that effectiveness which banks can exercise.

Le Quesne, K.C. and D. B. Somervell for the plaintiffs.

Jowitt, K.C. and Van den Berg for the defendants.

Cur adv. vult.

June 20, 1928.—WRIGHT, J. (In a considered judgment his Lordship reviewed the facts at length, and continued:) I find that the parcel of sugar in question was not shipped in September, and that no custom has been established. That being so, there is a default

on the part of the defendants because they have not fulfilled their contract. As I have held that the defendants have broken their contract, I have to consider what are the damages which the plaintiffs ought to recover. The defendants' case is that the plaintiffs cannot recover more than nominal damages. They contended that the plaintiffs, having accepted the sugar in question, and having disposed of it, cannot reject it, and the only relevant consideration is the market value of the sugar, considered simply as sugar solely from the standpoint of quality, was in no way affected by the breach of contract. The plaintiffs contended that even if that were a true argument on the limited question of a failure to deliver goods answering to the contract description, there were other relevant and vital considerations which I now consider.

A c.i.f. contract, such as those in question, is a contract for the sale and delivery of goods which must be shipped as called for by the contract description, but it is also a sale of documented goods. The c.i.f. seller is bound to procure and tender to the buyer shipping documents, in particular a bill of lading which will, among other things, show the date of shipment, that being a condition of the contract. In my judgment it is an implied condition of the contract that the bill of lading so to be tendered shall be a true and accurate document and correctly state the date of shipment. Such a condition seems to me to be absolutely necessary to give to the transaction such business efficacy as the parties must have intended. It is on the faith of the bill of lading that the buyer is called upon to pay the price if he has to pay cash against documents or to make himself liable for the price if he has opened a credit or otherwise agreed to give his acceptance against documents, and it is on the faith of the bill of lading that he accepts the goods so far as the essential fact of shipment date is concerned. He is, indeed, entitled to a reasonable time to inspect the goods after discharge from the ship, but he has, as a rule, no independent means of checking the accuracy of the bill-of-lading date, at least in any reasonable time, or before he has so acted as to have accepted the goods. In any case, the buyer is, I think, entitled to rely on the accuracy of the bill-of-lading date and to regard the seller as impliedly guaranteeing its accuracy, unless there are express terms in the contract to the contrary. If that were not so, the buyer would in most cases be left without any effective remedy in respect of most serious losses sustained by him through misdated bills of lading.

There may be no difference in market value (quality being identical) between an October and a September shipment and, if the goods only are looked at and their actual quality, it may be said that the buyer has not suffered damages and is only entitled to nominal damages, as the defendants say here. But I think such a view has little regard to the business realities of the position. The buyer under such a contract as those in question has

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the right to reject the tender of documents and refuse to pay the cash, or accept the draft, if the shipment is not made in the contract month. The effect of misdating the bill of lading deprives him of that right by rendering its exercise impossible if he relies, as in practice he generally must rely and in law is entitled to rely, on the accuracy of the bill-of-lading date. He takes delivery of the goods and pays for them because on the face of the bill of lading he is bound to do so under the contract, whereas if the bill of lading showed because it was a true bill of lading that the sellers could not enforce the contract because the shipment was out of date, the buyer could and would refuse the tender and could obtain the same goods at their market price, which I assume to be lower than the contract price; that is at a great saving to himself. In such a case the difference between the market price and the contract price, the latter being higher than the former, represents, in my judgment, the measure of damages in favour of the buyer for breach by the seller of his obligation to deliver a correct bill of lading. The obligation is in its nature, I think, a condition, and if the breach were known in time the buyer could reject the documents. But from its very nature the breach is often only ascertainable when it is too late to reject the documents or to treat the contract as repudiated and no remedy is possible to the buyer except a claim for damages on the footing of a breach of warranty. The measure of damages in such a case, in my judgment, is that which I have explained and it seems to me to fall exactly within the language of sect. 53, sub-sect. (2), of the Sale of Goods Act 1893, namely: "The estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty."

I apply once more the language of Fry, L.J., recently quoted by Lord Dunedin, in *Re R. and H. Hall Limited and W. H. Pim (Junior) and Co.'s Arbitration* (1928, 139 L. T. Rep. 50, at p. 52), from *Hammond and Co. v. Bussey* (20 Q. B. Div. 79, at p. 100): "What may the court reasonably suppose to have been in the contemplation of the parties as the probable result of a breach of contract, assuming the parties to have applied their minds to the contingency of there being such a breach?" In the present case it seems to me clear that the parties must have contemplated that the buyers would, by taking up the documents and accepting the goods in the faith that they were bound to do so, pay the higher contract price and lose their right to reject, and suffer damage accordingly. I may add that where sellers are shippers it is almost inconceivable that such a breach of contract can be other than designed by them, since only the sellers in such a case have any motive to procure from the ship the misdating of the bill of lading which can scarcely be accidental. I do not deal with the case on the basis of fraud since fraud is not alleged, but I must not be taken to agree with the contention that the defendants must

be deemed to have acted in good faith on the basis of an alleged custom or practice about which I have expressed my opinion. Nor can I attach any weight to the contention that the incorrectness of the date is a technical breach since the sugar is the same sugar whether shipped on the 30th Sept. or on the 1st Oct. In a business sense it is not the same. The date of shipment is of primary commercial importance; on it in any case depends the legal position of the parties since the date of shipment is a condition of the contract (*Bowes v. Shand* (1877, 36 L. T. Rep. 857; 2 App. Cas. 455), and on that legal position depends serious financial consequences.

As I have not been referred to any express decision on the point, I have to decide the question on principle. *Taylor v. Bank of Athens* (1922, 27 Com. Cas. 142) has given me no guidance because McCardie, J. there had merely to decide a limited question put before him in a special case stated by arbitrators in which the only question was whether the sellers committed a breach of contract in not shipping goods within the proper period. No question was there raised as to the breach of contract in not tendering correctly dated documents. The high standard of correctness which is almost universally, as I am convinced, observed all over the world in the dating of bills of lading is a matter of the utmost importance and I should be sorry to think that it can be departed from with impunity.

The defendants also raise another point as regards the 150 tons which were resold on the contract above referred to, namely, that the plaintiffs suffered no damage because, by reason of clause 7 in those contracts, they were entitled to force the goods on their buyers even after they ascertained that the bill-of-lading dates were not correct, and hence could have recouped themselves for the money they had paid on the misdated bills of lading. That contention assumes that the sub-buyers were solvent, of which no evidence is forthcoming, but where the proper measure of damages has been *prima facie* established, it is for the defendants to show circumstances that would entitle him to a mitigation (*Roper v. Johnson*, 1873, 28 L. T. Rep. 296; L. Rep. 8 C. P. 167). But there is a wider objection. No doubt a plaintiff is bound to take steps to minimise damages but that doctrine must be construed reasonably. The principle is thus stated by Lord Haldane, L.C., in *British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London Limited* (107 L. T. Rep. 325, at p. 329; (1912) A. C. 673, at p. 689): "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps. In

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THE HARKAWAY.

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the words of James, L.J. in *Dunkirk Colliery Company v. Lever* (1878, 39 L. T. Rep. 239, at p. 241: 9 Ch. Div. 20, at p. 25), 'The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business.' In the present case I have had the evidence of the manager for the plaintiffs at Bombay, a witness of the highest standing, who says that in no case would his company seek to enforce a misdated bill of lading on their buyers as soon as they knew it was incorrect. I fully accept his statement and can appreciate not only why they would regard it as a dishonourable act, but also why it would affect their business standing in the East. In addition I have heard arguments on both sides, though I do not think it necessary to express a final opinion, whether the plaintiffs would succeed in any action against their sub-buyers. In any case the proceedings, even if successful, might be prolonged to the Privy Council through the Indian Courts and finally fail in securing them fruits, but on the contrary leave the plaintiffs saddled with heavy costs. I do not think the defendants are entitled to impose on the plaintiffs this burden or to make it a condition of the recovery of damages to which the plaintiffs are, if my judgment is right, *prima facie* entitled. I do not think they have established circumstances which would entitle them to a mitigation of damages.

I think the plaintiffs are entitled to judgment for the difference between the contract price which they paid to the defendants and the market value of the actual goods, that is limited to 250 tons.

I do not deem it necessary to discuss further the two alternative forms in which the plaintiffs claim damages since I decide the case in the manner I have already explained. There will be judgment for the plaintiffs accordingly.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Sanderson, Lee, and Co.*

Solicitors for the defendants, *Ballantyne, Clifford, and Co.*

PROBATE, DIVORCE, AND ADMIRALTY
DIVISION.

ADMIRALTY BUSINESS.

Tuesday, June 12, 1928.

(Before BATESON, J. and Elder Brethren.)

THE HARKAWAY. (a)

Damage—Vessel at anchor in shallow river—Submerged anchor—Damage to passing vessel—Duty to warn or mark position of anchor by buoy.

The plaintiffs, owners of the motor vessel H., claimed damages in respect of injuries sustained by their vessel caused by coming into contact with the submerged anchor of the defendant's barge L., in the river M., Isle of Wight. The river M. is a public navigable channel, with a width at low water of about 30ft., increasing to about 200ft. at high tide. The L., which was lying on the mud, made fast astern to a tree on shore, had her port anchor and about 50 fathoms of chain, out in the river. The H. in passing up river bumped upon the anchor, sustaining damage.

Held, that the owners of the L. were liable. If a vessel puts out an anchor where vessels properly navigating may come into contact with it, the owners of the vessel are liable in negligence if no warning is given, or the position of the anchor is not marked by a buoy.

Clarke v. Scattergood (1663, *Marsden's Adm. Cas.* 243) followed.

DAMAGE ACTION.

The plaintiffs, owners of the motor vessel Harkaway, claimed damages from the defendants, owners of the barge Louisa, in respect of injuries sustained by the Harkaway on the 1st April 1927 in the river Medina, Isle of Wight, by striking the submerged anchor of the Louisa. The Louisa at the time of the accident was lying at anchor on the mud, made fast astern to a tree on shore, and with her port anchor and about 15 fathoms of chain leading forward right ahead of her. The Harkaway, which was proceeding up-river, struck the fluke of the anchor of the Louisa, which was projecting out of the mud.

The facts and arguments of counsel fully appear from the judgment.

Dumas for the plaintiffs.

A. T. Bucknill and Willis for the respondents.

BATESON, J.—I have no doubt the plaintiffs are entitled to recover the amount of the damage they have sustained. The *Harkaway*, a wooden vessel belonging to the plaintiffs, of 27 tons gross, 53ft. 1in. long, with a beam of 16ft. 5in. and fitted with engines of 35 B.H.P., was coming up river in the course of a voyage from Cowes to Newport, Isle of Wight. She had some general cargo and a crew of three

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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hands. It was a fine evening and there was not any wind. The tide was what is called a "lay tide," which means that the water was swelling in the river, and this motor-boat was proceeding up on the swelling water. She was drawing 5ft. 3in. aft and 4ft. 3in. forward, and she had about a foot of water under her as she was going up-river. The master was taking her up in the best water; he could not get further than a little above the West Medina Cement Works, because he would not have had enough water.

As the master of the *Harkaway* was going up he saw the *Louisa* ashore on the mud on his port bow. The river Medina at this place is, at low water, a mere gut-way of about 30ft. wide, but when the tide rises to high-water there is a considerable amount of water extending to some 200ft. on the other side. The master of the *Harkaway* was going up using the lay tide for his boat, when suddenly he found her bumping over what turned out to be the anchor of the *Louisa*, as to which he had no warning of any sort except that there was a chain hanging out from the bow of the *Louisa* on to the mud and then presumably going on some distance. It might be 10 or 15 fathoms; it might be more or it might be less. It might have been in one direction following the hawse pipe along the mud and in a different direction under the water; and unless there was some indication the master would not know where the anchor was. At any rate, he would not expect to find it in the best water in which he had to navigate. This anchor was sticking up out of the bed of the river and formed an obstruction in the river, either on the edge of the gut-way or just within it, and in my opinion in the one place an anchor ought not to be in having regard to the position of the *Louisa*, and certainly in a position in which the master of the *Harkaway* would not expect it to be. Having bumped over it, and his vessel having sustained considerable damage, the master found when the tide had ebbed, that this anchor was on his port quarter about 18in. behind him. His vessel was so injured that she sank.

As regards the *Louisa*, she was on the mud and had a rope tied to a tree from the stern, according to the mate, in order to keep her from floating on to her own anchor, so that evidently the possibility of her sitting on her own anchor was present in his mind. Having thus secured her, the mate and the crew went away, and there was nobody on board the *Louisa* to warn the persons coming up river as to the position of the anchor. The *Harkaway* gave the *Louisa* a perfectly proper berth, passing at a distance that her master thought was quite safe. The anchor may have been driven further into the river bed subsequently, but there is evidence to show that at the material time it was sufficiently projecting to catch the *Harkaway* in the shallow water. Under these circumstances, in my view, the case is really an undefended one.

In the olden days from 1663—and perhaps earlier—cases like these were quite common,

where light draft vessels were navigating in shallow places and used anchors to keep themselves in position. It was laid down so far back as 1663 in *Clarke v. Scattergood* (Marsden's Adm. Cas. 243), that it was negligence to leave an anchor in a shallow navigable river without a buoy. I think that is good sense, and the decision has stood for nearly 300 years. I have consulted the Elder Brethren and they also think it good seamanship, and that if people put down anchors in channels which are shallow at low tide they ought to be buoyed. It is said that if a buoy had been put down—a piece of wood or tin can—the range of the buoy would have been 15ft., but it would have been sufficient to give anybody warning, and no sort of warning was given in this case. It is also said that in this river buoys are not used because they get cut away by the motor boats, but that only means that they have not strong enough moorings; if stronger moorings were used, the motor boats would find possibly that their propellers were cut away instead of the mooring buoys. That, however, to my mind is no excuse for not buoying anchors, or if not, using some other means of warning people if anchors are put in such places as this. In my view a warning ought to have been given of this obstruction which the defendants' servants had no right to put in a public navigable river.

Mr. Dumas said his clients had a right to pass and repass in any navigable water without obstruction. Mr. Bucknill's reply was that his clients also had a right to put an anchor down. That is true, but they have no right to obstruct, and if they put such an anchor down they ought to give a warning. In the circumstances I think it was a trap, and a trap, unfortunately, that acted very successfully. Mr. Bucknill's case was that there was ample warning where the trap was; but the fact that you have a ship aground 90ft. from her anchor does not tell you where the anchor is or where it may be. How could the master obtain a knowledge of the actual place of the anchor from the position of the *Louisa*? If a person has an unbuoyed anchor that sticks up like a spike in the river and does damage I think he must pay. Mr. Bucknill pointed out that to have to buoy their anchors would put a serious burden upon the defendants. No doubt it would add a little to the care required by vessels, but the number of places in which it would be required is not great, the time during which there is any danger from an anchor is very limited, and the cost cannot be much to properly buoy an anchor of the type used in this case. It is said that no by-law has been made with regard to this matter. In my opinion no by-law is required; it is a case of common-law negligence. Mr. Bucknill raised the question as to what is to happen at night time. Well, when that case arises I will consider it. My attention was called by Mr. Dumas to *Jolliffe v. Wallace*, *Local Board* (2 Asp. Mar. Law Cas. 146; 29

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L. T. Rep. 582; L. Rep. 9 C. P. 62) and to *Harmond v. Pearson* (1 Camp. 515, 516), in which Lord Ellenborough said: "It is a peremptory law of navigation, that when any substance is sunk in a navigable river, so as to create danger, a buoy shall be placed over it for the safety of the public. This is the proper and specific notice, which all understand and are bound to attend to." That seems to be good law, fairly applicable to this case, except that there the court was dealing with a barge, and here I am dealing with an anchor. But it seems to me that where an anchor, or the fluke of an anchor, sticks up out of the bottom of a channel it is perhaps more dangerous than a larger article like a barge; although it does not cover such a wide area it might do greater damage from the sharpness of its point. Mr. Dumas also referred to *Marsden's Collisions at Sea*, 8th edit., p. 101, where it is stated that "before the days of floating docks, damage to ships by grounding upon unbuoyed anchors in the Thames and elsewhere was a very frequent cause of action. The ship whose anchor was unbuoyed was invariably found in fault"; and from the time of *The Susan* (*Clarke v. Scattergood*) (Marsden's Adm. Cas. 243), there are a series of similar cases in Admiralty from 1648 to 1840. Mr. Marsden goes on "and ordinances of the Admiralty—which appear to have been presentments of juries at Admiralty sessions—were issued against leaving anchors unbuoyed. In an American case it was held that in ordinary anchorage ground it is not necessary to buoy the anchor." That was *Baxter v. International Contracting Company* (65 Fed. Rep. 260), which Mr. Bucknill quoted to me. The learned judge, Brown, J., said it was an occurrence which happened in an ordinary anchorage ground, and he appears to have thought it was a case of a shifted anchor and that the plaintiff had failed to make out his case, so that the decision does not help us very much here. Mr. Bucknill also referred to *Coulson's Law of Waters*, 4th edit., p. 453, with regard to rights in navigable waters, and to *Attorney-General v. Wright* (8 Asp. Mar. Law Cas. 320; 77 L. T. Rep. 295; (1897) 2 Q. B. 318). They deal only with the right to moor in navigable rivers, about which there is no question.

I think, in the circumstances, the plaintiffs are entitled to succeed. As to the amount, there must be judgment for the plaintiffs with a reference to the registrar.

Solicitor for the plaintiffs, J. A. and H. E. Farnfield.

Solicitors for the defendants, *Ince, Colt, Ince*, and *Roscoe*.

Supreme Court of Judicature.

COURT OF APPEAL.

June 5, 6, and 15, 1928.

(Before SCRUTTON, GREER, and SANKEY, L.JJ.)

SMITH, HOGG, AND CO. LIMITED v. LOUIS BAMBERGER AND SONS. (a)

ON APPEAL FROM THE KING'S BENCH DIVISION.

Bill of lading—"Cargo to be taken from alongside the steamer . . . at charterers' risk and expense as customary"—Cargo of timber—Discharge partly into lighters and partly on to quay—Respective liability of owners of cargo and shipowners.

The plaintiffs were the owners of the steamship *F*. The steamer had loaded a cargo of deal battens and discharged the same at the Surrey Commercial Dock. The defendants were the holders of thirty-one bills of lading out of a total of sixty-three, and the quantity of cargo represented by those bills of lading was 569 standards, of which 326 standards were delivered on quay and 243 standards overside into barges. The mode of delivery of the remainder of the cargo was not explained. The plaintiffs claimed part of the expense of discharge which they alleged ought to have been borne by the defendants, and which expense they had incurred under protest because the defendants had repudiated all liability. The claim was put as for damages for breach of contract or, alternatively, for money paid at the implied request of the defendants. The bills of lading incorporated the terms, relating to discharge, of a charter-party dated the 13th Sept. 1926, clause 3 of which was as follows: "The cargo to be discharged with customary steamship dispatch as fast as steamer can deliver during the ordinary working hours of the respective ports and according to the custom of the respective ports, the cargo to be brought to and taken from alongside the steamer at charterer's risk and expense as customary." The custom of discharge on to quay at the Surrey Commercial Docks was thus stated: "The goods are discharged from the steamer by the ship's stevedores with the ship's tackle, and stacked by the stevedores on to the quay without sorting to bill-of-lading sizes or marks. The first pieces discharged are used to make a stage projecting over the quay for about 6ft. towards the side of the steamer, and as the cargo is discharged a stack is made varying in size with the quantity discharged on to the quay, but generally not exceeding the length of the steamer, and extending back about 30ft. from the edge of the stage. The timber is later carried away by the Port of London Authority and by them sorted to bill-of-lading sizes and marks and piled in the usual place for storing timber. The ship's stevedores' charges for discharging

(a) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

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the cargo and stacking it on the quay are paid by the shipowner and the Port of London Authority's charges for carrying the cargo from the quay and sorting and piling are paid by the consignees." As regards discharge into barges the custom was stated to be as set out in Glasgow Navigation Company Limited v. W. W. Howard Brothers and Co. (11 Asp. Mar. Law Cas. 376; 102 L. T. Rep. 172): "By the custom and practice of the Port of London in the case of cargoes of lumber (including both Baltic and pitch-pine lumber) the receiver is only liable to provide sufficient open craft alongside ready to receive the goods from the ship, and is under no obligation to have any men on such open craft to receive the goods from the ship's tackle or to stow the goods therein. The shipowner is bound to do the whole work of delivering the goods into the craft and of stowing the goods therein in the reasonable and ordinary manner so that the goods may not be damaged or imperilled and so that the craft may be loaded to the usual and reasonable extent and may be properly and safely navigable." The plaintiffs contended that their liability in both cases ended when the deals were released, or ready for release, from the ship's tackle and that the subsequent expense of carrying, arranging, and piling in a rough stack on the quay, or of receiving, arranging, and stowing in barges, fell on the defendants. As regards discharge into barges it was contended that the custom was inconsistent with the contract. For the defendants it was argued, as regards discharge on to quay, that the cargo should be treated as having been taken bodily from the ship and set down on the quay, and the area so covered should be regarded as alongside. As regards discharge into barges, Glasgow Navigation Company Limited v. W. W. Howard Brothers and Co. (sup.) was an authority which showed that it was the shipowners' duty to trim the cargo so that it could be taken away with safety to itself and the barge containing it.

Held, as regards the discharge on to quay, that the cargo was "alongside" when it was discharged on to the quay and stacked with one side of the stack almost touching the ship. As regards discharge into barges, the authorities were clear that the defendants' contention was right and that the cargo was not "alongside" till the barge was loaded and trimmed in a seaworthy manner, and the obligation so to load and trim fell on the ship.

Decision of Wright, J. (ante, p. 456; 138 L. T. Rep. 615) on the first point reversed, and on the second point affirmed.

APPEAL from a judgment of Wright, J. (ante, p. 456; 138 L. T. Rep. 615).

The plaintiffs, who were shipowners, claimed to recover from the defendants, who were the holders of bills of lading in respect of a cargo of timber, the sum of 102l. 9s. 3d., in respect of the discharge of a quantity of timber from the plaintiffs' steamship *Fernhill* at the Surrey Commercial Dock, London. The steamship

Fernhill was chartered in 1926 on the Merblanc (White Sea) charter form. It was provided that "the ship shall load a full and complete cargo of deals and (or) battens and (or) ends, &c., and proceed to a safe port (which was ultimately fixed as London), and there deliver the same. Cargo to be discharged with customary dispatch, but according to the custom of the respective ports. The cargo to be brought to and taken from alongside the steamer at charterers' risk and expense as customary. The *Fernhill* carried timber under sixty-three bills of lading, thirty-one of which were held by the defendants, and the quantity of timber represented by those bills of lading was 569 standards. Timber goods at the Surrey Commercial Dock were discharged in two ways: (1) On to the quay; and (2) over the side into lighters. In this case 326 standards were delivered on the quay and 243 standards over-side into barges. The plaintiffs pleaded that the defendants did not take the cargo from "alongside" the steamer, and that, in consequence, they (the plaintiffs) carried the cargo to and stowed it in the usual place at the docks for discharged timber at a cost of 102l. 9s. 3d. The defendants contended that they were under no liability in respect of the money claimed by the plaintiffs, because by the custom and practice of the Port of London the shipowners were under the obligation to bear all the costs of the unloading on to the quay and of the delivery over side into lighters and stowage therein. The custom in the Port of London with regard to discharging on to the quay was substantially as follows: The cargo for the quay was discharged continuously and stacked on the quay by the ship's gang, at the ship's expense, into two large stacks, one opposite the forward holds, one opposite the after holds. These stacks come up to the edge of the quay, and project over it towards the ship some 3ft. to 5ft. In respect of the lighters the custom was for the ship's men, at the ship's expense, to lower the cargo over side and stow the cargo so as to fill the lighters with reasonable stowage.

Wright, J. held, that with regard to the cargo delivered on to the quay, that the cargo was "alongside" when it was available for release from the ship's slings, if discharged by the ship's tackle, or, if discharged by hand, when laid with one end on the quay and the other resting against the ship, and the obligation of the consignees to take from "alongside" began, and they became liable for all expenses from that moment. With regard to the cargo discharged into lighters, the custom relied on by the defendants was not inconsistent with the terms of the charter-party, and might be relied on by them as showing that the act of delivery was completed only when the cargo was stowed into the lighters, so that the consignees' obligation began only after such stowage.

The defendants appealed against the decision with regard to the discharge on to the quay; and the plaintiffs cross-appealed against the

decision in so far as it related to the cargo discharged over side into lighters.

W. Norman Raeburn, K.C. and James Dickinson for the appellants (the receivers of the cargo).—Wright, J. was wrong in holding that the cargo was “alongside” when it was available for release from the ship’s slings, if discharged by the ship’s tackle, or if discharged by hand, when laid with one end on the quay and the other resting against the ship, and that the receivers of the cargo were liable for all expenses from that moment. The learned judge ought to have applied the same principle to the cargo discharged on the quay as he did to that discharged on the lighters. The authorities are discussed by Lord Birkenhead, L.C. in his judgment in *Palgrave, Brown, and Son Limited v. Steamship Turid (Owners)* (15 Asp. Mar. Law Cas. 538; 127 L. T. Rep. 42; (1922) 1 A. C. 397). In that case the House of Lords (applying *Holman v. Wade*, reported in *The Times Newspaper* of the 11th May 1877) that the custom of the port of discharge was inconsistent with the provision in the charter-party that the cargo should be taken from alongside the steamer at the charterers’ expense, and that the shipowners were entitled to succeed. See also *Rederi Aktiebolaget Acolus v. W. N. Hillas and Co. Limited* (16 Asp. Mar. Law Cas. 565; 134 L. T. Rep. 184; affirmed in the House of Lords 136 L. T. Rep. 385), *The Nifa* (7 Asp. Mar. Law Cas. 324; 69 L. T. Rep. 56; (1892) P. 411), and *Aktieselskabet Dampskibsselskabet Primula v. Horsley and Co.* (40 Times L. Rep. 11). These are the cases dealing with discharge of cargo on the quay. With regard to the discharge of cargo over side into lighters, see *Peterson v. Freebody and Co.* (8 Asp. Mar. Law Cas. 55; 73 L. T. Rep. 163; (1895) 2 Q. B. 295), *Aktieselskab Helios v. Ekman and Co.* (8 Asp. Mar. Law Cas. 244; 76 L. T. Rep. 537; (1897) 2 Q. B. 83), *Brenda Steamship Company v. Green* (9 Asp. Mar. Law Cas. 55; 82 L. T. Rep. 66; (1901) 1 Q. B. 518), and *Glasgow Navigation Company Limited v. W. W. Howard Brothers and Co.* (11 Asp. Mar. Law Cas. 376; 102 L. T. Rep. 172). These decisions have not been disapproved of by the House of Lords. They have been acted on for years and are binding on this court. The expression “cargo sent alongside” is dealt with in *Fletcher v. Gillespie* (1826, 3 Bing. 635). The expression means as near to the ship as practicable. See also *Holman and others v. Dasnieres* (2 Times L. Rep. 480, 607). With regard to the cargo discharged over side into barges, the judgment of Wright, J. is correct, and the learned judge ought to have decided the quay-delivery case in the same sense, and have decided in favour of the receivers of the cargo in respect of the quay delivery as well as the barge delivery.

Le Quesne, K.C. and Sir Robert Aske for the respondents.—The ship’s duty is at an end when she puts the cargo over the ship’s rail and possibly lowers it. The receiver must take the

cargo from alongside. His responsibility begins the moment the cargo is alongside the ship, and all work in regard to the cargo from that moment is to be at the expense of the receiver of the cargo. The alleged custom which places the expense of taking the cargo from alongside on the shipowners after they have put the cargo clear of the rail is inconsistent with the charter-party, and evidence of such a custom is inadmissible. The obligation of the shipowners under the charter-party in this case is at an end when the cargo is over the ship’s rail and within reach of the receivers of the cargo. The expense of taking the goods from over the ship’s rail falls on the receiver.

June 15, 1928.—The following considered judgments were read :

SCRUTTON, L.J.—This is an appeal in a test case intended to raise the question of the proper distribution of the costs of discharging timber in the Surrey Commercial Dock, London, as between shipowner and receiver. The steamship *Fernhill* was chartered in 1926 in the well-known Merblanc (White Sea) charter form, which has been in existence since 1899. The material terms are that “the ship shall load a full and complete cargo of deals and (or) battens and (or) ends, &c., and proceed to a safe port—which was ultimately fixed as London—and there deliver the same. Cargo to be discharged with customary steamship dispatch, but according to the custom of the respective ports. The cargo to be brought to and taken from alongside the steamer at charterer’s risk and expense as customary.” The *Fernhill* carried timber cargo under sixty-three bills of lading, thirty-one of which were held by the present defendants. These bills only identified the subject-matter by number of pieces and sizes, not by marks. The goods shipped under each bill were separated on ship by a paint line, and a painted number, corresponding to the number of the bill of lading. But one batten of a given size is as good as another, and after the goods passed the ship’s rail no attempt was made to keep them separate. So long as the receiver got his number of pieces of the right sizes, all was well. Timber goods at the Surrey Commercial Dock are discharged in two ways: (1) On to quay; (2) over side into lighters. As regards lighters, there has been litigation both before and after the Merblanc charter as to the amount of work the shipowner must do in the barge by way of discharge or delivery at his own expense. As regards the quay, the discharge or delivery has proceeded on an agreed custom during all the time the Merblanc charter has been in existence, the shipowner doing a recognised amount of work at his own expense, and until the present case no attempt has been made to disturb this custom or to impose less work on the shipowner, or alter the way in which by the custom of London the shipowner delivers or discharges. The present attempt is made in consequence of a decision of the House of Lords in the case of *Palgrave, Brown, and Son Limited v. Steamship*

Turid (Owners) (127 L. T. Rep. 42; (1922) 1 A. C. 397) in respect of timber discharged in the port of Yarmouth, followed by a similar decision as to the port of Hull in the case of *W. N. Hillas and Co. v. Rederi Aktiebolaget Acolus* (16 Asp. Mar. Law Cas. 565; 136 L. T. Rep. 385). The question is whether the facts of the discharge in London under these decisions are applicable or not, and whether the agreed customs of the Port of London are excluded by the terms of the Merblanc charter in that they contradict these terms. Discharge of timber cargoes in London under the Merblanc charter has proceeded, so far as the discharge on the quay is concerned, in accordance with the customs, for over twenty-five years without objection. The question is whether the decisions of the House of Lords in *The Turid* (15 Asp. Mar. Law Cas. 538; 127 L. T. Rep. 42; (1922) 1 A. C. 397) and *W. N. Hillas and Co. v. Rederi Aktiebolaget Acolus* (*sup.*) compel an alteration of this old-established practice. Wright, J. has decided that the practice of discharge on the quay is to be altered as regards incidence of expense, and the receiver appeals. He has also decided that the practice of discharge into lighters is not to be altered as to incidence of expense, and the ship appeals.

The respective customs for quay and lighter discharge in London are agreed, reserving the question of their applicability in law to the Merblanc charter. In practice they have always been treated as applicable to that charter until this case.

The agreed custom as to the quay discharge is set out in the correspondence and in the judge's judgment. In substance it amounts to this. Though the goods in the ship are stored in separate parcels and leave the ship in separate parcels, they are not delivered to the receivers in separate parcels from the ship or sorted on the quay to sizes, marks, or parcels. Largely for the convenience of the ship and to avoid delay, the whole cargo for the quay is discharged continuously on to the quay by the ship's gang and stacked on the quay by the ship's gang into two large stacks, one opposite the forward holds, one opposite the after holds. These stacks come up to the edge of the quay, and project over it towards the ship some 3ft. to 5ft. The timbers are of considerable lengths. In the bill of lading given me, out of 1783 pieces, 688 range from 20ft. to 27ft. in length. They are at first handed out and rest one end on the quay and the other end on the ship's rail, for the convenience of the workmen on the quay lifting them. When the ship's winches are clear the timbers are lowered in slings, the distance of the lowering place from the edge of the quay being about 3ft., and again rest at an angle on the ship's side. The ship's gang then build them up into a stack, which may go back 30ft. from the edge of the quay, of which it will be seen 25ft. may be one piece at right angles to the ship. The stack will extend the whole length of the ship, except for the central gangway, and may be 12ft. to 15ft. high. It could

be made higher and narrower, so extending less far back on the quay, but would in that case be less convenient to work. The whole cargo is thus discharged at once on to the quay, and stacked with one side of the stack almost touching the ship, by the ship's gang at the ship's expense. The ship has then finished with the cargo, and the Port of London Authority for the receivers, and at their expense, removes it to sheds, sorts it to sizes, and delivers it to individual receivers. This customary method of delivering on quay has prevailed for many years without objection under charters under which the receiver is bound to take from alongside at his risk and expense.

In respect of lighters, the custom which is agreed in this case has been proved in actual cases, and will be found stated in the judgment. The lighters receive the bill-of-lading parcels, quantities, and marks. The receiver provides the lighters but no men to receive the cargo. The ship's men at the ship's expense hand or lower the timber in slings into the lighters. Releasing the slings, they move and stow the timber so as to fill the lighters with reasonable stowage. The receiver has nothing to do with the matter until the barge is loaded, when he takes it away.

Apart from authority, I should have held that these customs defined the duty of discharge or delivery at the port which the shipowner had contracted to perform; that the stack and the barge were respectively "alongside" the ship, and that the receiver had only to remove the stack or barge when completely erected or loaded alongside. The custom seems to me an eminently reasonable and businesslike arrangement, as is evidenced by its working without objection for so many years. It enables the ship to be quickly discharged; it avoids friction and delay by two different gangs of men working in a confined space, and by numbers of receivers each coming, or delaying to come, to receive their parcels.

It is said, however, that the decisions of the House of Lords in *The Turid* (*sup.*) and *W. N. Hillas and Co. v. Rederi Aktiebolaget Acolus* (*sup.*) have disturbed this working arrangement. I take those decisions to lay down that the ship cannot be compelled to bear the expense of work in removing cargo to a place which is not "alongside" in the ordinary meaning of that term, and that custom is not available to make such a place "alongside." I should myself have held differently, and should have thought that the custom of the port could make a place "alongside," which was not ordinarily "alongside" just as custom can make twelve mean thirteen, or a hundred mean a hundred and twenty. But it is clear from the decision of the House of Lords that I was wrong in that view. It remains, therefore, to ascertain what facts the House of Lords was considering when it held that such facts could not be made "alongside" by custom.

The import of timber into the port of Yarmouth has given rise to a great deal of litigation—see *The Nifa* (7 Asp. Mar. Law

Cas. 324; 69 L. T. Rep. 56; (1892) P. 411) and *The Turid* (*sup.*) and a number of County Court cases. Anyone who has seen the Yarmouth river will understand why. The banks of the river slope so that the ship cannot lie near the bank and remain afloat, and cargo may not be deposited on the edge of the quay or bank. The result is that a considerable stretch of water and then of land intervenes between the ship's rail and the first place where the cargo can be deposited. In *The Nifa* case (*sup.*) there was 15ft. between the ship's rail and the quay edge, and 15ft. to 20ft. from the edge of the quay to the first place where the cargo could be stacked; 30ft. to 35ft. had to be traversed from the ship's rail to the cargo stack. In the case of *The Turid* (*sup.*) the distance was 22ft. to 23ft. The custom of Yarmouth proposed to put the expense of bridging this by a stage, and a gang carrying over it, on the ship. The House of Lords, as I understand the decision, has held that a place at such a distance from the ship cannot be "alongside" it, and custom is not admissible to extend the meaning of the word "alongside" to such a state of facts. The position at Hull is rather more severe on the ship; a distance which may be from 30ft. to 60ft. has to be covered before the cargo is placed upon bogies or near to the railway line on which the bogies run, and the custom of Hull proposes to put the cost of bridging this space on the shipowner. Again, I understand the House of Lords to have decided that a space 30ft. to 60ft. off cannot be "alongside" the steamer or be made so by custom. Following these decisions in the case of *Aktieselskabet Dampskibsselskabet Primula v. Horsley and Co.* (1923, 40 Times L. Rep. 11) relating to Sunderland, when the shore crane with a very wide range discharged on to a railway line, and then the goods were moved still farther off, sometimes up to 87ft. from the ship, it was held that this again could not be "alongside" the ship, even by custom. In a similar case relating to West Hartlepool and Sunderland no custom was proved, but no timber was stacked within 4ft. of the edge of the quay and the stacks went back 40ft. or 50ft. from this 4ft.

The difference in London, where a custom is admitted, is that the stack begins quite close to the ship's side overhanging the edge of the quay, and extends back 30ft., being a little more than the length of timbers which are delivered by custom at right angles to the ship's side, and which, therefore, when entirely clear of the ship's rail, reach nearly to the end of the stack. I see no difficulty in holding that such a stack of which one edge almost touches the ship, and which leaves no space of land, and no appreciable space of water between the ship's side and the edge of the stack, is "alongside" the ship without any extension of the term "alongside" by custom. I understood the objection of the shipowner was not to his gang's doing the work, which was obviously very convenient to him, but to his bearing the expense of it. Indeed, as I have said, he had been both doing the work and bearing the expense of it for

twenty-five years under this charter without objection. There has been litigation in London as to the discharge into lighters over side and the work to be done by the shipowner. In 1895, in *Petersen v. Freebody and Co.* (8 Asp. Mar. Law Cas. 55; 73 L. T. Rep. 163; (1895) 2 Q. B. 295), no custom of the port was proved, and it was held that the receiving of logs of timber was a joint operation; the shipowner must put the end of the log so that the receiver could get hold of it, and the receiver must then help the ship to get the log out of the ship and into the lighter. The "alongside" clause was in the charter.

In 1897, in *Aktieselskab Helios v. Ekman and Co.* (8 Asp. Mar. Law Cas. 244; 76 L. T. Rep. 537; (1897) 2 Q. B. 83), where also there was an "alongside" clause in the charter, a custom was proved that the receivers need have no men in the barge, but that the shipowner was bound to have men there to release the slings and stow the barges, though the exact extent of the stowage was not determined. The custom was upheld as explaining the customary mode of delivery which the shipowner had to perform.

In 1910, in *Glasgow Navigation Company Limited v. W. W. Howard Bros. and Co.* (11 Asp. Mar. Law Cas. 376; 102 L. T. Rep. 172), the custom was further defined, after an exhaustive hearing of witnesses. The shipowner was held bound to do the whole work of stowing the barge to a reasonable extent, the receiver not being required to have any men in the barge. When the barge provided by the receiver is stowed fully, the receiver takes it away. The barge is alongside and all the timber in it is treated as alongside, though the shipowner has to move it after the slings are released. All these cases were cited to the House of Lords in *The Turid* (*sup.*) and were treated as distinguishable and as explaining the customary method of discharge or delivery.

In these circumstances, the learned judge below has declined to interfere with decisions which the House of Lords has treated as not affected by their decision in *The Turid* (15 Asp. Mar. Law Cas. 538; 127 L. T. Rep. 42; (1922) 1 A. C. 397), and has dismissed the claim of the shipowner to recover the expenses of his work in the barge. I agree with this decision and am not disposed to interfere with a custom which the House of Lords has not treated as affected by their decision, and which is quite explicable as defining what the ship must by custom do to deliver or discharge in the Port of London in a barge which is alongside the ship.

But the learned judge has thought himself bound by the decision of the House of Lords to interfere with the long-established practice of delivery on to the quay in the Port of London, which has never before been questioned under this charter, though delivery into lighters has been questioned.

The judge has decided that the receiver must bear the cost of work on the quay, after the timber is within the consignee's reach in the ship's slings. I am not sure that he has

decided who is bound to do the work, only who is to pay for the work; and I think the shipowner rather wants to do the work, in order to release his ship more quickly.

The counsel for the shipowner at once argue that the two decisions of the judge are inconsistent. If the ship need not pay for the work on the quay after the timber is slung overboard, why need it pay for the work in the barge after the timber is lowered into the barge in slings? I think the two decisions are inconsistent, but that the result is that the decision as to work on the quay cannot stand. Both the timber in the barge and the timber on the quay are, in my opinion, in London "alongside" the ship. One side of the barge is some way from the ship, but the other is touching the ship; the same is true of the stack. The work to be done by the ship appears to me to be on the quay, as it has been held to be in the barge, explained by the customary method of delivery or discharge in London.

In these circumstances, in my opinion, the decision below as to work on the quay must be reversed; the custom of London held applicable to the Merblanc charter, and the shipowner held bound to do the work specified in the custom at his own expense. I have the more satisfaction in coming to this conclusion as it upholds the method in which shipowners and receivers have done work on the quay under this custom for over twenty-five years without objection, because I think it is a way of discharging the ship with businesslike advantages to both parties.

The cross-appeal of the ship must be dismissed with costs; the appeal of the receivers allowed, the judgment against them set aside, and judgment entered for them in the action with costs here and below.

GREER, L.J.—I agree that the defendants' appeal should be allowed, and the plaintiffs' cross-appeal dismissed, with the usual consequences as regards costs.

The facts of the case are fully stated by Wright, J. in his judgment, and they have been conveniently summarised by Scrutton, L.J. in the judgment which he has just read. The only fact to which I desire to call special attention is that the relevant term of the charter-party incorporated in the bill of lading is a term that applies to the cargo as a whole, and not to each separate piece of wood that is lifted out of the hold of the ship. The words are: "The cargo to be brought to and taken from alongside the steamer at charterer's risk and expense as customary."

In the case of *The Oresund*; *Rederi Aktiebolaget Acolus v. W. N. Hillas and Co.* (16 Asp. Mar. Law Cas. 565; 134 L. T. Rep. 184)—which was originally tried by me, and went through this court to the House of Lords—I used these words in giving judgment: "To put the goods over the rail is thus the *prima facie* limit of the obligation of the ship to discharge and deliver the cargo. If there be nothing in the charter-party about the con-

signee taking from alongside, it may well be that a custom such as is alleged in this case might impose the further duty of delivering into bogies 18½ ft. from the ship's side. It has been decided that the ship's obligations, even where there is an alongside clause, may be extended and the receiver's duties diminished by an established custom of the port—*Aktieselskab Helios v. Ekman and Co.* (8 Asp. Mar. Law Cas. 244; 76 L. T. Rep. 537; (1897) 2 Q. B. 83), and *Glasgow Navigation Company Limited v. W. W. Howard Bros. and Co.* (11 Asp. Mar. Law Cas. 376; 102 L. T. Rep. 172)—so long as the added duties of the ship are being performed while the goods are still alongside. But if the added duties of the ship imposed by the custom extend to taking the goods beyond a place that can properly be described as alongside, the custom is inconsistent with the contract made by the express words of the charter-party and is not binding on the parties to the contract." I see no reason to alter the view thus expressed as to the law applicable to cases like the present.

I think the point to be decided in the present case is whether, when the cargo had, in accordance with the custom of the port, been placed in a position extending from the quay edge to about 30 ft. from the quay edge, it was still in a position that could reasonably be said to be "alongside" the ship? I think if anyone had been asked where the cargo of the *Fernhill* was after discharge, he would not have been misusing the English language if he had said, as to the part of the quay, that it was alongside the ship on the quay, and as to the part discharged into lighters it was alongside the ship in lighters. In my judgment this case so far as it is concerned with the part of the cargo discharged on to the quay, is distinguishable from *The Turid* (15 Asp. Mar. Law Cas. 538; 127 L. T. Rep. 42; (1922) 1 A. C. 397), on the ground that in that case no portion of the cargo was placed on the quay at a less distance than eight yards from the rail of the ship. As Lord Sumner says in the concluding part of his judgment, 13 ft. of water plus 10 ft. of quay is too far away from the ship's side to be within the meaning of the words "alongside the steamer."

In the other case, *W. N. Hillas and Co. v. Rederi Aktiebolaget Acolus* (16 Asp. Mar. Law Cas. 565; 134 L. T. Rep. 184; 136 L. T. Rep. 386), the custom involved the carriage of the whole of the cargo at least 18½ ft. to the bogies and loading it in the bogies, and it was held by all the courts that when in the bogies at this distance from the ship's side the cargo could not be said to be "alongside the steamer."

In my judgment the facts of this case take it outside the decisions of the House of Lords in the two cases referred to.

As regards the part of the cargo delivered into lighters, I agree with my Lord that the case is within the decisions in *Aktieselskab Helios v. Ekman and Co.* (*sup.*), and *Glasgow Navigation Company Limited v. W. W. Howard Bros. and Co.* (*sup.*), and that the learned judge was

right in his decision with regard to the cargo so delivered, but wrong in his decision with regard to the part delivered on the quay.

I only desire to add that I am not myself satisfied that there was any inconsistency between the decisions in the *The Turid* (sup.) and *W. N. Hillas and Co. v. Rederi Aktiebolaget Acolus* (sup.) and the cases where it has been held that the customary meaning of a dozen in a particular trade can be proved to be thirteen, and the customary meaning of a hundred may be proved to a hundred and twenty. Those are cases in which the customary meaning of a word was established, and as pointed out in my judgment in *W. N. Hillas and Co. v. Rederi Aktiebolaget Acolus* (sup.) and by the Lord Chancellor in the House of Lords, the attempt to prove a customary meaning to the word "alongside" entirely failed. It seems to me difficult to establish a customary meaning of the word "alongside" in a charter-party which involves the possibility of discharge at a variety of different ports, a customary meaning which will vary according to the port which may afterwards be selected as the port of discharge. The word "alongside" would then be like the sailor who is said to have a wife at every port. It would in effect be wedded to a different meaning with regard to each of the ports included in the words of the charter-party as the ports to which the charterer might order the vessel. In any event, it is right to say that neither in *The Turid* (sup.) nor in *W. N. Hillas and Co. v. Rederi Aktiebolaget Acolus* (sup.) was it proved that the word "alongside" in contracts of affreightment such as those involved in those cases had acquired a customary meaning.

With this qualification I agree with my Lord's judgment, not only as regards its finding, but also with the reasons given by him and the observations made in the course of his judgment.

SANKEY, L.J.—By the combined effect of thirty-one bills of lading, dated on various dates from the 29th Sept. to the 14th Oct. 1926, and a charter-party dated the 13th Sept., the plaintiffs, as owners of the steamship *Fernhill*, agreed to deliver certain pieces of deals, battens, and boards at the Surrey Commercial Dock, London, the charter providing that the cargo was to be brought to and taken from alongside the steamer at charterers' risk and expense, as customary.

The defendants were the endorsees of the said bills of lading and receivers of the cargo in question. I shall refer in the course of this judgment to the plaintiffs as the ship and the defendants as the receivers.

The vessel duly arrived at the Surrey Commercial Dock and moored alongside the quay, part of the cargo in question being discharged into lighters and part being discharged on to the quay.

There has been for many years a custom of the Port of London (Surrey Commercial Dock), which was agreed as follows, with

regard to the discharge of wood goods on to the quay. The goods are discharged from the steamer by the ship's stevedores with the ship's tackle, and stacked by the stevedores on to the quay, without sorting to bill-of-lading sizes or marks—the first pieces discharged are used to make a stage projecting over the quay for about 6ft. towards the side of the steamer, and as the cargo is discharged a stack is made varying in size with the quantity discharged on to the quay, but generally not exceeding the length of the steamer and extending back about 30ft. from the edge of the stage. The timber is later carried away from the stack by the Port of London Authority, and by them sorted to bill-of-lading sizes and marks and piled in the usual place for storing timber.

The ship's stevedores' charges for discharging the cargo and stacking it on the quay are paid by the shipowner, and the Port of London Authority's charges for carrying the cargo from the quay, sorting, and piling are paid by the consignees.

With regard to the discharge into lighters, the custom was stated to be as set out in the case of *Glasgow Navigation Company Limited v. W. W. Howard Bros. and Co.* (11 Asp. Mar. Law Cas. 376; 102 L. T. Rep. 172): "By the custom and practice of the Port of London in the case of cargoes of lumber (including both Baltic and pitch-pine lumber) the receiver, instead of being liable to receive the goods from the ship's tackle alongside into craft, is liable only to provide sufficient craft alongside ready to receive the goods, and is under no obligation to have any men thereon to receive the goods from the ship's tackle or to stow the goods therein, and the shipowner is bound to do the whole work of delivering the goods into barges, whether dock company's barges or outside barges, and of stowing the goods therein in the reasonable and ordinary manner, so that the goods may not be damaged or imperilled, and so that the barges may be loaded to the usual and reasonable extent and may be safely and properly navigable."

Disputes arose between the parties as to whether the expense caused by these operations should fall upon the ship or should fall upon the receivers. There have been a great number of cases before the courts dealing with both these points, which may be conveniently classified as quay cases and barge cases. With regard to the quay cases there have been two recent decisions of the House of Lords—namely, *The Turid* (15 Asp. Mar. Law Cas. 538; 127 L. T. Rep. 42; (1922) 1 A. C. 397) and *W. N. Hillas and Co. v. Rederi Aktiebolaget Acolus* (16 Asp. Mar. Law Cas. 565; 134 L. T. Rep. 184; affirmed 136 L. T. Rep. 385). The former concerned with unloading at Yarmouth, the latter with unloading at Hull.

With regard to the barge cases there have been several in connection with unloading in London—for example, *Petersen v. Freebody and Co.* (8 Asp. Mar. Law Cas. 55; 73 L. T. Rep. 163; (1895) 2 Q. B. 295); *Aktieselskab*

Helios v. Ekman and Co. (8 Asp. Mar. Law Cas. 244; 76 L. T. Rep. 537); and *Glasgow Navigation Company Limited v. W. W. Howard Bros. and Co.* (sup.). In this case the learned judge has decided that in respect of the discharge on to the quay the cargo is alongside when it is available for release from the ship's slings, if discharged by the ship's tackle, and if discharged, as was the first portion of the deck cargo in this case, by being handed from the vessel, when it is laid with one end on the quay and the other resting against the ship. It is from this point, he continues in his judgment, that, in the case of cargo landed on the quay, the obligation of the receiver to take from alongside begins, and therefore all expense from that moment is expense which, by the contract, the receiver has to bear. From that part of the decision the receivers appeal.

In respect of the discharge into barges, the learned judge has decided that it is the duty of the ship to move the cargo and put and stow it into the barge, and that the ship must bear the expense of doing so. From that the ship appeals.

I now deal with both points. The transaction of loading or unloading a ship is a composite one, and is performed by a joint operation of the ship and the receiver; the one delivers and the other receives the cargo, and in respect of the delivery and the receiving the law imposes obligations upon the parties. The principles are, perhaps, best stated in Lord Esher's classic judgment in *Petersen v. Freebody and Co.* (sup.).

Although, however, as an abstract question, his decision is simple, when it comes to practical matters difficulties arise. In many charters, as in this 'one, a duty is imposed upon the charterer to take the cargo from alongside at his own risk and expense, as customary. In some ports a vessel cannot get close to the quay; for example, at Yarmouth she is moored at a distance of some feet from the quay—see *The Nifa* (7 Asp. Mar. Law Cas. 324; 69 L. T. Rep. 56; (1892) P. 411) and *The Turid* (sup.). Again, in some ports the cargo is taken from the ship and placed on a spot a little distance from the edge of the quay, and questions have arisen as to who is to bear the expense of carrying the cargo from the ship itself over an intervening space of water to the quay, and from the edge of the quay over an intervening space of land to the spot where it is usual to stack it. In many ports a custom has grown up with regard to this matter.

The decision in *The Turid* (sup.), the leading case of the quay cases, which dealt with the custom of the port of Yarmouth, where the vessel could not come nearer than 13ft. out from the quay, was that a custom imposing upon the shipowners the obligation of making a stage between the ship and the quay, and then carrying of the timber over that stage to the quay, and then over another space of about 10ft. between the edge of the quay and the spot where the timber was stacked, was

invalid, as inconsistent with the provisions of the charter-party, which was in the same form as in the present case, namely, that the cargo should be taken from alongside the steamer at charterers' risk and expense.

It would not be profitable to go through all the other cases, as they are dealt with in the House of Lords in the case of *The Turid* (sup.), which was approved in the *Acolus* case (sup.). As far as the quay discharge is concerned, in my opinion, the question at stake here is whether, on the facts, the decision in *The Turid* is applicable. It must be taken that the *ratio decidendi* of *The Turid* was that you cannot have the custom to explain and so enlarge the meaning of the word "alongside." I think, however, that before you apply the law you must carefully consider the facts.

At Yarmouth (*The Turid*, sup.) the cargo has to be carried from the ship over a space of water to the quayside, and from the edge of the quay over a space of land to a place where it is stacked. At Hull (the *Acolus* case, sup.), it has to be carried over a space of land to the spot where it was stacked. These intervening spaces range between distances of 10ft. and 70ft.

In the present case there is no such intervening space; the vessel is moored close to the quay, and although the cargo is discharged, at first some little distance from the quayside, when the discharge is finally completed the stage composed of the cargo is lying, not only absolutely at the edge of the quay against which the ship is moored, but some of it projects over the ship's rail. There is, therefore, no intervening space, either of water or land, between the ship's rail and the place where the cargo as a cargo is placed. On the facts, therefore, this case is entirely different from the *The Turid* (sup.), and I can see no distinction between this case and the barge cases.

The spot upon which the timber was unloaded in this case is comparable to the barge. It was actually alongside the steamer, as was the barge. No intervening space of water or of land, as was the fact in the quay cases, was between the ship and the unloading spot, just as there was no intervening space of water or land in the barge cases. I cannot see that the ship in this case had more to do than it was decided she was liable to do in the barge cases. Lord Sumner says in *The Turid* (15 Asp. Mar. Law Cas. 538; 127 L. T. Rep. 42; (1922) 1 A. C., at p. 416): "The fact is the steamer is the starting point. It is from her side that the extension is to be measured, which ultimately reaches the customary spot, and when that extension involves 13ft. of water, bridged by a staging, and at least 10ft. of quay, traversed by porters, I think the spot is too far away." That is not the fact in the present case.

For these reasons I am of the opinion that the custom is not inconsistent with the terms of the charter-party, that it is valid, and that the appeal should be allowed, and I now turn to the question of the cross-appeal.

As far as the barge discharge is concerned, just as *The Turid* (sup.) is the leading case on the question of the quay delivery so *Glasgow Navigation Company Limited v. W. W. Howard Bros. and Co.* (sup.) is the leading case on the question of barge delivery, although it must be remembered that in that case what was fought was the custom and not the point that the custom contradicted the charter. It was pointed out that the decision of *Aktieselskab Helios v. Ekman and Co.* (sup.), the judgment did not apparently impose upon the shipowner a duty to stow the cargo in the barge, as distinguished from merely placing it there, and that the barge cases should be decided in the same way as the quay cases, but in my view the learned judge in the court below was right in the conclusion he arrived at on this point.

The Lord Chancellor in *The Turid* (sup.) described the barge cases as easily distinguishable from the quay cases, and the barge cases upon which the receivers rely and which are in their favour were all before the House of Lords in *The Turid* (sup.) and were not disapproved of.

In my view, if the barge cases are to be brought into a line with the decision in *The Turid* (sup.) in the way suggested by the learned counsel for the ship, that is a matter which must be determined by their Lordships' House.

I think the cross-appeal should be dismissed.

Appeal allowed.

Cross-appeal dismissed.

Solicitors for the appellants, *William A. Crump and Son.*

Solicitors for the respondents, *Botterell and Roche, for Botterell, Roche, and Temperley, West Hartlepool.*

May 3 and 4, 1928.

(Before SCRUTTON, GREER, and SANKEY, L.JJ.)

DEW v. UNITED BRITISH STEAMSHIP COMPANY LIMITED. (a)

ON APPEAL FROM THE KING'S BENCH DIVISION.

Master and servant—Shipping—Accident—Negligence—Breach of statutory duty—Coal trimmer stumbling into open hold—Protection of hatchway—Plaintiff's knowledge of the danger—Absence of precautions by plaintiff—Contributory negligence—Regulation 34 (a) (S. R. & O. 1925, No. 231)—Merchant Shipping Act 1894 (57 & 58 Vict. c. 60)—Practice—Trial of action with a jury—Questions left to jury—Sufficiency of jury's answers—Jury asked to reconsider answer to one question—Redirection—Misdirection—Verdict set aside.

The plaintiff was a coal trimmer, and in proceeding to his work on the defendants' ship

after a meal, along a passage-way which he was entitled to go along, he stumbled and fell down an open hatchway into one of the holds of the ship and was injured. He sued the defendants for damages, basing his action on a breach of a statutory regulation made under the Merchant Shipping Act 1894, which provided for the fencing and protection of open hatchways on ships. The action was tried by a judge with a jury, and several questions were left to the jury, which they answered. One of the questions (question 6) left to them was as follows: "(6) Was the effective cause of the plaintiff's fall into the hold (a) failure, if any, by the defendants' servants to fence or to light; (b) negligence, if any, of them in leaving the hatch uncovered; or (c) plaintiff's own negligence, if any?" The jury's answers were as follows: (a) "Failure to fence"; (b) "Yes, in absence of fence"; and (c) "Yes, by not taking sufficient precaution, knowing that hatch was open and unfenced." The learned judge thereupon redirected the jury on the question of the effective cause of the accident, and requested them to reconsider their answers. The jury thereupon, at the invitation of the learned judge, reconsidered their answers on that point and made a second finding, namely, that the real and effective cause of the accident was the defendants' failure to fence the hatchway in accordance with the regulation. Judgment was accordingly entered for the plaintiff for 750l. damages.

Held, (1) that the plaintiff's own contributory negligence was an answer to his claim against the defendants based on a breach of statutory duty; (2) that the answers of the jury to the questions left to them were sufficient to determine the case and the judge was not entitled to ask them to reconsider their findings on the question of the effective cause of the accident; (3) that the learned judge had thereby misdirected the jury and their second finding must be set aside; and (4) by a majority (Sankey, L.J. dissenting on this point) judgment must be entered for the defendants.

Caswell v. Worth (1856, 5 E. & B. 849) Senior v. Ward (1859, 1 E. & E. 385), and *Groves v. Lord Wimborne* (79 L. T. Rep. 284; (1898) 2 Q. B. 402) applied.

APPEAL from a judgment of MacKinnon, J. at Cardiff Assizes.

The plaintiff, a coal trimmer, claimed damages for alleged negligence and breach of statutory duty. On the day of the accident, the defendants' steamship the *Lavington* was bunkering at Cardiff Docks and the plaintiff was one of the coal trimmers employed by the plaintiffs. One of the holds was stripped of its hatch coverings. The plaintiff was employed on the night shift, and on his way to his work after a meal he slipped and fell into an open hold. He based his action on alleged negligence and also on a breach of a regulation which provided that "if any hatch of a hold exceeding 5ft. in depth measured from the level of the deck in which the hatch is situated to the bottom of

(a) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

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the hold, is not in use for the passage of goods, coal or other material, or for trimming and the coamings are less than 2ft. 6in. in height, such hatch shall either be fenced to a height of 3ft. or be securely covered."

At the trial certain questions were left to the jury, and the jury gave certain answers in one of which the plaintiff's own negligence was given as the effective cause of the accident. But the judge gave the jury a further direction. In the result the plaintiff's negligence was omitted from the effective causes of the accident. Judgment was entered for the plaintiff for 750*l.* damages, with costs.

The defendants appealed, and contended, *inter alia*, that the learned judge had no jurisdiction to give the jury the further direction after they gave their answers to the questions left to them.

Artemus Jones, K.C. and *Godfrey Parsons* for the appellants.

Trevor Hunter, K.C. and *C. Kirkhouse Jenkins* for the respondent.

SCRUTTON, L.J.—This is an appeal from a judgment in favour of the plaintiff in an action tried by MacKinnon, J. and a special jury at Cardiff Assizes, and it is undoubtedly a difficult case. This court is unanimous that the present judgment cannot stand, but the court is, unfortunately, divided with regard to what the result should be, the present judgment not standing. I therefore proceed to deliver my own judgment, and my brothers will give their judgments afterwards.

The facts are that a coal trimmer tumbled down an open hatch on a ship and broke his leg, and he also sustained other damages about which there is no dispute, because the jury have found as a fact that it was so. If the coal trimmer is entitled to retain his judgment, there is no doubt with regard to the amount which he would be entitled to recover. If he is entitled to succeed he is entitled to recover the 750*l.* which the jury have awarded him. A number of matters were disputed at the trial with regard to some of which the verdict of the jury is conclusive, and there is no question about them.

The matters in dispute are these. It is common ground with regard to the way in which the plaintiff walked when he fell into the open hold. This was a space between a deck erection and the end of the No. 3 hatch, to which as regards different parts of it different conditions apply. Approaching it from one side there is a raised platform above the deck, which goes some distance up the coaming, if you treat the coaming as beginning at the deck, and that is obviously intended to be walked on. That apparently, from the plan is the only way to the room in which the steering machinery gear is, and anybody wanting to go into that room would have to get on to that raised platform and walk along. The platform is not continuous between the deck erection and the coaming of the hatch, because there is

a triangular sort of open space which is only intended for coal to fall into, but which probably has some connection with the steering gear, if one knew all about it. Similarly, if you approach that passage, if I may call it so—in my opinion it obviously is not a passage-way as an entirety—from the other side you again come to a raised platform, which is obviously intended for people to walk on. That is the only way to the cook's compartment, and they have to walk along there. Between those two raised platforms there is a large cylinder, or roller, with chains over it, connected apparently with the steering gear, which has bars to prevent people approaching it. One would have thought that it was pretty clear that it was not intended that people should walk along the raised platform on the way to the steering-gear compartment and then get to the other raised platform which is the access to the cook's compartment, by going over the raised cylinder and chains and fences which guard them. One would have thought offhand, especially if one has any knowledge of ships, that if the hatch covers were on and anybody wanted to go that way to save himself going round the other end of the hatch, he would first jump on to the hatch and walk along the hatch covers; but when the hatch covers were off he would be much better advised if he went round instead of trying a sort of hurdle race over the part where the steering gear is in the middle. The plaintiff had been on the ship, when it was daylight, with the hatch cover off, and had gone that way, and, therefore, he knew what was there in daylight. It was at night, apparently while on the raised platform, that he stumbled in some way and fell into the hatch. It was said on his behalf that the defendants had committed two statutory breaches. It was said, first of all, that it was dark and that the defendants had not lighted the lights. There was a tremendous conflict of evidence on the simple question of whether there were or were not lights there, one side saying that there were no lights there, and the other side saying that they were sure that there were lights there. That question was left to the jury, and the jury found that there were lights there and that the lights were on. One man saw that the lights in his cabin were on, therefore, the dynamo must have been going; while other people for the plaintiff said that the dynamo was not going. However, the jury found that the lights were on. But they found that there was no evidence on the question of whether the lights were efficient or not. Now, as it is the plaintiff's duty—he alleging a breach of duty on the part of the defendants by not having lights there—to prove that, if the lights were on, they were inefficient, and as he has failed to do that to the satisfaction of the jury, there is an end of that particular matter, and that particular matter disappears from the case.

The other matter relied on by the plaintiff was this. There is a regulation made under a

statute (the Merchant Shipping Act 1894)—the breach of which is a breach of that statute—with regard to the height of the coaming and the protection to be given to certain classes of coaming. The regulation in question is Reg. 34 (a) (S. R. & O. 1925, No. 231), and it is as follows :

Where there is more than one hatchway, if any hatch of a hold exceeding 5ft. in depth measured from the level of the deck in which the hatch is situated to the bottom of the hold, is not in use for the passage of goods, coal or other material, or for trimming, and the coamings are less than 2ft. 6in. in height, such hatch shall either be fenced to a height of 3ft. or be securely covered.

The ship in question in this case had more than one hatchway. I should say that the fall in this case was more than 5ft. ; it was more than 5ft. from the level of the deck to the hold ; therefore, the hatchway comes within the regulation. There was a controversy with regard to the question whether the coamings were less than 2ft. 6in. in height. Now, as this hatch was open, it obviously was not securely covered, and, therefore, the question is, were the coamings less than 2ft. 6in. in height ? If they were, then the regulation says that they were to be fenced to a height of 3ft.

It will be seen that the regulation, while it has been careful to say how you are to measure the 5ft. in depth, has not said anything about how you are to measure the height of the coamings. The two contentions in this case are these : The defendants' contention is : these coamings are more than 2ft. 6in. from the deck to the top of them ; consequently, there is no obligation to fence them. For the plaintiff, the contention is that for practical purposes you have to look at the height of what you are walking on ; you are walking on a sort of raised passage which comes up some 2ft. or so above the deck, and, consequently, when you are walking on that raised passage the coaming is only 6in. high, and, therefore, you must fence it. It is very unfortunate that the Government department, or whoever it is who does these things, has left a matter like that in doubt. It may be that they did not contemplate this sort of place being treated as a passageway—but it is obviously a passageway to the steering gear compartment and to the cook's compartment ; and anybody walking perfectly legitimately, as he is entitled to do, to one of those two compartments, would be walking on a platform, a place intended for walking on, with a coaming only 6in. above it. While I quite see the difficulty, it appears to me—I believe one, at any rate of my brothers does not take the same view—that to construe this regulation effectively, having regard to its object, you must treat the height of the coamings as having to be measured as above the walking way. Now, if so, the coaming was less than 2ft. 6in. above the walking way on which the man was when he fell, and the hatch was not fenced to a height of 3ft., and if so, the plaintiff was entitled to say : " Here is a

statutory breach, and I have suffered damage, because if there had been a proper 3ft. fence I should not have tumbled into the hold."

There was again an equal dispute, as there had been in regard to the matter of the lights, as to whether there was or was not a fence there. On the one side it was said that there was an effective rope fence round the hatchway more than 3ft. from the coaming ; and on the other side, it was said that there was no rope there at all. The jury have found that there was no fence there ; and, if so, on the view I take of the regulation, that constituted a statutory breach of duty.

The next question to be considered, before I come to the findings of the jury, is : Is this an ordinary passageway ? The jury have found that it is. The learned judge left it to the jury and told them that they must decide the matter by using their common sense and their knowledge of steamships, or only a knowledge of steamships. Having such material as they had before them, however, they found that it was a passageway. I proceed on the assumption that that finding stands—that it was a passageway. Then there would obviously arise another question.

I pause for a moment here to say this : It was said that if it had been a question of whether the lights were turned on, or if it had been a question of whether the fence had been put up, if the lights had not been put on or the fence had not been put up through the negligence of a man in common employment with the plaintiff, the plaintiff cannot recover. That, I think, has been disposed of by the case of *Groves v. Lord Wimborne* (79 L. T. Rep. 284 ; (1898) 2 Q. B. 402), which says that the statutory default in not doing a thing is the statutory default of the owner, continuing down to the moment when the accident happened, and it is not open to him to say : " That negligence is the negligence of your fellow-servant." Therefore, one may leave " common employment " out of the question.

One may also leave out of the question the state of things which arose in the case of *Smith v. Baker and Sons* (65 L. T. Rep. 467 ; (1891) A. C. 325), where it was said : " You knew that this was dangerous or you knew that there was a statutory breach, and you voluntarily took the risk of injury—*volenti non fit injuria*." No point of that sort was made at the trial, and having regard to the way in which that sort of point has been treated by the higher tribunals requiring a finding by the jury that the plaintiff knowingly and intentionally took upon himself the risk of the danger, it is very improbable that it would have been successful if the point had been taken.

Then there comes the question, which is the serious question in this case—a case of a breach of statutory provisions, with regard to the breach continuing up to the moment of the accident. What is the position if the plaintiff either wilfully acts so that he runs himself into danger, or knowing of the danger, does not

take sufficient precautions and so suffers injury from the danger by his wilful default and contributory negligence? I think that it is clearly established by authority that contributory negligence, properly defined, if properly proved, prevents the plaintiff from recovering, though there is a continuing statutory breach up to the time of the accident: (Vaughan Williams, L.J. in *Groves v. Lord Wimborne*, 79 L. T. Rep. 284; (1898) 2 Q. B. 402). No one would contend, if there were contributory negligence, that such negligence on the part of the plaintiff would be no answer to a claim by him for damages in respect of an injury occasioned through the neglect of his master to perform the absolute statutory duty." In *Caswell v. Worth* (5 E. & B. 849) exactly the same point was held. That was a case of a breach of statutory duty, and Coleridge J., in his judgment, said this (5 E. & B., at p. 855): "The statute makes the omission of a certain act illegal and subjects the parties omitting it to penalties. But there can be no doubt that a party receiving bodily injury through such omissions has the right of suing at common law." That was an action for breach of statutory duty which caused the plaintiff special damage. Coleridge, J. adds: "The action, however, must be subject to the rules of common law; and one of those is, that a want of ordinary care, or wilful misconduct, on the part of the plaintiff, is an answer to the action."

The same thing was held in the case of *Senior v. Ward* (1 E. & E. 385). Therefore, so far as we have gone on the facts, there would be a question for the jury, and the point was raised by the defendants, assuming, as I find, that there was a breach of the statutory duty by the defendants, the shipowners, was there contributory negligence on the part of the plaintiff? If so, he cannot recover.

MacKinnon, J. framed a series of questions for the jury in which counsel concurred. They looked at them and thought they could not improve on them. Looking at them in cold light afterwards, it is quite clear that they were defective in one sense, that the same question was asked in two different places, question 2 and question 5; and question 6, which I am coming to, might have been worded in a much better way. The questions and answers were as follows:

(1) Was the No. 3 hatch fenced to a height of 3ft.? Answer. No.

Here the jury adopted the view that there was not a fence.

(2) Was this alley-way a part of the ship through which the plaintiff might reasonably think he was required to proceed, or through which he might reasonably go when required to proceed from the gangway on the port side to the bunker hatches on the starboard side? Answer: Yes.

That answer puts the plaintiff in the position of not being a trespasser.

(3) If so, was this alley-way efficiently lighted? Answer: Satisfied electric lights were

on, but evidence not sufficient to show that the lights were efficient.

Thus the plaintiff's contention that there were no lights was negated by that answer; and as the onus was on the plaintiff to prove that the lights were inefficient, if the jury were not satisfied on that point, he had not satisfied his obligation with regard to the alleged inefficiency of the lights.

(4) Were the servants of the defendants negligent in leaving No. 3 hatch open, having regard to the fencing, if any, and lighting, if any, which they provided, and the reasonable likelihood of the coal trimmers using this alley way as a passage? Answer, Yes. That is the same point there—a breach of statutory obligation. The shipowner was liable for the hatch being open, unless there was contributory negligence.

(5) Was the plaintiff negligent in that he used this alley-way as a passage, or the way in which he used it? Answer, Yes.

That seems to be the same question as (2). There is a finding of the jury that the plaintiff in the way in which he used the passageway was negligent. I assume that that is not a finding that the plaintiff was negligent in using the alley-way as a passageway, because the jury, in answer to question (2), have said that he might reasonably think that he was allowed to proceed that way.

(6) Was the effective cause of the plaintiff's fall into the hold (a) failure, if any, by the defendants' servants to fence or to light, (b) negligence, if any, of theirs in leaving the hatch uncovered, or (c) plaintiff's own negligence, if any?

Before I say anything about the answers to that question, I think that it was quite a wrong question. It assumes that there could be only one effective cause in an accident caused by negligence, whereas the very phrase "contributory negligence" assumes that there are two sets of negligence, one of which contributes to the result, and I rather suspect, knowing the extreme familiarity of the learned judge with marine insurance and *causa proxima non remota spectatur*, and the recent controversy which has taken place with regard to the question whether the cause of a loss is a war risk or a marine risk, that the learned judge had that in his head and had omitted to keep in his head the much more ordinary and obvious condition, that in actions for personal damage caused by collision the continuing negligence of each side up to the moment of the collision, in which there are two effective causes, one contributes to the other. However, whatever the jury may have thought of it and whether they understood it or not, they proceeded to answer it according to their common sense and their knowledge of ships. What they said was: "Was the effective cause of plaintiff's fall into the hold failure, if any, by defendants' servants to fence or to light?" Answer, "Failure to fence." "Or negligence, if any, of theirs in leaving the hatch uncovered?" Answer, "Yes, in absence of fence." "Or

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plaintiff's own negligence, if any?" "Yes, by not taking sufficient precaution knowing hatch open and unfenced."

Therefore, the jury, in my opinion, have given the answer which a jury would ordinarily give if asked in cases of collision and continuing negligence on each side. They have said that all of them were contributing causes and that all of them were effective causes. The learned judge was much astonished at that answer, and he said: "I did not anticipate that you would answer all three questions in the affirmative." The learned judge, with great respect, must have tried any number of running-down cases where the jury have said: "The defendant was negligent and the plaintiff's negligence contributed to the accident," in which case there would be the two efficient causes. Then the learned judge proceeded to say: "I do not know whether if, on further consideration, you could make up your minds with regard to the real effective cause of the accident. You may still be able to say: 'We are not satisfied that it was one or the other; it was both equally.' If you could make up your minds that the real effective cause of this accident was on the one hand either the defendants' negligence, or, on the other hand, the plaintiff's negligence, then we should have an answer, one way or the other, which would settle it." The learned judge does not seem to have appreciated that he had answers which settled the question already on the lines of contributory negligence in a case where both the plaintiff and the defendant were guilty of negligence which contributed to the accident and that negligence was continuing negligence. Then he goes on to say: "Members of the jury, if you would not mind looking at question (6) and seeing whether you can satisfy yourselves, on the plaintiff's side or the defendants' side, which was the real and effective cause of the accident, and can answer it one way or another, then it would be more satisfactory. It may be that you will have to say 'We cannot make up our minds; one is just as much the cause as the other.' But if you can manage to settle it one way or the other, it would be more satisfactory."

I ask myself, more satisfactory to whom? It would be more satisfactory, no doubt, to the person on whose side they come down, but whether it would be more satisfactory to the administration of justice that a jury, which has said that two matters contributed to an accident should be driven into saying that only one of them did contribute to the accident, seems to me to be extremely doubtful. But that is what happened. The jury took four minutes, on the invitation of the learned judge, to throw over their previous answer, and said that the one matter—we have not seen the actual paper—the failure to fence, was the real and effective cause of the accident. Then the learned judge, with great respect to him, showed that for the moment he had not appreciated the kind of action he was trying. He said: "The defence of contributory negli-

gence means that the plaintiff was negligent, and that the real cause of the damage was his negligence." With great respect, that seems to me to be quite wrong. The defence of contributory negligence means that an accident has happened, contributed to by the negligence of both sides and that neither had a chance, after the negligence of the other, of avoiding it by reasonable care. It is not as if the real cause of the negligence is one person's only, but that each was negligent—that the negligence of each contributed to the damage, and that neither had a real chance, after the negligence of the other, of avoiding the accident. Take a donkey which is hobbled in the middle of the road and cannot move. That means that there is negligence on the part of the owner of the donkey. A stage coach comes along, and the driver sees the donkey, has ample chance of avoiding it but drives over it. Therefore, the real cause of the accident is that driver's negligence. Then take another case, a case of a very deaf old lady who starts crossing the road without looking up the road, and a motor car comes along fast and hoots continuously at the old lady, under the impression that the lady can hear, but the old lady being deaf does not hear the hooting and walks into the motor car and is knocked down; or, to make the case simpler, assume that the motor car is a bicycle and that the old lady knocks the cyclist off his machine and he breaks his leg, and she tumbles over and breaks her leg too, neither of them can recover against the other, because there is continuing negligence up to the last moment on the part of either of them, and the cause of the breaking of the leg of either one or the other is the continuing negligence of both—of the driver in going too fast, and of the old lady in not looking where she is going.

Consequently, I am quite clear, and I think my brothers are quite clear, that the last finding of the jury cannot stand. There was misdirection and misunderstanding, in that the jury were led to suppose that there could be only one effective cause of the accident, and that it would be more satisfactory if they found one, whereas in truth they were perfectly justified in finding two, as they had in their first set of answers. Now, what had the jury found in their first set of answers? They had found that the plaintiff was negligent in the way in which he used the passageway, that he knew that it was open and unfenced and did not take sufficient precaution. That seems to me to be a clear case of continuing negligence on each side—a continuing breach of statute on the part of the shipowners in leaving the hatch open and unfenced up to the moment of the accident, and the negligence of the plaintiff in that, knowing that the hatch was open and unfenced, he proceeded to use the passageway in a way that was negligent and without taking sufficient precaution. That seems to me to be a clear case of contributory negligence preventing the plaintiff from recovering. That is the second case

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which was put by Lord Birkenhead, L.C., in his judgment in the case of *Admiralty Commissioners v. Steamship Volute* (15 Asp. Mar. Law Cas. 530; 126 L. T. Rep. 425; (1922) 1 A. C. 129), which we know was a supreme contribution to our classical jurisprudence. He says there (15 Asp. Mar. Law Cas., at p. 534; 126 L. T. Rep. 429; (1922) 1 A. C., at p. 136): "In all cases of damage by collision on land or sea, there are three ways in which the question of contributory negligence may arise. A. is suing for damage thereby received. He was negligent, but his negligence had brought about a state of things in which there would have been no damage if B. had not been subsequently and severally negligent. A. recovers in full."

That is very like the case of the donkey. Then he says: "At the other end of the claim, A.'s negligence makes collision so threatening that though by the appropriate measure B. could avoid it, B. has not really time to think and by mistake takes the wrong measure. B. is not held to be guilty of any negligence and A. wholly fails."

Then he goes on: "In between these two termini comes the cases where the negligence is deemed contributory, and the plaintiff at common law recovers nothing, while in Admiralty damages are divided in some proportion or other."

Then he proceeds to illustrate what he says by the case of *Dowell v. General Steam Navigation Company* (1885, 5 E. & B. 195).

The part, I understand, on which one of my brothers dissents is whether the clear, as I think, misdirection which led to the second finding may possibly have misled the jury in finding their first three findings by not exactly understanding the questions they were asked. I think it is a case on the other line, and the fact that one of my brothers has come to a different conclusion has given me reason seriously to consider the matter; but I have come to the conclusion on the whole that the answers of the jury to the first set of questions are substantially free from error caused by misdirection, and that their nature is such that the judge ought to have said that that is a verdict of contributory negligence on the part of the plaintiff which prevents him from recovering.

I have, therefore, come to the conclusion, after careful consideration of the arguments addressed to us in what is undoubtedly a difficult case, that the judgment for the plaintiff should be set aside and judgment entered for the defendants, with costs.

GREER, L.J.—I also have come to the conclusion that the judgment in this case should be entered for the defendants with costs, but I have reached that conclusion partly by a path which my Lord will not travel along. I am satisfied myself that there was no breach of statutory duty proved in this case. The plaintiff's case was, firstly, that his

injuries were due to a breach of statutory duty; and, secondly, that if there was no breach of statutory duty, there was, in any event, negligence on the part of those who represented the defendants in leaving the hatchway unguarded; and he was, of course, entitled to have both his contentions considered by the tribunal which considered the case. The first matter to be decided is whether or not there was any evidence of a breach of statutory duty. The only regulation which need now be considered is reg. 34 of the Statutory Rules and Orders 1925, No. 231. That regulation provides as follows: Where there is more than one hatchway, if any hatch of a hold exceeding 5ft. in depth measured from the level of the deck in which the hatch is situated to the bottom of the hold, is not in use for the passage of goods, coal or other material, or for trimming, and the coamings are less than 2ft. 6in. in height, such hatch shall either be fenced to a height of 3ft. or be securely covered.

Then the question to be determined is whether the coamings of this hatch into which the plaintiff fell are less than 2ft. 6in. in height. It seems to me clear that on three sides of this hatch it is demonstrable that the coamings are 2ft. 7in. high and they exceed the limit which is mentioned in the regulation. The top of the coamings on the side where the accident happened is exactly on a level with the top of the coamings on the other three sides of the hatch, and it seems to me, therefore, impossible to say that though the height of the coamings was 2ft. 7in. on three sides the height of the coamings was only 6in. on the other side.

I regret coming to that conclusion, because obviously, if it is right, the regulation has not afforded to those who do work upon ships the protection which it was intended to afford. It is not the first time that it has been discovered that a regulation is not sufficiently well drawn to bring about the result desired by those who drew it up. I am unable to come to the conclusion that the height of the coamings can be measured in any other way than by measuring the whole of that which is part of the coamings, namely, the whole of that which starts from the deck and finishes at the top of the hatch. For that reason, I think that there was no breach of the statutory duty proved in this case—and it is not contested that the negligence, if any, of those who knew that this path was going to be used and who did not protect the open hatchway was the negligence of a fellow-servant of the plaintiff, and clearly, if I am right with regard to the construction of reg. 34, the plaintiff cannot succeed on that ground.

I also think that he necessarily fails on another ground, even though my construction of reg. 34 may not be sound. The jury found in answer to the questions which were put to them by the learned judge the true facts. The learned judge might have put a question to them as to whether the accident was due to two effective causes, the negligence of the plaintiff and the negligence of the defendants—the breach of statutory

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duty by the defendants; and if he had put that question to them in that form there could be no doubt, from what the jury said, that they would have given the answer that the damage was due to both those causes—to both the negligence of the plaintiff in failing to walk warily along the path along which he was walking and to the breach of the statute; and they did, in fact, so find, although the question had not been put to them; and when they so found, it seems to me that they had found all the facts which were necessary for the determination of the case, and it was not open then, having considered the real questions and found the true answer, to the learned judge to try to persuade them to find a different verdict, a verdict which might be more favourable to the plaintiff. It may be that at one time there was some doubt as to whether contributory negligence was a defence in the case of a breach of statutory duty, but by the judgment of Vaughan Williams, L.J. in the case of *Groves v. Lord Wimborne* (79 L. T. Rep. 284; (1898) 2 Q. B., at p. 415), following the other cases which have been referred to by my Lord, it was definitely settled, and has been acted on ever since as a rule of law, that in cases of this kind contributory negligence, if established, is a defence to an action based on breach of statutory duty; and, of course, it had never been doubted by anybody that contributory negligence is a defence to an action based on negligence. It is a simpler problem to deal with when the allegation is negligence than it is when the allegation is breach of statutory duty, because necessarily a breach of statutory duty is, as Mr. Trevor Hunter pointed out, a wrong which continues right up to the time when the accident happened, and, therefore, it would not be possible, if the ship had been damaged by the fall of the man in this case, which really, of course, would be impossible, for the shipowners to say: "The last negligence was the negligence of the man, and, therefore, we are entitled to recover"; but it is possible for the owners of the ship to say that the two negligences continued right up to the moment when the plaintiff fell into the hold, and, therefore, it is a clear case of two causes operating to bring about the unfortunate result; and, inasmuch as one of them, without which the accident could not have happened, was the negligence of the man himself, the plaintiff is disentitled to recover.

I have hesitated a little before coming to a conclusion on the question with regard to whether there ought to be a new trial in this case, or whether there ought to be judgment for the defendants; but I have come to the conclusion that, whereas in this case the jury have once found the facts which are sufficient to justify the judge in giving a judgment, it is not right that the judge should redirect the jury in order to bring about a finding different from that to which they had already come. This case is not quite the same as the one to which our attention was called of *Arnold v. Jeffreys* (110 L. T. Rep. 253; (1914) 1 K. B. 512).

In that case the headnote is as follows: "When upon a trial before a judge and jury the jury have once given a general verdict, the judge is not entitled to ask any further question of the jury for the purpose of ascertaining whether the ground of their verdict was one which there was evidence to support"—and the decision is to that effect. In giving judgment in that case *Bray, J.* said (110 L. T. Rep., at p. 253; (1914) 1 K. B., at p. 514): "I agree with the view of *Martin, B.* in *Brown v. Bristol and Exeter Railway Company* (4 L. T. Rep. 830) and think the judge here was wrong in asking the jury a special question after they had given a general verdict. It may be conceded that if a judge has left several specific questions to the jury and they have answered them, he may afterwards, notwithstanding that they have given their verdict, ask them a further question; but it is otherwise where the verdict is general."

In my view the learned judge in that case did not mean that where the answers to the question were sufficient to enable him to give judgment in the case the judge could ask the jury further questions and so enable the jury to find another verdict. Whether the verdict is general or whether it is in answer to specific questions, if the answers to those questions are sufficient to determine the case the jury are *functus officio* and the judge is not entitled to ask them further questions.

For these reasons I agree with my Lord that this appeal should be allowed, and judgment entered for the defendants with costs.

SANKEY, L.J.—I agree that this judgment cannot stand, but, in my opinion, there ought to be a new trial. I do not differ from my Lord on any questions of law. In my view, contributory negligence by the plaintiff is a defence even where the defendant has been guilty of a breach of a statutory duty. The authorities for that proposition are *Caswell v. Worth* (1856, 5 E. & B. 849) and *Senior v. Ward* (1859, 1 E. & E. 385).

But the defence of common employment is not open to a defendant who has been guilty of such a breach: (see *Groves v. Lord Wimborne*, 79 L. T. Rep. 284; (1898) 2 Q. B. 402) and *Jones v. Canadian Pacific Railway Company* (110 L. T. Rep. 83; 29 Times L. Rep. 773). The plaintiff in such a case is not under the necessity of proving negligence as part of his cause of action, for the breach of statutory duty continues up to the time of the cause of action arising. I agree, too, with my Lord, *Scrutton, L.J.*, in thinking that there was a breach of statutory duty in this case. I have heard what *Greer, L.J.* says with regard to the interpretation of reg. 34 (a), and I appreciate the force of it; and, certainly, having regard to what *Greer, L.J.* has said, it would be far safer in the interests of persons using ships if that regulation were made perfectly plain, for, as *Greer, L.J.* said, if his interpretation is the correct one, the regulation fails to provide the protection which it was obviously meant to

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afford. Therefore, although I think that the view taken by my Lord and by myself is the correct one, I very much hope that the authorities will consider the advisability of reconsidering the drafting of that regulation.

The difficulty I feel in the matter is the way in which the questions were left to the jury and what happened when the verdict was given. Although there are undoubtedly cases where specific questions may have to be left to a jury that practice is not one to be encouraged. In most cases it is preferable, after a full and accurate summing-up, to leave two questions only to the jury: (1) Do you find for the plaintiff or for the defendant; and (2) if for the plaintiff, how much? The questions which were left to the jury in this case were, in my opinion, embarrassing, and I think they embarrassed the jury. The language in which they were couched also embarrassed the jury, particularly questions (5) and (6). [His Lordship discussed questions (5) and (6) and the jury's answers thereto, which are set out above, and said:] It is not wise to introduce into an ordinary common-law special-jury action adjectives which have given so much trouble in marine insurance cases. In this case the jury were apparently not asked to give a general verdict, but were requested to answer a number of interrogatories, with what was, I think, the obvious result, namely, that there was confusion. The judge, having summed up in the terms of a marine insurance case, was obviously extremely surprised when he got the answer "Yes" to question (6) in all its three alternatives, except with regard to the lighting. He was obviously embarrassed, and I am not sure whether the special jury of Glamorganshire to whom Mr. Artemus Jones referred in such glowing words would be less likely to be embarrassed than the learned judge. But at any rate, he asked them to reconsider their verdict on the point of "effective cause." The jury went out again to reconsider their verdict, and returned to court in about four minutes. I suppose they took a little time to get from the court into the jury room, and a little time to return from the jury room into the court. At any rate, the jury seem to have answered this somewhat difficult question which embarrassed the judge in about two minutes.

The learned judge then thought that it was a verdict for the plaintiff, and I cannot help thinking that the jury intended it to be a verdict for the plaintiff. It is quite immaterial what I think, but what the learned judge said was this: "As a matter of fact, having been detained so long waiting for the jury, I made up my mind what my verdict would be, and it agreed in every particular."

I think that the learned judge unfortunately was betrayed into a misdirection. I think that the result of this case is unsatisfactory, and I should have felt much more comfortable had there been an opportunity for it to be submitted to another jury who would have had the advantage perhaps of not quite such a

learned summing-up. I am, unfortunately, in conflict with my brethren, who think that judgment should be entered for the defendants. For the reasons which I have endeavoured to give I think there ought to be a new trial.

Appeal allowed.

Solicitors for the appellants, *Holman, Fenwick, and Willan.*

Solicitors for the respondents, *Allen Pratt and Geldard, Cardiff.*

May 17, 18, and June 8, 1928.

(Before SCRUTTON, LAWRENCE, and GREER, L.JJ.)

Re HAIN STEAMSHIP COMPANY LIMITED
(OWNERS OF THE STEAMSHIP TREVANION)
AND THE BOARD OF TRADE. (a)

ON APPEAL FROM THE KING'S BENCH DIVISION.

Shipping — Requisitioned ship — Charter-party T.99—Collision—Negligence of both ships—War risk—Marine risk—Warlike operation—Liability of Admiralty.

In 1917 the steamship T., belonging to the claimants, was requisitioned by the Shipping Controller, under charter-party T.99, which provided that the Crown would undertake to indemnify the owners in respect of all consequences of warlike operations while the owners would continue to bear the marine risks. In Dec. 1918, after the Armistice had been signed, the T. was on a voyage from the United States with a cargo of oats, and a steamer, the R., which had been requisitioned by the United States Government, was on a voyage from England to the United States with a cargo of mines which, as the Armistice had been signed, were no longer required for carrying on hostilities in European waters. On the night of Christmas Day, the steamers came into collision in mid-Atlantic, and the T. was so much damaged that she was off hire for ninety-nine days. The collision was due to the fact that both steamers were being negligently navigated at the time.

The arbitrator considered himself bound by the decisions in the Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service; The Geelong (16 Asp-Mar. Law Cas. 33; 128 L. T. Rep. 546; (1923) A. C. 191) and Attorney-General v. Adelaide Steamship Company Limited; The Warilda (129 L. T. Rep. 161; (1923) A. C. 292), and held that the collision was a consequence of warlike operations, and therefore that the Crown was liable under the war-risks clause in the charter-party to indemnify the owners of the T.

Rowlatt, J. held, on a case stated, that as hostilities had ceased, the mine-carrying steamer was not engaged in a warlike operation, and the Crown was not liable.

(a) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

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Held, reversing the decision of Rowlatt, J., (1) that at the time of the collision the steamship *R.*, which was carrying the mines, was engaged in a warlike operation, and (2) that as the *R.* was engaged on a warlike operation, though conducted negligently, the Crown was not excused from liability under its war-risks clause, because the loss was equally caused by the negligence of another ship. The Crown was, therefore, liable, and the award of the arbitrator in favour of the shipowners must be restored.

APPEAL from a judgment of Rowlatt, J. on a special case stated by an arbitrator.

In 1917 the steamship *Trevanion*, of which the claimants were the owners, was requisitioned by the British Admiralty under the terms of charter-party T.99. By clause 18 of that charter-party, "The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured, or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather, or any other cause arising as a sea risk," and by clause 19: "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause: Warranted free of capture, seizure, and detention and the consequences thereof, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war."

On the afternoon of Christmas Day 1918, about six weeks after the Armistice was signed by Germany and the Allies in the Great War, the *Trevanion*, which was then carrying a cargo of oats, the property of the British War Department, from the United States of America, to Portland, for orders, collided in mid-Atlantic with the steamship *Roanoke*, which was then in the possession and under the control of the United States Government, employed by that Government solely for naval purposes as a regularly commissioned mine planter of the United States Navy, operated by the Navy Department, officered by commissioned officers of the United States Navy and manned by a United States naval crew.

The arbitrator found that, at the time of the collision, the *Roanoke* was proceeding "under her aforesaid public employment" from Portland, England, to Hampton Roads, Virginia, having 720 mines on board, but no other cargo and no passengers, and that there was no evidence with regard to the circumstances under or the purposes for which the mines were being carried. He found that both vessels were negligent and both were equally to blame.

The collision occurred on the 25th Dec. 1918, some six weeks after the Armistice. The duration of the Armistice was originally fixed at thirty-six days, but was subsequently extended from time to time. During the Armistice the blockade conditions set up by the Allied and Associated Powers remained unchanged,

and German merchant ships at sea and vessels carrying contraband goods remained liable to capture; but the other hostilities had ceased. Up to the time of the Armistice, the *Roanoke* had been employed as a warship engaged in operations of war, and the question was whether she was performing a warlike operation when proceeding under orders, from England to America, during the temporary and qualified suspension of hostilities at sea brought about by the Armistice.

The owners of the *Trevanion* contended that the Armistice did not change the character of the *Roanoke's* employment, and that as the war had not terminated the case was simply one of a warship in the employ of one of the belligerent Powers carrying munitions of war from one place to another during a state of war, and consequently that the *Roanoke* was engaged in a warlike operation at the time of the collision.

The Board of Trade, on the other hand, contended that in order to render an operation "warlike" within the meaning of clause 19, it must be one which is performed in furtherance of hostilities, or for combatant purposes, and that an American warship proceeding to America after the cessation of hostilities, with munitions of war which were no longer required, was not engaged in a warlike operation.

The arbitrator, in deciding in favour of the owners of the *Trevanion*, had found as a fact and held as a question of law that the *Roanoke*, at the time of collision, was performing a warlike operation; and he held, further, following the decisions in *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service*; *The Geelong* (16 Asp. Mar. Law Cas. 33; 128 L. T. Rep. 546; (1923) A. C. 191); and *Attorney-General v. Adelaide Steamship Company*; *The Warilda* (16 Asp. Mar. Law Cas. 579; 129 L. T. Rep. 161; (1923) A. C. 292), that the collision was a consequence of warlike operations, and that, therefore, the Crown was liable to indemnify the owners of the steamship *Trevanion* under the war-risks clause of the charter-party T.99.

Rowlatt, J. disagreed with that decision and acceded to the contention of the Board of Trade, holding, on a case stated, that as hostilities had ceased, the *Roanoke*, the mine-carrying ship, was not engaged in a warlike operation at the time of the collision, and that, therefore, the Crown was not liable.

The claimants appealed.

Dunlop, K.C. and *Balloch* for the appellants.—This appeal raises the question whether a collision between a merchant ship and a warship was a consequence of warlike operations. At the time of the collision the *Trevanion* was on a voyage from the United States of America to Portland carrying oats for the British Government, while the other ship—the *Roanoke*—was going back to America carrying mines. The *Roanoke* was then in the possession and under the control of the United States Navy Department. It is submitted that the collision in this

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case was a consequence of warlike operations. What is a warlike operation is largely a question of fact. Any movement of a warship in war-time is a warlike operation. The collision in this case happened during the Armistice, and there is no case in which the House of Lords have dealt with the effect of the Armistice, although they have given some guidance on the question of what is a warlike operation. Notwithstanding the Armistice the *Roanoke*, at the time of the collision, was still on active service, carrying mines. The Armistice did not change the character or the employment of the *Roanoke*. That vessel was a warship employed by one of the belligerent Powers, solely for naval purposes, carrying munitions of war. Active hostilities are not a necessary ingredient of a warlike operation: (see *Green v. British India Steam Navigation Company*; *The Matiana*, 5 Asp. Mar. Law Cas. 58; 123 L. T. Rep. 721; (1921) 1 A. C. 99; *Britain Steamship Company v. Regem*; *The Petersham*, 15 Asp. Mar. Law Cas. 58; 123 L. T. Rep. 721; (1921) 1 A. C. 99; *Attorney-General v. Adelaide Shipping Company*; *The Warilda*, 16 Asp. Mar. Law Cas. 579; 129 L. T. Rep. 161; (1923) A. C. 292; and *British India Steam Navigation Company v. Liverpool and London War Risks Association*, 15 Asp. Mar. Law Cas. 58; 123 L. T. Rep. 721; (1921) 1 A. C. 99). There are two questions for the court to decide: (1) whether the *Roanoke*, at the time of the collision, was engaged on a warlike operation; and (2) if she was, whether the fact that both the *Roanoke* and the *Trevanion* were negligent made any difference on the question of liability. It is submitted that negligence is immaterial if one of the ships, namely, the *Roanoke*, was engaged on a warlike operation at the time of the collision. The claimants are entitled to succeed.

Sir T. W. H. Inskip, K.C. (A.-G.) and F. M. Russell Davies for the Crown.—At the time of the collision, the *Roanoke* was not engaged on a warlike operation. She was going home to America after the cesser of active hostilities to resume her peaceful occupation there. In order to show that the *Roanoke* was engaged on a warlike operation, it must be shown that she was proceeding for some purpose connected with combative operations. The mere fact that, during active hostilities she was a minelayer, did not make her engaged on a warlike operation after hostilities had ceased. She was not engaged on anything combative at the time of the collision. The state of war had ceased at the date of the Armistice, and the *Roanoke*, after the cessation of hostilities, could not be said to be performing a warlike operation. She was sailing west, away from the seat of war, engaged on a peacelike operation: (see *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service*; *The Geelong*, 16 Asp. Mar. Law Cas. 33; 128 L. T. Rep. 546; (1923) A. C. 191). Assuming, however, that the *Roanoke* was engaged on a warlike operation, the collision was not the consequence of that warlike operation. But

for the negligence of the *Trevanion* there would not have been any collision. Applying the principle laid down by the House of Lords in *Attorney-General v. Adelaide Steamship Company*; *The Warilda* (16 Asp. Mar. Law Cas. 579; 129 L. T. Rep. 161; (1923) A. C. 292), the negligence of the *Roanoke*—the vessel said to be engaged in the warlike operation—was not the cause of the collision. The *Trevanion* was negligent in not avoiding the warlike operation. It was the negligence of the *Trevanion* and not that of the *Roanoke* which caused the collision. [SCRUTTON, L.J. referred to *Reischer v. Borwick* (7 Asp. Mar. Law Cas. 493; 71 L. T. Rep. 238; (1894) 2 Q. B. 548).]

Dunlop, K.C. in reply.—There is a fundamental distinction between this case and such a case as *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service*; *The Geelong* (sup.). The arbitrator has found as a fact that the *Roanoke* at the time of the collision was performing a warlike operation. She had the status of a warship and was performing the duties of a warship. Carrying mines away from the field of battle is as much a warlike operation as carrying them to the field of action. The collision was a consequence of warlike operation.

Cur. adv. vult.

June 8, 1928.—The following judgments were read:

SCRUTTON, L.J.—This appeal raises yet another question with regard to the incidence of risks during the war between the shipowner and the Government who had requisitioned his ship. Some half-dozen decisions of the House of Lords have relieved this court from the solution of the difficult problems involved, but fresh points keep arising, even ten years after the Armistice.

The claimants were the owners of the steamship *Trevanion*, requisitioned by the Government during the war and carrying, at the date of the collision, a cargo of oats, the property of the British War Department from the United States to Portland for orders. The *Trevanion* was requisitioned under the terms of charter-party T.99, which provided for what may be roughly classified as marine and war risks by clauses 18 and 19.

Clause 18: The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather or any other cause arising as a sea risk.

Clause 19: The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause:—Warranted free of capture, seizure, and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether

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before or after declaration of war. . . . The relevant words of clause 19 are "from all consequences of hostilities or warlike operations, whether before or after the declaration of war."

The *Trevanion*, on the afternoon of Christmas Day, some six weeks after the Armistice, collided with the steamship *Roanoke*. The latter vessel is found by the arbitrator to have been in the possession and control of the United States of America, employed by them solely for naval purposes as a regularly commissioned mine-planter of the United States Navy, operated by the Navy Department, officered by commissioned officers of the United States Navy, and manned by a United States Navy crew. He finds that at the time of the collision the *Roanoke*, under her aforesaid public employment was proceeding from Portland, England, to Hampton Roads, Virginia, with 720 mines on board belonging to the Navy Department and with no other cargo and no passengers.

The arbitrator further finds that both vessels were negligent, the negligence beginning with a bad look-out on both ships, probably not unconnected with Christmas Day, and continuing with negligent navigation when too late the vessels sighted each other. This is found to be a case of both vessels being equally to blame, and is a case of clearly continuing negligence up to the time of the collision, not a case where one vessel up to that time acting carefully could have avoided with care the consequence of the other's negligence.

On these facts two contentions were raised on behalf of the Crown: (1) That the *Roanoke* was not engaged in a warlike operation; and (2) that the collision was partly caused by the negligence of the *Trevanion*, and this prevented the collision being the consequence of a warlike operation by the *Roanoke*.

I deal first with the second point, which can be shortly disposed of. The decision of the House of Lords in *Attorney-General v. Adelaide Steamship Company; The Warilda* (16 Asp. Mar. Law Cas. 579; 129 L. T. Rep. 161; (1923) A. C. 292) shows that negligence of a warship engaged in a warlike operation does not prevent the collision caused thereby from being the consequence of a warlike operation. It is only that the warlike operation is negligently conducted, and the collision happening in that warlike operation is still the consequence, though the navigation of the warship were negligent. So says the House of Lords.

But, further, it has been decided by the House of Lords that if a loss were equally caused by two risks or perils, the person insuring or bearing the risk of one of those perils is not relieved because another peril which he did not insure or bear the risk of equally contributes to the loss. In *Reischer v. Borwick* (7 Asp. Mar. Law Cas. 493; 71 L. T. Rep. 238; (1894) 2 Q. B. 548), where the ship was insured against collision, and was lost, after the collision damage had been repaired, by perils of the sea acting on the repairs, Lindley,

L.J. said (7 Asp. Mar. Law Cas., at p. 494; 71 L. T. Rep. 238; (1894) 2 Q. B., at p. 551): "Assume that this ship would have floated in calm water notwithstanding the injury she had sustained by the collision, and suppose that, before such injury could be made good, the water became so rough as to get into her and sink her, by reason only of her injured condition, such loss would, in my opinion, be proximately, though not exclusively, caused by the collision, and would fall on the underwriters of a policy worded as this policy is. It may be that such a loss would also be covered by a policy against perils of the sea in the ordinary form; but this does not, in my opinion, show that no liability attaches under a policy such as the present. Policies may be so worded as to overlap and cover some risk common to them all. The sinking of this ship was proximately caused by the internal injuries produced by the collision, and by water reaching and getting through the injured parts whilst she was being towed to a place of repair. The sinking was due as much to one of these causes as to the other; each was as much a proximate cause of her sinking as the other; and it would, in my opinion, be contrary to good sense to hold that the damage by the sinking was not covered by this policy."

That decision was approved by the House of Lords in *Leyland Shipping Company v. Norwich Union Fire Insurance Society Limited* (13 Asp. Mar. Law Cas. 426; 118 L. T. Rep. 120; (1918) A. C. 350), where a torpedoed vessel got into harbour, but was then sunk in a storm, without which she would have been saved, and there the loss was held to be a war risk. As Lord Sumner says in *Samuel and Co. v. Dumas* (16 Asp. Mar. Law Cas. 305; 130 L. T. Rep. 771; (1924) A. C., at p. 468), explaining these two causes: "They were both immediate and concurrent causes, and if either was within the policy, the assured recovered."

In my opinion, therefore, if the *Roanoke* was engaged in a warlike operation conducted negligently so as to cause the loss, the persons liable for war risks are not excused because the loss was equally caused by the negligence of another ship.

There remains the question whether the *Roanoke*, some six weeks after the beginning of the Armistice, was engaged in a "warlike operation." The Armistice did not suspend operations of war; the blockade continued, and any German ships at sea were liable to capture. Vessels carrying contraband were captured and condemned by the Prize Court. The state of active war might have revived in full severity. It was admitted that if on Christmas Day 1918, the *Trevanion* had struck a floating mine the damage would be a consequence of a warlike operation. It was, he understood, admitted that if in the actual collision some mines on board the *Roanoke* had exploded the damage would be a consequence of a warlike operation.

The arbitrator finds that there was no evidence with regard to the circumstances in, or the

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purposes for, which the mines were carried by the *Roanoke*. It is very probable that they were being carried home to the United States in the belief that the war was coming to an end, in which case the problem would be the same as if a warship were carrying the United States troops back to the United States. But the arbitrator also finds that the *Roanoke* was at the time of the collision proceeding "under her aforesaid public employment"—namely, that of a regularly commissioned mine-planter of the United States Navy. He then finds as a fact that the *Roanoke* at the time of the collision was performing a warlike operation. If there were evidence on which he could so find, his finding was conclusive, and I am clear on the facts found that there was such evidence.

The word "warlike" is, no doubt, a difficult word to define. It is not made easier by the fact that in the case of *The Matiana—Britain Steamship Company v. The King* (15 Asp. Mar. Law Cas. 58; 123 L. T. Rep. 721; (1921) 1 A. C. 99); *Green v. British India Steam Navigation Company* (*ibid.*); *British India Steam Navigation Company v. Liverpool and London War Risks Insurance Association* (15 Asp. Mar. Law Cas. 58; 123 L. T. Rep. 721; (1921) 1 A. C. 99)—the House of Lords, by a majority of three to two, held that requisitioned merchant ships, sailing in convoy under the orders of a warship, sailing without lights, and zig-zagging to avoid submarines, were not performing a "warlike operation." But for that decision one would have thought it clear that the operation was a defensive one against an enemy carried out because of war, and that both the shepherding warship and the intelligent merchant ships, who were acting in a most unpeacelike fashion to defend themselves against the enemy, were engaged in a warlike operation.

In *The Warilda* case (16 Asp. Mar. Law Cas. 579; 129 L. T. Rep. 161; (1923) A. C. 292), a hospital ship carrying wounded home, but with means on board to protect herself against submarines, was held to have been engaged in a warlike operation Lord Cave, L.C., in *The Geelong* case said (16 Asp. Mar. Law Cas., at p. 36; 128 L. T. Rep. 546; (1923) A. C., at p. 199): "Probably the phrase includes all those operations of a belligerent Power or its agents which form part of or directly lead up to those processes of attack and defence which are of the essence of war."

The question of the Armistice was not before the Lord Chancellor, but I should amend the definition by reading "directly lead up to or are the necessary result of." I should like the definition "pertaining to or directly connected with war."

Marching down the hill under the command of the Duke of York was as much a warlike operation as the march up, and when Johnny came marching home again he was engaged, in my opinion, in as warlike an operation as when he marched out.

However that may be, in my view the findings of the arbitrator are conclusive here, with the result that the appeal must be allowed and the decision of the arbitrator restored, with costs here and below.

LAWRENCE, L.J.—The first question on this appeal is whether the *Roanoke* at the time of the collision with the *Trevanion* was engaged in a warlike operation within the meaning of clause 19 of charter-party T.99.

The arbitrator has found that at the relevant time the *Roanoke* was in the possession and under the control of the United States of America; that she was employed by the United States of America solely for naval purposes as a regularly commissioned mine-planter of the United States Navy; and that she was operated by the Navy Department, officered by commissioned officers of the United States Navy and manned by a United States Navy crew.

The arbitrator has further found that at the time of the collision the *Roanoke* was proceeding "under her aforesaid public employment" from Portland, England, to Hampton Roads, Virginia, having 720 mines on board, but no other cargo and no passengers, and that there was no evidence with regard to the circumstances under or the purposes for which the mines were being carried.

The collision occurred on the 25th Dec. 1918, some six weeks after the Armistice. The duration of the Armistice was originally fixed at thirty-six days, but was subsequently extended from time to time. During the Armistice the blockade conditions set up by the Allied and Associated Powers remained unchanged, and German merchant ships at sea and vessels carrying contraband goods remained liable to capture, but the other hostilities had ceased. The *Roanoke* had, up to the time of the Armistice, admittedly been employed as a warship engaged in operations of war, and the question is whether she was performing a warlike operation when proceeding, under orders, from England to America, during the temporary and qualified suspension of hostilities at sea brought about by the Armistice.

The owners of the *Trevanion* contended that the Armistice did not change the character of the *Roanoke's* employment, and that as the war had not terminated the case was simply one of a warship in the employ of one of the belligerent Powers carrying munitions of war from one place to another during a state of war, and consequently, that the *Roanoke* was engaged in a warlike operation at the time of the collision.

The Board of Trade, on the other hand, contended that in order to render an operation "warlike" within the meaning of clause 19, it must be one which is performed in furtherance of hostilities, or for combatant purposes, and that an American warship proceeding to America after the cessation of hostilities, with munitions of war which were no longer

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required, was not engaged in a warlike operation.

The arbitrator, in deciding in favour of the owners of the *Trevanion*, has found as a fact and held as a question of law that the *Roanoke*, at the time of collision, was performing a warlike operation.

Rowlatt, J. has disagreed with this decision and has acceded to the contention of the Board of Trade. Hence the present appeal.

In my opinion, the learned judge has put too narrow a construction on the expression "warlike operations." In the collocation in which that expression is found, in clause 19, it is plainly wider than the expression "hostilities" which immediately precedes it and to which it is an alternative. A common acceptance of the word "warlike" is "pertaining to war" or "martial," and, in my opinion, it is used in that accepted sense in clause 19. Even so, however, that does not solve the present problem, because it still remains to be considered whether the operation in which the *Roanoke* was engaged at the time of the collision can properly be called a warlike operation in the sense in which I have indicated.

In the present case the court is spared the more difficult task of determining whether a merchant vessel officered and manned by her owners is engaged in a warlike operation. Here the court is concerned with the movements of a warship of one of the belligerent Powers, proceeding under orders in a time of war, in the area of the war, and on a mission directly connected with the war. There is no evidence with regard to the object with which the order was given to the *Roanoke* to proceed to Hampton Roads, and I can well conceive that it would be difficult, if not impossible, for the Board of Trade to have adduced evidence as to what the intention of the American Naval Authority was in giving the order. If one might be allowed to hazard a guess, the giving of the order was probably due to an intelligent anticipation that the peace negotiations with Germany would have a successful issue, but it is quite likely that the naval authority concerned deferred its decision with regard to what to do with the *Roanoke*, and with the mines which she had on board, until her arrival at Hampton Roads. It must be a matter of pure conjecture whether on her arrival there she would be ordered to remain in harbour with the mines on board, to await the outcome of the peace negotiations, or whether she would be ordered to disembark the mines and either be put out of commission or else be retained in commission and employed in carrying stores or munitions, or otherwise assisting the fleet which was engaged in the blockade of the German ports and in other operations of war. One point, however, is clear—namely, that at the time of the collision the *Roanoke* was still in commission as a fully equipped mine-planter, immediately available in the possible event of the resumption of hostilities. It cannot, I think, be open to serious doubt that a warship, while hostilities

are still in progress, is engaged in a warlike operation when, after having accomplished a particular operation of war—whether successfully or otherwise—she is returning home because, for the time being, she is no longer required at the place where she was conducting that operation, and even although it is unlikely that she will be required again during the war, and in that sense her return may be said to be a peaceable operation. In my opinion, the fact that the return of a warship from active hostilities is due to the temporary cessation of those hostilities—either in the particular locality where she was engaged or generally—does not operate to remove the return voyage from the category of warlike operations. Such a return, whether after a victory and undamaged or after a defeat and crippled, is, in my opinion, a movement of a combatant force directly connected with its combatant duties, and is therefore a warlike operation.

The authorities cited by counsel do not deal with the effect of the Armistice on the character of the movements of warships, but they contain dicta which have been relied on by counsel on both sides as supporting their respective contentions.

The Petersham case (15 Asp. Mar. Law Cas. 58; 123 L. T. Rep. 721; (1921) 1 A. C. 99) and *The Matiana* case (*Britain Steamship Company v. The King, Green v. British India Steam Navigation Company*) 15 Asp. Mar. Law Cas. 58; (123 L. T. Rep. 721; (1921) 1 A. C. 99) were cases concerned with merchant vessels, both of which were held not to have been engaged in warlike operations at the material times. The actual decisions in those cases have no direct bearing on the question to be determined in the present case, but in the Court of Appeal Atkin, L.J. said that he was inclined to think that during war almost any action or movement of the combatant forces in the course of their combatant duties, while exercised in the area of war, could be included in the expression "warlike operations" (see 14 Asp. Mar. Law Cas. 512; (1919) 2 K. B., at p. 695); and in the House of Lords various dicta concerning the operations of warships seem to support the present appellants' contention to this extent, that they point to the correct view being that in case of a warship the carrying on of actual hostilities is not a necessary ingredient in a warlike operation.

The Ardgantock case (*Attorney-General v. Ard Coasters*) (15 Asp. Mar. Law Cas. 353; 125 L. T. Rep. 548; (1921) 2 A. C. 141) and the *Richard de Larringa* case (*Liverpool and London War Risks Insurance Association v. Richard de Larringa (marine underwriters of)*) (15 Asp. Mar. Law Cas. 353; 125 L. T. Rep. 548; (1921) 2 A. C. 141) were cases concerned with warships, both of which were held to have been engaged in warlike operations at material times. In the *Richard de Larringa* case (*sup.*) it was decided that a warship proceeding to a particular place in order to pick up a convoy was engaged in a warlike operation. Although

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this decision does not cover the present case, there are some passages in the judgment of Bailhache, J., and in the speeches in the House of Lords, which are of assistance here. Bailhache, J., in the course of his judgment, expressed the opinion that almost any movement in war time at sea of a warship is a warlike operation, and in the House of Lords the result of the opinions delivered seems to me to be that although there may be occasions when movements of warships in time of war are not warlike operations, yet, speaking generally, when a warship is in time of war at sea, under orders to proceed to a particular spot to perform a warlike operation, whatever its nature may be, she is engaged in that warlike operation. If, as I think, the disembarkation of such dangerous and destructive munitions of war as live mines—which are never carried at sea except for the purpose of actual warfare—be a warlike operation, then the opinions expressed in the House of Lords in that case would cover the case of the *Roanoke*, even assuming that the proper inference to be drawn from the facts as found by the arbitrator is that she was proceeding to Hampton Roads in order to disembark the mines which she was carrying when the Armistice was signed.

The *Geelong* case (*Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service* (16 Asp. Mar. Law Cas. 33; 128 L. T. Rep. 546; (1923) A. C. 191) was concerned with the movements of a merchant vessel called the *Bonvilston*, which, at the material time, was under requisition by the British Government and was carrying ambulance wagons and other Government stores from Mudros to Alexandria. The speeches delivered in the House of Lords were, therefore, directed to the question whether a merchant vessel, under requisition by the British Government, carrying stores in time of war, was or was not engaged in a warlike operation. In such a case, it is, of course, of the utmost importance to ascertain for what particular purpose the stores were being carried, and the decision that the *Bonvilston* was engaged in a warlike operation was based entirely on the fact found by the arbitrator that the stores were carried from one war base to another war base. Viscount Finlay, in his speech, states that it was immaterial whether the stores were being carried to a war base for the purpose of warlike operations to be conducted from that base, or were being fetched away from the base because the warlike operations conducted from it had ceased, as in either case the carriage was part of a military operation. This reasoning would *à fortiori* apply to a warship such as the *Roanoke* when carrying munitions of war from a war base because the warlike operations conducted from that base had temporarily ceased.

A careful perusal of all the opinions delivered in the House of Lords in the cases to which I have referred has satisfied me that they contain nothing which militates against the conclusion at which I have arrived that the

Roanoke was at the time of the collision engaged in a warlike operation, but, on the contrary, so far as they go, they support that conclusion. I therefore think that the arbitrator was right and that his award ought to be affirmed on this point.

The second and only other question on this appeal is whether the negligent navigation of the *Trevanion* operates to take the loss out of clause 19 and to free the Board of Trade from liability. The arbitrator has found that the collision was caused by the negligent navigation of both vessels and that both were equally to blame, the negligence consisting in a bad look-out on both vessels, insufficient porting by the *Trevanion* and failure to keep her course on the part of the *Roanoke*.

This question is, in my opinion, covered by authority. The *Warilda* case (*Attorney-General v. Adelaide Steamship Company* (16 Asp. Mar. Law Cas. 579; 129 L. T. Rep. 161; (1923) A. C. 292) decides that when a ship, engaged in a warlike operation, comes into collision with another ship, the loss occasioned by the collision is none the less a consequence of a warlike operation because such operation is negligently conducted. The case of *Reischer v. Borwick* (7 Asp. Mar. Law Cas. 493; 71 L. T. Rep. 238; (1894) 2 Q. B. 548), approved in the House of Lords in *Leyland Shipping Company v. Norwich Union Fire Insurance Company Limited* (13 Asp. Mar. Law Cas. 426; 118 L. T. Rep. 120; (1918) A. C. 350) decides that where a loss is due to two concurrent causes, each being as much the proximate cause as the other, it is no answer to a claim under a policy covering one of the causes that the loss was also due to the other cause which was not covered.

Applying the principles laid down in those cases to the facts of the present case, I am of opinion that as the negligent navigation of both vessels continued up to the moment of the collision, and as the negligence of the *Roanoke* while engaged in a warlike operation did not alter the character of that operation, the Board of Trade cannot escape liability under clause 19 by reason of the fact that the loss was also due to the negligent navigation of the *Trevanion*.

In my judgment, for the reasons stated, the appeal succeeds, and the award of the arbitrator should be restored.

GREER, L.J.—The question for decision in this appeal is whether Rowlatt, J. was right in holding that upon the facts stated by the arbitrator, Mr. Raeburn, K.C., in a special case, the Board of Trade were not bound by the provisions of clause 19 of the charter-party T.99, to compensate the plaintiffs for the loss of their vessel the steamship *Trevanion*.

The steamship *Trevanion* on the 25th Dec. 1918 collided in the North Atlantic with the steamship *Roanoke* in circumstances which would, if the case had been a claim for damages by the one ship against the other, have resulted in a decision of both to blame. The

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Trevanion was carrying, under the terms of the charter-party known as T.99, a cargo of oats, the property of the British War Department, for discharge at Rotterdam. The learned arbitrator states in par. 5 of the special case the status of the *Roanoke* and the operations which she was conducting at the time of the collision as follows:

The steamship *Roanoke* at the time in question was in the possession and control of the United States of America under a bareboat charter. During the period from the 25th June 1918 to the 25th Jan. 1919 she was employed by the United States of America solely for naval purposes as a regularly commissioned mine-planter of the United States Navy, operated by the Navy Department, officered by commissioned officers of the United States Navy, and manned by a United States Navy crew.

At the time of the collision with the *Trevanion* the *Roanoke*, under her aforesaid public employment, and officered and manned as above stated, was proceeding from Portland, England, to Hampton Roads, Virginia, with 720 mines on board belonging to the Navy Department of the United States of America, and was carrying no other cargo and no passengers. She was exhibiting the regulation lights. There was no evidence before me with regard to the circumstances under, or the purposes for, which the mines in question were being carried. In the arbitration, the owners of the *Trevanion* claimed that she was entitled to recover from the respondent Board the damage occasioned to her by the collision, on the ground that clause 19 of T.99 imposed that liability on the respondents. The arbitrator held that it did, and stated his findings in the form of a special case, raising, among other questions with which this appeal was not concerned, the question whether, upon the facts and documents referred to, the award was correct in law. Rowlatt, J. has held that it was not correct in law. He took the view that the Armistice was sufficient to make it impossible to regard either of the two vessels as engaged on a warlike operation at the time of the collision. In my judgment the learned judge was wrong in so holding, and this appeal ought to be allowed.

The material clauses of charter-party T.99 are those numbered 18 and 19:

Clause 18.—The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather or any other cause arising as a sea risk.

Clause 19.—The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause:

Warranted free of capture, seizure and detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike

operations, whether before or after declaration of war.

It was not suggested by the owners of the *Trevanion* that the collision was a consequence of hostilities, inasmuch as it could not be said that either vessel was at the time engaged in active hostilities, but it was said, and I think rightly said, that there was sufficient in the findings of the arbitrator, as stated in the special case, to show that the collision was the result of a warlike operation, that is to say, of the operation that was being carried on by the *Roanoke* steaming across the Atlantic towards Hampton Roads, carrying mines.

Certain of the terms of the Armistice, so far as they related to naval operations, were made part of the special case. These terms included immediate cessation of all hostilities at sea, the surrender of all submarines, the dismantling of certain German surface warships, the right of the Allies to sweep up all minefields and destroy obstructions laid by Germany outside certain territorial waters, and the maintenance of existing blockade conditions—German merchant ships found at sea remaining liable to capture. By clause 34, the duration of the Armistice was thirty-six days, with powers of extension, and it was thereby agreed that during such period on failure of execution of any of the above clauses the Armistice might be repudiated by one of the contracting parties on forty-eight hours' previous notice.

It is clear from the terms of the Armistice that it did not put an end to all warlike operations. The continuation of the blockade involved a continuance of some warlike operations, so also, in my judgment, did the sweeping-up of mines. The steamship *Roanoke* was at the time of the collision in all respects a United States war vessel carrying munitions of war. The American Navy Department were the chartered owners of the vessel in possession, and she was carrying out an operation which, but for the Armistice, could not have been described otherwise than as a warlike operation. If she had been carrying mines during the war for the purpose of planting them she would, beyond question, have been engaged in a warlike operation. If she had been engaged in lifting mines during or immediately after war it would probably be admitted that her operations could properly be described as warlike operations. If she had been carrying mines towards the place where it was intended they should be laid, this, again, would be a warlike operation. If for some reason it had been decided not to lay the mines in their intended position and the vessel had been carrying them back to a place of safety, till it could be decided in what other position they should be laid, she would still be engaged in a warlike operation. The existence of a temporary suspension of active hostilities at the time does not, in my judgment, convert that which would otherwise be a warlike operation into a peaceable operation. The Armistice only operated as a suspension of certain acts of hostility, and did not put an end to the war

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or render it impossible for warlike operations to continue. The *Roanoke* was at the time of the collision engaged in preserving and moving across the Atlantic munitions of war which could at any time, if the Armistice came to an end, be utilised for the purposes of war.

A number of decisions in the House of Lords and the Court of Appeal were discussed in the course of the argument, but on the question I am now considering, reliance was placed by the Attorney-General almost entirely upon the decision in the case which is known as *The Geelong* case (*Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service*, 16 Asp. Mar. Law Cas. 33; 128 L. T. Rep. 546; (1923) A. C. 191), as establishing the proposition that in order to bring the carriage of combatant forces or of munitions of war from one area of war to another within the words "warlike operations" it must be proved that they were being so carried for combatant purposes. I assume for the purposes of my judgment that this was part of the *ratio decidendi* of that case, and of *The Petersham* case (*Britain Steamship Company v. The King*, 15 Asp. Mar. Law Cas. 58; 123 L. T. Rep. 721; (1921) 1 A. C. 99); but I think that counsel for the appellants was right in saying that it had reference to the temporary use of merchant vessels, and not to the carriage of munitions of war by the armed naval forces of one of the belligerents.

In my judgment the arbitrator was not wrong in law in deciding upon the facts stated in the special case, that the *Roanoke* was engaged at the time of the collision in a warlike operation.

A further point was raised on behalf of the Board of Trade by the Attorney-General. He contended that inasmuch as the negligence of both vessels contributed to the collision, the collision could not be said to be the consequence of the warlike operation which was being negligently conducted by the steamship *Roanoke*. I do not think that this argument ought to prevail. It was decided in *The Warilda*; *Attorney-General v. Adelaide Steamship Company* (16 Asp. Mar. Law Cas. 579; 129 L. T. Rep. 161; (1923) A. C. 292), that the negligence of a vessel which is claiming under clause 19 of the charter-party T.99 does not prevent her recovering against the Crown if she was engaged in a warlike operation. Lord Shaw (129 L. T. Rep. 161; (1923) A. C., at p. 300) uses these words: "Faulty navigation on the part of the one ship or the other is, of course, the determining factor of responsibility as between the two ships, but, in my opinion, it is not a legitimate factor for the other purpose which is here attempted—namely, of converting a war risk into a sea risk."

This must be equally true where the negligence is the negligence of both ships. The loss of a vessel caused by the entrance of water through a hole in the hull caused by a collision due to negligent navigation is without doubt an ordinary sea risk, and a marine underwriter

would, in the absence of an f. c. and s. clause, be liable to indemnify the owner from damage so caused.

The question to be decided is not whether the collision in this case was a sea risk, but whether, being a sea risk, it is one of the risks covered by the exceptions created by the f. c. and s. warranty. If it comes within one or other of the special sea risks described in that clause, it ceases to be a risk for which the owner accepts liability under clause 18, and becomes one for which the charterer accepts liability under clause 19. If what happened is a consequence of a warlike operation it is none the less so because it is also a consequence of faulty navigation of one or other or of both of the colliding vessels. For the purpose of deciding this case negligent navigation of either or of both vessels is irrelevant.

When a collision is caused, as in this case, it was, by more than one approximate cause, one of which is a "warlike operation," it seems to me that it is taken out of the sea risk by the warranty, inasmuch as it is a consequence of a warlike operation. This view is in accordance with the decision in *Reischer v. Borwick* (7 Asp. Mar. Law Cas. 493; 71 L. T. Rep. 238; (1894) 2 Q. B. 548) and *Leyland Shipping Company v. Norwich Union Fire Insurance Society Limited* (13 Asp. Mar. Law Cas. 426; 118 L. T. Rep. 120; (1918) A. C. 350), as explained by Lord Sumner in *P. Samuel and Co. v. Dumas* (16 Asp. Mar. Law Cas. 305; 130 L. T. Rep. 771; (1924) A. C. 431). In the report of the last-named case, Lord Sumner says (16 Asp. Mar. Law Cas., at p. 381; 130 L. T. Rep. 771; (1924) A. C., at p. 467): "Where a loss is caused by two perils operating simultaneously at the time of loss and one is wholly excluded because the policy is warranted free of it, the question is whether it can be denied that the loss was so caused, for if not the warranty operates. It is then convenient and even necessary to test the application of the term 'proximate' otherwise than by sequence of time, and attempts, more or less successful, have been made to explain it by using other adjectives, but the rule remains. I doubt if the present question would ever have been disposed of in favour of the respondents simply by saying that the hole had to be made first and then the water came in afterwards. Accordingly, the explanation of the two cases cited in this connection, *Leyland Shipping Company v. Norwich Union Fire Insurance Society (sup.)*, and *Reischer v. Borwick (sup.)*, I think, is this: In the former, where the question was really one of fact, the pressure of the water overcame the resistance of the bulkhead and the ship filled and sank, but it was the explosion of the torpedo which admitted that pressure to the bulkhead. Thus there were two concurrent causes, proximately operating, namely, the opening of the ship's side and the pressure of the sea, and the policy being free of the consequences of the former, it was free of this loss, though if the insurance had been against perils of

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the sea and no more, the loss would have fallen within it. So in the other case. The policy was against collision and damage received in a collision only, and it could not be denied that the vessel was damaged in collision. It took two things to sink her—the hole made in collision and water flowing into it. They were both immediate and concurrent causes, and if either was within the policy, the assured recovered.”

For these reasons, I think that the appeal should be allowed.

Appeal allowed.

Solicitors for the appellants, *Thomas Cooper and Co.*

Solicitor for the respondents, *Solicitor to the Board of Trade.*

June 22, 25, and 26, 1928.

(Before SCRUTTON, GREER, and SANKEY, L.JJ.)

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APPEAL FROM THE KING'S BENCH DIVISION.

Insurance (Marine)—Sale of cargo of goods—Cocoa beans—Damage by rain and surf—Warehouse-to-warehouse insurance effected by sellers—Resale of goods under c.i.f. contract to plaintiffs—Assignment of rights under insurance policy—Assignment after loss or damage—Substantial part of damage sustained before resale—Right of buyers to sue for such damage—Marine Insurance Act 1906 (6 Edw. 7, c. 41), s. 50.

A firm of sellers in Africa sold a quantity of cocoa beans f.o.b. of a certain quality “fair fermented,” with certain allowances. The contract provided (inter alia) “insurance against marine and war risk to be effected from the port of shipment to destination by sellers for buyers’ account, sellers allowing 2s. per cent. on f.o.b. value which covers their risk from beach to steamer.” The goods were re-sold by the purchasers to the plaintiffs under a contract which required the second sellers to pass on to the second buyers the usual policy in the trade insuring against the usual risks. The first sellers had effected a policy “from a port to ports, place or places . . . the risk to commence from the time of leaving the factory or warehouse in interior until delivered to warehouse . . . including all country damage.” The goods were found to be damaged on delivery and the judge held that the damage was caused by rain and surf, aggravated by sweating before shipment. A substantial part of the damage was caused at a time when the plaintiffs were not interested in the goods covered by the insurance, but by an endorsement on the policy all claims under it were assigned to the holder of the policy.

Held, that under sect. 50 of the Marine Insurance Act 1906, a marine policy was assignable

unless it contained terms expressly prohibiting the assignment, and it could be assigned either before or after loss. The effect of assigning the policy in the manner in which the policy was assigned in this case, which was the ordinary manner in which policies were assigned in England was to assign to the person holding the policy the right to sue on any claim which the assignor had on the policy irrespective of the fact that at the time of the loss or damage the assignee was not interested in the subject-matter lost or damaged. The plaintiffs were the assignees of the policy in question in this case. The assignor of the policy had a right to make a claim in respect of the damage in question. That claim was assignable, and it was in fact assigned to the plaintiffs, and therefore the plaintiffs were entitled to sue the underwriters in respect of the damage in question.

Decision of Roche, J. affirmed.

APPEAL from a judgment of Roche, J.

The plaintiffs, who were interested in a cargo of cocoa beans, claimed to recover from underwriters for alleged loss or damage to the cargo covered by a policy of insurance. The policy contained a warehouse-to-warehouse clause. The plaintiffs had purchased, under a c.i.f. contract some 3000 bags of cocoa beans, which had been shipped from the West Coast of Africa. The beans were found to be damaged on delivery. The judge held that the damage was caused by rain and surf, aggravated by sweating before shipment. He held further that the plaintiffs had an interest in the goods covered by the policy of insurance and could sue for the damage which had occurred before shipment.

The defendants appealed.

D. N. Pritt, K.C. and James Dickinson for the appellants.

W. Norman Raeburn, K.C. and David Davies for the respondents.

SCRUTTON, L.J.—I need not trouble you, Mr. Raeburn. During the time since this case started I and the other members of the court had an opportunity of carefully looking into the papers, and had a very careful discussion on the matter from Mr. Pritt, with the result that I am quite satisfied we cannot interfere with the judgment of the learned judge below.

The claim is by a person interested in cocoa beans coming from the West Coast of Africa against underwriters. Some damage undoubtedly happened to the cocoa beans. The underwriters take three points in opposition to a judgment in favour of the assured, or, I will say, in favour of the persons interested in the cocoa beans—a judgment given by Roche, J.—giving the persons interested in the cocoa beans (the plaintiffs) an award of certain sums of money, and the underwriters say—by Mr. Pritt—three things. They say, first of all, you—these particular persons interested in the cocoa beans—cannot sue for this damage, because a

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(a) Reported by T. W. MORGAN, Esq., Barrister-at-Law
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very substantial portion, if not all of it, occurred at a time when you were not interested in cocoa beans. Secondly, they say, as I understand, if you have a claim on us you have forfeited it by the way in which you have dealt with an arbitration against the sellers which has destroyed our right of subrogation; and, thirdly, they say that the learned judge has given much too much; he has made a mistake in the figure. The second and third questions appear to me to turn entirely on the question of fact. The first may raise more important questions of law.

The facts are these. A firm on the West Coast of Africa, Bartholomew and Co., acting through a gentleman in London named Thompson, sold, under form of contract which appears to apply to a considerable portion of the beans, and I take it that the contract applies to all, certain cocoa beans f.o.b. of a certain quality "fair fermented" with certain allowances and with a term as to insurance which was this: "Insurance against marine and war risk to be effected from the port of shipment to destination by sellers for buyers' account, sellers allowing 2s. per cent. on f.o.b. value which covers their risk from beach to steamer." It is pretty clear, therefore, under that contract, that the person who would then effect the insurance would be effecting it on account of buyers from shipment and on account of sellers from beach to steamer. Those goods so sold were resold by these purchasers to the present plaintiffs under a contract expressed to be c.i.f. which would require the second sellers to pass on to the second buyers the usual policy in the trade covering against the usual risks. Now when one looks at the policy that the first sellers effected, it is a policy "from a port to ports, place or places, on the West Coast of Africa to Boston, the risk to commence from the time of leaving the factory or warehouse in interior until delivered to warehouse as above, including all country damage"—country damage being a phrase which usually covers damage sustained in the land transit from the warehouse in the interior to shipment—and if the question simply arose on this policy and the damage claimed was country damage or damage happening before shipment I think there would be no doubt that the purchaser would not be a person interested under the policy. The goods were not at his risk from warehouse to steamer. However, it is not necessary for me to decide that.

I have not heard Mr. Raeburn on the subject, and Heaven forbid that anybody should suggest that c.i.f. contracts have yet arrived at translucent clearness; but a thing has happened in this case which appears to me to render it unnecessary to decide whether these plaintiffs could sue on the policy as persons for whose benefit it was intended to be effected, for one finds on the policy an assignment of the policy in the ordinary form in which policies are assigned in England, that is to say, the brokers who effected the policy have signed their name, and the agent of the first seller has signed his name. That endorsement in blank, according

to my experience and according to the custom of marine insurance in England, assigns all claims on the policy to the holder of the policy, and it is made more precise in this case by Messrs. Aron, the holders of the policy, endorsing on it a request that the claim shall be paid to them.

In my view, the effect of effecting the assignment of the policy in that way, in the ordinary manner in which policies are assigned in England, assigns to the person holding the policy the right to sue on any claim which the assignor has on the policy, irrespective of the fact that the assignee was not at the time of loss interested in the subject-matter lost or damaged. That appears to me to have been clearly pointed out by Blackburn, J. in the judgment to which I have referred in *Lloyd v. Fleming* (1 Asp. Mar. Law Cas. 192; 1872, 25 L. T. Rep. 824; L. Rep. 7 Q. B. 299), in which he discussed whether it is necessary when there is an assignment after loss that the assignee should have been interested in the goods at the time of the loss, and decides (giving the judgment of the then Court of King's Bench) that it is not necessary, but that this assignment is merely the assignment at common law of a *chose in action*, the *chose in action* being the claim which the assignor has against the underwriters on the original policy. That statement was again followed and adopted in the case of *Swan and Cleland's Graving Dock and Slipway Company v. Maritime Insurance Company and Croshaw*, by Channell, J. (10 Asp. Mar. Law Cas. 450; 96 L. T. Rep. 839; (1907) 1 K. B. 116, at p. 123); and it is again stated (to be discarded, because there was in that case no assignment) in the very elaborate judgment in the Privy Council delivered by Lord Sumner in *Yangtze Insurance Association Limited v. Lukmanjee* (14 Asp. Mar. Law Cas. 296; 118 L. T. Rep. 736; (1918) A. C. 585. Lord Sumner pointed out what would be the position if there was an assignment, or if the documents in that case against which cash had to be paid, had by custom included an insurance policy. It was pointed out that in that particular case there was no assignment and no evidence that the cash was against documents—that the document included an insurance policy. The first point, therefore, put before me by Mr. Pritt, in my view fails, because it is open to the plaintiffs to sue here as assignees of the sellers' rights under the policy though they were not, at the time when the loss for which the sellers would claim, interested in the subject-matter which sustained the loss or damage.

The other two points are points, as I have said, of fact, and I am bound to say, although I have not heard Mr. Raeburn, that I approach these two points with every sympathy with the underwriters, because I am not at all impressed with the way Messrs. Aron have conducted these proceedings. They do not seem to have understood—I say this not having heard Mr. Raeburn, and I reserve myself—if I should have heard him—full power

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to reconsider it, but I do think it right to say I am not at all impressed with the way Messrs. Aron have conducted this claim. They do not seem to understand that in dealing with underwriters the utmost good faith is necessary, and that concealment and keeping back matters and saying "We will not disclose matters" is not the utmost good faith. But having approached the matter from that point of view, with every sympathy with the underwriters, and having considered all the documents, I do not feel able to interfere with the judgment which Roche, J., after three days' hearing, has arrived at.

The first point is this: It is said, as I understand, by the underwriters, "Assume that we should be liable to you for this full amount, what you have done is, by the way you have conducted an arbitration against the sellers, you have prejudiced the claim we should have had against the sellers by subrogation, so that we can reduce, either partially or entirely, the amount which we ought to pay." On that class of point I have no sympathy with underwriters who decline to pay and who put upon the purchaser the burden of fighting the seller and then wait afterwards to see whether they can pick holes in the way in which he did so. In my view, if underwriters wish to avoid the risk of having their right of subrogation damaged, let them take over the claim. Do not let them stand out and say "We will not pay," and leave the purchaser to fight his own battle and then try to pick holes in it afterwards. What has happened in this case is this: I have no doubt that when first these goods arrived damaged—and I am using "damaged" to cover both defect or non-conformity with the contract and damage of goods conforming to the contract—when they first arrived at Boston I think it is pretty clear that nobody quite appreciated that there might be two sets of claims, that there might be a claim by buyers against the sellers, on the ground that the latter did not ship goods in conformity with the contract "fair fermented Accra," which would have nothing to do with the policy—the policy does not guarantee that the seller shall conform to his contract—and that there might be another claim—damage to the goods by matters covered by the policy, which would be a matter in which underwriters were concerned; and I think it is pretty clear on the correspondence that when the first samples were drawn the parties had not appreciated there was going to be any difference between these two kinds of claims, and that the first samples were drawn indiscriminately from the whole parcel. But I also think it is quite clear that within three or four months it did occur to everybody that there was going to be a difference between the claim by the purchasers against the sellers, alleging that the goods did not conform to the contract, and the claim by the purchasers and (or) sellers against the underwriters for damages by perils insured against in the policy.

The questions arose as to whether the arbitration could go on without prejudice to the claim

on the underwriters. The parties discovered that there was a practice in England that such a thing could go on if the samples were drawn from 30 per cent. of sound bags. Mr. Thompson's letter—to which the learned judge refers—shows to me quite clearly that he was appreciating at that time there was a difference between a claim for breach of contract and a claim for damage under the policy. The letters of Messrs. Aron show to me quite clearly that they were appreciating it, and in those circumstances a second set of samples was drawn. It was drawn by three people. It was drawn by Mr. Hodges and Mr. Permuy of Smith Kirkpatrick; Mr. Hodges representing Messrs. Aron, Mr. Permuy of Smith Kirkpatrick representing Mr. Thompson, and Mr. Dillaway representing Lloyds agent; the underwriters, having been told at that time that there might be a claim on the policy, by Mr. Thompson, put the matter in the Salvage Association's hands, who were in communication with Lloyd's agent. Mr. Dillaway, representing the underwriters in the sense that he was appointed by Lloyd's agent after the Salvage Association had communicated with him, was not called. He was the person I should expect to be called by the underwriters, if it was the fact that those samples were drawn of all damage whether it was a breach of contract or caused by insured perils. He was not called at all. The other two people each signed a certificate; that these samples were drawn from the bags which appeared to be sound and which bore no evidence of having been damaged by sea water in transit. Messrs. Aron's representative signed that, and Mr. Permuy, who was called by the underwriters signed it, and now desires to say that he signed what was not true. I have no sympathy with people who, having signed documents, come and try and repudiate them afterwards, and a judge who acts on the documents signed at the time is, in my opinion, quite justified in disregarding the evidence of a gentleman who comes and says: "It is quite true I signed it, but I did not mean it," or "It is not true." So that we have the man whom one would expect to be called to say that the samples were taken of all damaged goods and not merely sound goods, not called by the underwriters; and we have the other two men who signed the document both saying that the samples were taken in the way you would expect them to be taken, if it was appreciated that the question was whether sound goods, or apparently sound goods, came up to the contract quality. And so far as the samples were concerned, therefore, I have no doubt that the parties took them and intended to take them to represent sound goods in order that it might be seen whether they were of the contract quality.

Then the question is, if the samples were taken for that purpose, did the two arbitrators in England misunderstand them and treat them as samples of all damage? I have read Mr. Dodd's evidence carefully, and Mr. Dodd seems to me to be extremely confused as to

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what he did do and what he did not do, but he does say clearly that he would not consider salt-water damage to be a matter which he was arbitrating on, and that is only consistent, in my view, with the fact that he thought he was arbitrating on the contract quality.

I am unable, therefore, to interfere with the view the judge has taken, who has heard Mr. Dodd and declined to accept his evidence, not on the ground of intentional deceit, but on the ground of lack of memory of what really happened. I am personally slow to interfere with quality arbitrations. I dare say they are not scientifically accurate, but very often the gentlemen who make the awards are puzzled to explain in intelligent language exactly what they have done, but they are people fully cognisant with the things they arbitrate upon, and by looking at them and going through the formalities which a quality arbitrator does go through of sometimes smelling them, tasting them, or pulling them about, and sometimes cutting them open, they are far more likely to arrive at an accurate conclusion than the judge who hears three witnesses on one side and three on the other contradicting one another, each other, and probably one or the other perjuring themselves, and under these circumstances I am not able to interfere with the view of the learned judge below, who has come to the conclusion on this point that the samples were taken for an arbitration on contract quality and that the arbitrators decided for contract quality. Once that conclusion is arrived at there is no question of spoiling the right of subrogation because any claim for damages remains exactly where it was before the contract quality arbitration.

Then, lastly, it is said the judge was wrong in the amount of damages he fixed. Well, Messrs. Aron put forward a very elaborate documentary claim for about 3700*l.* supported by the estimates of a very experienced highly respectable firm of average adjusters in London. The learned judge looked very carefully into it. He quite appreciated that the state of the market in New York might have led to an estimate of value which was not the real estimate of value as shown by the fact that the goods were afterwards sold at a higher figure. But having looked at it all he has reduced the figure to a sum a little over 2000*l.* I dare say if each of the three members of this court had tried the case they would have each given a different figure. I dare say if twelve people tried the case they would have each given a different figure, and it is not, in my view, a matter which a Court of Appeal can interfere with where a judge in a complicated case of figures has arrived at a particular result. There would be no possible ground to interfere with a jury's verdict in this case, and I think, possibly, with regard to the decision of a learned judge, it should be the same when they are challenged in the Court of Appeal.

For these reasons I think the appeal should be dismissed with costs.

GREER, L.J.—I agree. Mr. Pritt, on behalf of the appellants, has made three points, and has expressed them with his usual facility and vigour, but I agree with my Lord that he fails in establishing any of the three points. The first point, as I understand it, is this: Mr. Pritt says that the plaintiffs never acquired the right to sue upon the policy in question in respect of the damage that happened before the goods were delivered at the ports of shipment over the ship's rail, because he says they bought on a c.i.f. contract and they were entitled to have the goods delivered over the ship's rail which were of the quality contracted for and in the condition contracted for. Therefore he says that they had no interest whatever in the damage which happened in respect of the delivery to the ship and any damage called country damage which happened before the goods had got to the port of shipment.

The answer to that point depends, in my judgment, on whether the plaintiffs became the assignees, with contractual rights under the policy, and it is no concern of the court, in dealing with a claim upon the policy, in my opinion, to say whether or not the policy moneys, when obtained by the person who has the right to sue for them, are to be held for themselves entirely, or whether partly for themselves and partly for some other person. If the contractual rights have in fact passed to the assignee then the assignee is entitled to sue for anything that may be due upon the policy, and that the question must be left to be determined between the assignor and the assignee as to whether part of the proceeds is or is not held for the benefit of the assignor.

Before the statute (The Policies of Marine Assurance Act 1868), 31 & 32 Vict. c. 86, the policies could not be assigned at law. The rights to sue could not be passed from the person who took out the policy to any assignee, and the rights of the assignee were only recognised in equity as the assignee then had the right to sue in the name of the assignor, and if this Act had not passed this action would have been brought in the name of the assignor and everything that could be recovered in the name of the assignor would have been recovered by the assignee operating in the name of the assignor, and then it would have had to be determined, that is between assignor and assignee, which part of the policy moneys went to the one and which part of the policy moneys went to the other. I am not suggesting in this case there ought to be any doubt as to where the policy moneys are to go; all I am suggesting is that it is unnecessary for us to decide that question. I am inclined to think from the document that the beneficial right in all the policy moneys was intended to pass and did pass to the assignee, the plaintiff in this case, but it seems to be unnecessary to determine that question.

I think that the result of the statute to which I have referred, and sect. 50 of the Marine Insurance Act 1906, is that where there is an assignment of the policy, the contractual rights

go to the assignee, and the sole question is whether there was an assignment of the claims under this policy. I am unable to draw any other conclusion from the fact of the endorsement than that it was intended and did operate as an assignment of all the claims under the policy. If it was not so intended it was not necessary to endorse the policy at all, because the assignees, the plaintiffs, could have sued as persons for whose benefit the policy was taken out. They did not need an endorsement for that purpose. The only purpose for which an endorsement was required was to pass to them something that they would not have had if that endorsement had not in fact been made. They had a beneficial interest in the policy because there was something at risk; they had some risk, namely, the risk of damage which might happen, and the deterioration which might take place in the course of the voyage after the goods were handed over the rail of the ship. That I think disposes of the first question which we have to determine.

The other questions are questions of fact, and in my judgment the question as to what happened on the arbitration is really determined by the form of the award. It is in these terms: "The undersigned having been appointed to arbitrate on a dispute arising on a policy of 3101 bags of Accra intermediate crop cocoa sold for arrival upon guarantee of being fair fermented Accra intermediate crop, or if inferior thereto a fair allowance to be made, have carefully considered the same, and award thereunder . . . (b) 3101 bags, being an allowance to the buyers of 2s. 6d. per cwt." I cannot read that except as meaning that what the arbitrators are dealing with is a claim for an allowance on the ground that the goods were not "Fair fermented Accra intermediate crop." But it is quite immaterial whether they arrive at the right conclusion or the wrong conclusion, whether they drew wrong inferences from samples which had been wrongly drawn or whether they drew a right inference from samples which had been rightly drawn to represent the undamaged portion of the cargo. It seems to me that that arbitration stands, and so long as that award stands it is impossible to say that the arbitrators dealt with anything else except the claim as to quality. Therefore the second point, which is that the plaintiffs are not entitled to recover in a contract of indemnity because they have already recovered it from their sellers, fails by reason of the fact that the award shows that they have not recovered anything whatever with reference to water damage but only with reference to their complaint that they had not got "fair fermented Accra intermediate crop."

With regard to the point raised about the damages, I agree with what my Lord has said, and do not desire to add anything.

SANKEY, L.J.—I agree. I only desire to add a few words upon the first point. The remaining points appear to me to be questions of fact upon which the learned judge came to

a right conclusion. The plaintiffs were purchasers under c.i.f. contract of certain parcels of cargo, and the question which falls for determination is: Are they entitled to claim the damages that those goods sustained before they were put on board ship? In my view the plaintiffs were assignees of the policy in question. The assured had a right to make a claim in respect of this damage. It was a claim which was assignable, and it was in fact assigned, as appears by the documents themselves, to the plaintiffs. The case of *Lloyd v. Fleming* (1 Asp. Mar. Law Cas. 192; 25 L. T. Rep. 824; L. Rep. 7 Q. B. 299) has been referred to as an authority in favour of the contention, and it provided, by sect. 50 of The Marine Insurance Act 1906, that the marine policy is assignable unless it contains terms expressly prohibiting the assignment, and it may be assigned either before or after loss. This policy was assigned, and the plaintiffs were entitled to sue. I think the first point fails.

With regard to the second point I desire to add nothing.

Appeal dismissed.

Solicitors for the appellants, *Ballantyne, Clifford, and Co.*

Solicitors for the respondents, *Ince, Colt, Ince, and Roscoe.*

July 18 and 19, 1928.

(Before SCRUTTON, LAWRENCE, and GREER, L.JJ.)

CLAN LINE STEAMERS LIMITED v. THE BOARD OF TRADE. (a)

ON APPEAL FROM THE KING'S BENCH DIVISION.

Requisitioned ship—Charter-party T.99.—Loss due to warlike operation taken by Government—Marine risks by owners—Collision due to breakdown of steering gear—Not a consequence of warlike operation—Marine risk.

The claimants were the owners of the steamship Clan M., which, during the war, was requisitioned by the Government under the terms of the charter-party T.99. By the terms of this charter the Government was responsible for loss or damage due to a warlike operation, and the owners were responsible for ordinary marine risks. While the vessel was proceeding in a convoy from the United States to France she suddenly left her course owing to a defect in her steering gear, which was never explained, came into collision with the W. F., another ship in the convoy, and sank. At the time of the collision the Clan M. carried a cargo the greater part (amounting to 84 per cent. of the whole cargo) of which consisted of cereals intended for the civil population. A small quantity of the cereals was intended for the

(a) Reported by T. W. MORGAN, Esq., Barrister-at-Law.

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troops, and there was also in the cargo a quantity of steel billets intended for the manufacture of shells. The *W. F.* was carrying war supplies, and it was admitted that that ship was engaged in a warlike operation at the time of the accident. The owners claimed compensation on the ground that the loss of the ship was due to a warlike operation. The Crown contended that the loss was not due to a warlike operation but to a marine risk. The arbitrator found that the sinking of the *Clan M.* was proximately caused by the impact of the *W. F.* moving in the course of a warlike operation which she was then carrying out, and that the sheering of the ship to port was not the real or proximate cause of her loss within the meaning of the charter-party. He, therefore, awarded in favour of the claimants.

Wright, J. held that whether a ship was engaged in a warlike operation was a question of fact and degree, the words "warlike operation" not being capable of precise definition. On the facts the *Clan M.* was not engaged in a warlike operation at the time of the loss, and although the *W. F.* was engaged in a warlike operation, the loss of the *Clan M.* was not due to that fact, but to her sudden sheering out of her course. The award was wrong, and there must be judgment for the Crown.

Held, by the Court of Appeal (Greer, L.J. dissenting) that the loss was not the consequence of warlike operation.

Decision of Wright, J. affirmed by a majority.

APPEAL from a decision of Wright, J., on an award stated in the form of a special case.

The question raised by the special case and by the appeal was whether the loss of a requisitioned vessel during the war was the consequence of a warlike operation.

The claimants, the Clan Line Steamers Limited, were the owners of the steamship *Clan Matheson*, which was a cargo vessel, built in 1917. The *Clan Matheson* was requisitioned by the British Government on the 28th Sept. 1917, while the war was still in progress, on the terms of the charter-party known as charter-party T.99, under which the shipowners remained liable for loss by ordinary marine risks, under clause 18 of the charter-party, while the Government, under clause 19, undertook liability for loss from all consequences of hostilities or warlike operations.

Clause 18 provided that the Admiralty shall not be liable if the steamer shall be lost, wrecked, driven on shore, injured or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather or any other cause arising as a sea risk."

By clause 19 the risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause. Warranted free of capture, seizure or detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences

of hostilities or warlike operations, whether before or after the declaration of war. Such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost, at the time of such loss.

In May 1918 the *Clan Matheson* sailed in convoy from New York with about forty vessels escorted by cruisers for Europe. The convoy sailed in columns; the *Clan Matheson* was the third ship in the second column from the port hand, and the steamship *Western Front* was in the corresponding position in the port column. The convoy sailed without lights. On the night of the 22nd-23rd May, the steering gear of the *Clan Matheson* broke down, and she sheered out of her line across the bows of the *Western Front*, which rammed and sank her. The *Clan Matheson* carried a cargo of which only 16 per cent. was for military purposes, and was bound for Nantes, a war base as well as a commercial port. The *Western Front* was carrying a cargo made up entirely of war supplies for St. Nazaire, a war base. The claimants pleaded that at the time of the collision both vessels were engaged upon and were carrying out a warlike operation within the meaning of clause 19 of the charter-party, and that the loss was a consequence of warlike operations. The respondents admitted that the *Western Front* was engaged upon and carrying out a warlike operation but denied that the *Clan Matheson* was so engaged, or that the loss was in consequence of a warlike operation. The value of the vessel was agreed at the sum of 265,000*l.* Subject to the opinion of the court, the arbitrator held in favour of the claimants on the ground that there was no negligence on the part of either vessel, and that the loss was a consequence of warlike operations within the meaning of clause 19 of the charter-party T.99.

The Crown appealed.

W. Norman Raeburn, K.C. and Russell Davies for the Crown.

G. P. Langton, K.C., A. T. James, K.C., and J. MacMillan for the shipowners.

May 14, 1928.—WRIGHT, J., read the following judgment: This is a claim by the Clan Line Steamers Limited—herein referred to as the shipowners—against the Board of Trade—herein referred to as the Government—for the sum of 265,000*l.* as the value of the steamship *Clan Matheson*, of which they were owners, on the ground that the *Clan Matheson* was lost as a consequence of warlike operations within the meaning of the *pro forma* charter-party under the terms of which she had been requisitioned by the Government in Sept. 1917. The *Clan Matheson* sank after collision with an American steamship, the *Western Front*, on the 23rd May 1918, while under the requisition. The *pro forma* charter-party contained an arbitration clause under which the question was submitted to an arbitrator, who has made his award in the form of a special case for the opinion of the court, which now comes before me.

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The clauses of T.99 which are material for this case are clauses 18 and 19, which are in the following terms. Clause 18: "The Admiralty shall not be held liable if the steamer shall be lost, wrecked . . . by or in consequence of dangers of the sea or tempest, collision . . . or any other cause arising as a sea risk." Clause 19: "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following but not more extensive clause: Warranted free of capture, seizure or detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after the declaration of war. Such risks are taken by the Admiralty on the ascertained value of the steamer, if she be totally lost, at the time of such loss." These clauses must obviously be construed in accordance with the principles of marine insurance. The arbitrator has found that the loss of the *Clan Matheson* was a consequence of warlike operations within these clauses, but subject to the opinion of the court whether in law on the facts the loss was so caused and did not arise as a sea risk.

At the time of the casualty the *Clan Matheson* was sailing in convoy; the convoy consisted of thirty-five to forty vessels in columns; the *Clan Matheson* was the third ship from the front in the second column from the port side; the *Western Front* was in the corresponding position on the port column; the regulation distance between them being 800yds.; the convoy was under the escort of cruisers and each ship was required to keep in line and maintain her proper distance. The *Clan Matheson* was carrying a cargo of about 7500 tons, including 363 tons of steel for shells, and about 919 tons of oats intended for the military authorities; the rest of her cargo was intended for the civil commissariat, that is, about 84 per cent. by weight of the cargo was for the civil commissariat and about 16 per cent. for the military authorities; she was bound for Nantes, which was admitted by the pleadings to be a war base, but was also, as the arbitrator finds, an ordinary commercial port. The arbitrator finds that the *Clan Matheson* was not at any material time engaged upon or carrying out a warlike operation within clause 19 of the charter-party. Counsel for the shipowners has asked me to say that this finding is wrong in law. I have considered the relevant authorities, in particular *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service (The Geelong)* (16 Asp. Mar. Law Cas. 33; 128 L. T. Rep. 546; (1923) A. C. 191), but I can see no ground to justify me in holding that on the facts stated the arbitrator is wrong in law in so finding. The cargo destined for the military authorities was a comparatively small portion of the whole, and was of a character not directly referable to use or immediate use in war; the steel would need to go to a munition

factory to be made into shells, and the oats intended for the military authorities might be used for feeding horses or mules far from the lines; the term "warlike operations" is not capable of precise definition, and "does not include all operations in war or even all operations for the purpose of war" (per Lord Cave, L.C. in the case cited). In any case the character of the cargo and the port of destination were predominantly civil. Questions such as this must mainly be questions of fact and degree. I accept the arbitrator's finding on this point—if, indeed, it is left to me on the case—and I proceed on his finding that the *Clan Matheson* was not engaged on a warlike operation. On the other hand, it is both admitted in the pleadings and found that the *Western Front* was engaged upon and carrying out a warlike operation within clause 19 at all material times. No question arises on the point.

On the night of the collision the convoy was proceeding at about nine to nine and a half knots, the wind was about force five, the sea was rough with a considerable swell; the convoy was sailing without lights but it was a moonlight night, visibility was good, and other vessels in the convoy could easily have been seen. About 1 a.m. the *Clan Matheson* was found to be sheering to port, and though the wheel was put hard-a-port the sheer continued. Every effort was made on the *Clan Matheson* in the brief moments available to correct her course, but she swung seven points off her course across the bows of the *Western Front*, by which she was struck about amidships approximately at right angles; she sank in about two hours and became a total loss. It seems clear that some defect had developed in the patent hydraulic steering telemotor gear with which she was fitted; the steering gear was of a well-known and widely used make, and it does not appear that there was any reason to suspect any defect in it. The arbitrator finds that there was no breach of any warranty of seaworthiness on the part of the shipowners in respect of the *Clan Matheson*, and no negligence on their part or on the part of those in charge of her. He does not find whether there was any negligence on the part of those in charge of the *Western Front* in not avoiding the collision when the *Clan Matheson* swung across her bows. I should have sent the case back to the arbitrator for a finding on this point, but both counsel said that negligence on the part of the *Western Front* had not been and was not suggested; that is to say, the *Western Front* could not avoid striking the *Clan Matheson* as she did when the *Clan Matheson* swung out of her course and across the bows of the *Western Front*.

At first sight there could not well appear to be a clearer case of a collision arising simply as a sea risk and as such recoverable under an ordinary marine policy. Sailing in convoy is not in itself a warlike operation *quoad* the convoyed steamers such as the two in question in *Green and others v. British India Steam*

Navigation Company (The Matiana), where Lord Sumner thus summed up the decision of the House of Lords (15 Asp. Mar. Law Cas., at p. 67; 123 L. T. Rep. 721; (1921) 1 A. C., at p. 129): "In brief, sailing with convoy is only sailing in company, and is no more a warlike operation than sailing alone." Sailing without lights in war time is not in itself a warlike operation—*Britain Steamship Company v. The King (The Petersham)* (15 Asp. Mar. Law Cas. 58; 123 L. T. Rep. 721; (1921) 1 A. C. 99)—but even if it had been, the fact would have been irrelevant because the steamers were in easy sight of each other. The weather was not bad, the speed moderate, there was abundant sea room; the casualty simply occurred because the *Clan Matheson* instead of keeping line and position suddenly swung out across the bows of the *Western Front*, thus rendering collision inevitable by reason of the sudden developing of a latent defect in her steering gear. The shipowners' case, however, is that the collision was caused in consequence of warlike operations because one of the colliding steamers, the *Western Front*, was admitted and held to be engaged on a warlike operation in the somewhat artificial sense that she was carrying a full cargo of war supplies for the United States Government—under charter to that Government—to St. Nazaire, then being used by that Government as a war base. The *Western Front* was accordingly for purposes of this case engaged upon a warlike operation; the question remains whether the loss of the *Clan Matheson* was caused by that warlike operation, in the sense appropriate in marine insurance law. Overwhelming by the sea is *prima facie* a sea loss, recoverable as a loss by perils of the sea under an ordinary marine policy. Where, however, there is an excluding clause such as is set out in clause 19 of T.99—which is usually known as the f.c. and s. clause—questions may arise whether the loss *prima facie* within the policy is not taken out of it by the f.c. and s. clause; the onus of establishing that it is thus taken out is on those who so allege; for this purpose it is necessary to look beyond the cause immediate to the loss in time. In such a case as the present this cause immediate in time is the fortuitous incursion of sea water into the ship, causing her to sink, and it is necessary then to ascertain how the misfortune occurred that was the cause of it. As Lord Dunedin said in *Leyland Shipping Company Limited v. Norwich Union Fire Insurance Company Limited* (14 Asp. Mar. Law Cas., at p. 262; 118 L. T. Rep. 120; (1918) A. C., at p. 363): "This class of competition between causes can only truly arise when you have to deal with an exception." Lord Shaw, in the same case, said (14 Asp. Mar. Law Cas., at p. 264; 118 L. T. Rep. 120; (1918) A. C., at p. 363): "But the idea of the cause of an occurrence or the production of an event of the bringing about a result is an ideal perfectly familiar to the mind and to the law, and it is in connection with that that the notion of *proxima causa*

is introduced." What was it that brought about the loss, the event, the calamity, the accident? And this is not in an artificial sense, but in that real sense which parties to a contract must have had in their mind when they spoke of cause at all. To treat *causa proxima* as the cause which is nearest in line is out of the question. Indeed it is clear that where there is a competition of causes, which involves a choice between them in order to determine whether the loss falls within the general body of the policy or within the f.c. and s. clause, the difficulty can only be solved by deciding which is the dominant cause, according to what "common sense of mankind would assert in such a case," to use Lord Haldane's words in the same case. To the same effect, Lord Sumner in *Becker, Gray, and Co. Limited v. London Assurance Corporation* (14 Asp. Mar. Law Cas. 156; 117 L. T. Rep. 609; (1918) A. C. 101), speaking of the rule of proximate cause as truly applied in marine insurance cases, says (14 Asp. Mar. Law Cas., at p. 159; 117 L. T. Rep. 609; (1918) A. C., at p. 112): "Cause and effect are the same for underwriters as for other people. Proximate cause is not a device to avoid the trouble of discovering the real cause or the common-sense cause." If then it is necessary, as it must be in the present case, to go behind the bare fact of the *Clan Matheson* being sunk by the inrush of water through a casualty and to consider the whole event and the totality of circumstances under which the accident occurred, the dominant fact is, in my judgment, that the *Western Front* came into contact with the *Clan Matheson* only because of the sudden departure of the *Clan Matheson* from her proper line and position, and because by an extraordinary and unanticipated motion the *Clan Matheson* put herself directly in the way of the *Western Front*; collision was thereby inevitable. If ships can be personified, as in language they always tend to be, the collision was in no sense the voluntary act of the *Western Front*, but was simply and solely the act of the *Clan Matheson*, and her loss was "due to her own fault," to use the expression of Lord Sumner in *Attorney-General v. Adelaide Steamship Company (The Warilda)* (16 Asp. Mar. Law Cas. 178; 129 L. T. Rep. 161; (1923) A. C. 292), in a passage to which I shall refer more fully later. In the facts of the case the collision followed directly and by necessary sequence because of the sheer taken by the *Clan Matheson*, and that even was, in my judgment, in marine insurance law and according to the true construction of clauses 18 and 19 of T.99, the cause of the loss of the *Clan Matheson*. But that cause was in no sense connected with warlike operations. No doubt the *Western Front* was engaged in a warlike operation, and if her stem had not run into the *Clan Matheson* the *Clan Matheson* would not have sunk, but that was, to use a convenient if inelegant expression, the "*causa sine qua non*," the necessary condition of the loss occurring, not the real or dominant or

efficient cause. In my judgment the loss was accordingly not due to the warlike operation of the *Western Front*, namely, in proceeding on her voyage which was the warlike operation, but to the fortuitous motion of the *Clan Matheson*, which was in no sense a warlike operation. The *Western Front*, in my judgment, was the instrument but not the cause of the loss.

This conclusion does not depend on whether there was or was not any negligence on the side of the *Clan Matheson*, either in fitting her out or navigating her. The question is simply what courses, as a matter of actual fact, did the vessels take? The extraordinary manœuvre of the *Clan Matheson* in throwing herself across the bows of the *Western Front* might be due, for instance, to carelessness of the helmsman, but equally to a sudden physical seizure, disabling him and putting the vessel off her course before help could come; it might be due to a mechanical defect due to bad design or workmanship or a mechanical defect purely latent. In any such case for purposes of this question the result would be the same, the objective motions of the ship being the only relevant consideration; these constitute the event on which the shipowners' rights depend. Negligence and kindred questions are in this and similar cases of marine insurance only material as explaining how the eccentric departure from the ship's proper course occurred. In certain cases so far decided where collisions have occurred between merchant vessels and vessels engaged on a warlike operation, the question of a collision caused by negligent navigation of the merchant vessel has been discussed by way of observation, the real object of the discussion being to determine whether the loss was due to the act of the merchant vessel. I rely on these observations as supporting my conclusion in this case. The whole matter is fully discussed for this appeal by Lord Sumner in the case of *Attorney-General v. Adelaide Steamship Company (The Warilda)* (16 Asp. Mar. Law Cas., at p. 182; 129 L. T. Rep. 161; (1923) A. C., at p. 304). He quotes Bailhache, J. as saying in *Attorney-General v. Ard Coasters Limited (The Ardgantock)* (35 Times L. Rep., at p. 605): "If negligence on the part of the *Ardgantock* was the effective cause of the loss the case would be one of loss by marine risk." Lord Sumner adds (16 Asp. Mar. Law Cas., at p. 182; 129 L. T. Rep. 161; (1923) A. C., at p. 304): "Literally, this was right, though it is not easy to see what is meant by negligence, as such, being the cause; but no doubt what was meant was that if the loss of the *Ardgantock* was proved affirmatively to be due to her own fault, it would not be caused by the warship and its warlike operations." He further quotes, and as I read it, with approval, the view of Roche, J., in the *Charente Steamship Company v. Transports Director* (38 Times L. Rep. 148; affirmed in C. A. 38 Times L. Rep. 434), that in a collision between a merchantman and a ship engaged in warlike

operations, during the war, both showing no lights, if the merchantman was solely to blame the collision would not be the result of the other ship's warlike operation. Lord Sumner thus sums up the matter (129 L. T. Rep. 161; (1923) A. C., at p. 305): "When damage is done by two ships coming into collision, one being engaged in a warlike operation, and the other on an ordinary commercial voyage, the collision is a risk falling on the marine policy, unless it is taken out of it by being proved to be caused by warlike operations, and this proof fails, when it is shown to be caused by the action of the officer in charge of the commercial operation, all the more so if his action is negligent and blameworthy; but I think the result would be the same if his action was only an error of judgment or wrong, but excusable in what is called the agony of the moment, so long as it is his action that causes the collision effectively and proximately, for the ship engaged in the warlike operation may play a minor part, since it takes two to make a collision." I think these observations in effect cover the case, when it is borne in mind that the action of the ship's officer is only natural, when the question arises in connection with some movement in so far as it changes the course of the ship, a change which may be equally caused with the same fatal result by a mechanical breakdown of the ship's steering gear.

The essential conclusions of the learned arbitrator, for whose opinion I have the greatest respect, though in this case it differs from my own, are embodied in par. 16 (IV., V., and VI.) of his award, of which V. is the most vital. It is in these terms: "16. (V.) That the sinking of the *Clan Matheson* was proximately caused by the impact of the *Western Front* moving in the course of a warlike operation which she was then carrying out." The language appears to be almost literally repeated from a passage in the judgment of Atkin, L.J. in *Attorney-General v. Ard Coasters Limited (The Ardgantock)* (15 Asp. Mar. Law Cas. 353; 125 L. T. Rep. 548; (1921) 2 A. C. 141) quoted by Lord Finlay in that case in the House of Lords. The language was aptly used in reference to the facts of that case, where a destroyer on patrol duty swung at full speed in the dark in the course of its duty, and ran into the merchant vessel which was, without negligence on her part, navigating without lights in such a fashion that the destroyer, executing her warlike operation without negligence, must run into her. For the reasons I have given I do not think the language can be correctly applied to the facts of the present case. Indeed, in all these cases up to the present there has been no ground for ascribing the loss to the act of the merchant vessel, rather than to the vessel engaged on the warlike operation—*Attorney-General v. Adelaide Steamship Company (The Warilda)* (*sup.*)—where the vessel engaged in the warlike operation had caused the collision by her faulty navigation, it was held that a warlike operation was still a warlike operation if negligently conducted; in the other cases,

while no blame attached to either vessel, the vessel engaged in the warlike operation ran into the merchant vessel because the warlike operation compelled her to proceed at speed in the dark without lights, and the merchant vessel was similarly unlighted. In none of these cases could it be said with truth, as it can, in my judgment, be said here, that, to use Lord Sumner's phrase, the vessel engaged in warlike operation "played a minor part," or, to put it differently, was an instrument and not a cause. This can be said, I think truly in this case, because it was the merchant vessel which acted individually outside the course of correct navigation so as to render the collision unavoidable; whether that action was due to negligent navigation or mechanical breakdown appears to me to be irrelevant: it is the actual behaviour of the vessels which is to decide the issue.

The present case, coming for decision so many years after the war, though no doubt the delay can be well explained, is the first in which the question to be determined has been directly raised for decision. For the reasons given I hold the arbitrator's award is not right, but should take effect in the alternative form of clause 18 of the award.

The shipowners appealed.

G. P. Langton, K.C., A. T. James, K.C. and J. MacMillan for the appellants.

Sir T. Inskip, K.C. (A.-G.), W. Norman Raeburn K.C. and Russell Davies for the Crown.

SCRUTTON, L.J.—If the point at issue in this case were now coming before us for the first time, I should undoubtedly have taken time to consider, and express in a carefully written judgment, my views on the very difficult question which, in the absence of authority, is concerned with it. But this is one of a series of cases raising questions with regard to the meaning of the words "a consequence of warlike operations," on which we have the guidance of six cases in the House of Lords, and, in view of the amount in dispute here, it is quite obvious that this case will also go to the House of Lords. I do not propose, therefore, to take time to put my views into more careful language. I am the more ready to take that course because, but for the guidance of the cases in the House of Lords, I should have gone very wrong, and, unfortunately, have remained under the impression that I ought to go wrong, but for the controlling influence of the decisions of the House of Lords.

The facts of this particular case are these: There was a convoy—a convoy which the arbitrator finds consisted of between forty and forty-five ships—apparently they did not take the trouble to count the precise number of them—and from what one may know of convoys in previous cases there were in the convoy probably six or seven columns of six or seven ships, and one hears that they were not all English ships. I abstain from speculating with

regard to the particular nationalities of the ships which went to form the convoy, but they were not all English ships. They were running in a manner in which in peace time no sensible shipmaster would ever dream of running his ship—they were running without lights in columns and there were three ship's lengths between the bow of one ship and the stern of the next, and six ships' lengths between the columns. They were running to orders, zig-zagging at given times, a manœuvre which required to be executed with accuracy by forty ships in six columns, in order to avoid a most extraordinary mix up by collision. No lights, a moonlight night, and the vessels running in columns in that way, a ship called the *Clan Matheson*—the nature of which I will speak of presently—was the third ship in her column, and a ship called the *Western Front*—the nature of which, again, I will speak of presently—was the third in her column on the port hand of the *Clan Matheson*. In these circumstances, the steam steering gear of the *Clan Matheson* broke down. It was not a thing that you would detect at once. The presence of lights would probably have helped you to detect it quicker, but it was detected when the vessel ahead was observed to be getting on the starboard side of the *Clan Matheson* more and more. Repeated orders given by the master of the *Clan Matheson* to port the helm so as to get into line again did not seem to have any effect, and the mate—the officer—went over to the helm to see what the Lascar quartermaster was doing, and he found that the helm was hard-a-port, but that the ship was not paying any attention to it. The engineer was hastily summoned, and he tried to do something which he thought might make the steering gear work again. It did not, and the *Clan Matheson* altered her course seven points to port, to the extent nearly of a right angle, and found herself in front of the *Western Front* which cut her down, and she sank in a couple of hours. It is quite obvious that what might have happened might have been that the sheer, instead of taking her in front of the *Western Front*, might have taken her into the side of the *Western Front*, in which case, the *Western Front* herself would have been cut down and lost, or it might have caused the *Clan Matheson* to have gone so far as to take her astern of the *Western Front*. But inasmuch as it was found by the arbitrator that there was no negligence on the part of either ship—that is to say—that there was nothing that the people on the *Clan Matheson* could have done to avoid the sheer—and having regard to the fact that the vessels were running without lights in this form, there was nothing which the *Western Front* could have reasonably done to get out of the way. Because one must bear in mind that the *Western Front* had, first of all, to appreciate that the vessel abreast of her was coming out of her column, and coming towards her, and, secondly, the *Western Front*, when she appreciated that, had to bear in mind that if she stopped, the boat behind her might be into her. One therefore has the agreed facts, that the

engines of the *Clan Matheson* broke down; that in consequence she sheered seven points right across into the other column, that there was no negligence on the part of the *Western Front*, and no negligence on the part of those on board the *Clan Matheson* in not being able to arrest the sheer of the vessel. Those being the facts, what are the legal relations of the parties concerned—the owners of the *Clan Matheson* on the one hand and the charterers, the Admiralty, on the other? According to the terms of the charter, clause 18, the charterers, the Admiralty, “shall not be held liable if the steamer shall be lost” by collision. So far the Admiralty are not affected. Clause 18 is the war risks clause, and the risks of war which were taken by the Admiralty were risks excluded by the following clause: “Warranted free of capture, seizure, or detention and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations.”

It seems to me, therefore, that the question to be decided is, Was the collision a consequence of warlike operations?—not, Did it happen in the course of warlike operations?—not, Are warlike operations one of the events which, in their totality, contributed to the collision?—but, Was the collision a consequence of warlike operations in the sense in which these terms are understood in insurance matters?

One is apt to think of T.99 as introducing a new problem, but T.99 began in 1863, with the case of *Ionides v. Universal Marine Insurance Company* (1 Mar. Law Cas. (O.S.) 353; 8 L. T. Rep. 705; 14 C. B. (N. S.) 259), where the exception was warranted “free from all consequences of hostilities,” and one has the advantage of the very careful judgments—which cannot be too often studied by people who have to argue insurance cases—of Erle, C.J. and Willes, J. Erle, C.J., referring to the language of the policy (8 L. T. Rep. 705; 14 C. B. (N. S.), at p. 285), “to make the policy attach, the court must in that case have held that the consequence of hostilities was so connected with the loss of the ship as to make the underwriters liable. The maxim *Causa proxima non remota spectatur* is peculiarly applicable to insurance law. The loss must be immediately connected with the supposed cause of it.” Willes, J. says (8 L. T. Rep. 705; 14 C. B. (N. S.), at p. 290): “If you cannot presume the exception of loss from a consequence of hostilities to involve all consequences, however remote, you are necessarily driven to say that the word ‘consequences’ is to be dealt with according to the ordinary rule, as meaning proximate consequences only.” The question then seems to me to be: Was this collision—which obviously resulted from the breakdown of the steering gear on the *Clan Matheson*—a proximate consequence of hostilities?

The difficulties that seem to me to follow from the decisions of the House of Lords are these: First of all, but for the decision in *Green and others v. British India Steam*

Navigation Company (The Matiana) (15 Asp. Mar. Law Cas. 58; 123 L. T. Rep. 721; (1921) 1 A. C. 99), I should have been confident—possibly wrongly confident—that, sailing in convoy, under the conditions described, was a warlike operation. A number of merchant ships desire, and their Governments desire, that they shall avoid attack by the enemy, and to avoid attack by the enemy they adopt a series of precautions which they would never dream of adopting in time of peace, because they are much too dangerous. They sail in a dense convoy, some forty ships altogether; they sail without lights at night; and they sail having orders at given times to alter their course in a particular way. I should have thought, but for the decision of the House of Lords, that these were defensive operations against enemy attack, and being defensive operations against enemy attack they were warlike operations. I do not understand that warlike operations are confined to attacking operations. Defensive operations seem to me as much warlike, appertaining to war, connected with war, as attacking operations.

I know it has been said by a learned judge, for whose judgment I have the greatest respect, that the convoying warship is the shepherd, and the convoy are the sheep, and the shepherd may be doing something warlike but the sheep doing nothing warlike. I think that if you asked the unfortunate ships in a convoy what they were doing, and whether it was a peaceful operation, they would say that it was the very reverse—it was a very dangerous operation which they were intentionally adopting in order to avoid attack by an enemy. If it had been left to myself to decide, I should have said unhesitatingly that sailing in convoy at night without lights was a warlike operation. But I have to start, in my view of the events that happened, by assuring myself that I am quite wrong, because the House of Lords, in *Green and others v. British India Steam Navigation Company (The Matiana)* (sup.), by three voices to two, has said that sailing in convoy is a peaceful operation. Therefore, I have got to take it that such of the vessels as were merchant vessels were engaged in a peaceful operation when they sailed in convoy.

Then there comes another matter which seems to me to be peculiarly a matter for the House of Lords to solve, and not for me, and I only call attention to the differences—or what seem to me to be the differences—of opinion among certain members of their body.

The *Western Front* was manned by United States Naval units and was carrying war stores to a war base, and was said, therefore, to be engaged in a warlike operation. The collision happened because the *Clan Matheson* got in front of the *Western Front*, and the *Western Front* had not time to pull up, and the *Clan Matheson* could not help getting there because of the breakdown of her steering gear. If everything that happens during a warlike operation is a consequence of a warlike operation, then I can understand that Wright, J. was

wrong when he—as I am disposed to do—applied the ordinary rule of *causa proxima* to the term “consequence of hostilities,” and I think there is some justification in the House of Lords cases for saying that some of their Lordships think that everything that happens during a warlike operation is a consequence of that warlike operation. Of course there is a very old fallacy, which is this, that *post hoc* is *propter hoc*, which was very well illustrated by a poem of Canning’s in the *Anti-Jacobin*, where he recited all the evil things which were happening in England, including a plague of blue flies in butchers’ shops, and attributed all such evils to the existence of Napoleon. *Post hoc propter hoc* is generally wrong. *Ante hoc propter hoc*, I suppose, is worse, and the question in this case seems to be whether *simul hoc propter hoc* is a right conclusion, and whether it is right to say, if two things happen at the same time, one must be the consequence of the other.

Lord Dunedin has used language in *Attorney-General v. Ard Coasters Limited (The Ardgantock)* (15 Asp. Mar. Law Cas. 353; 125 L. T. Rep. 548; (1921) 2 A. C. 141) which does suggest that he is prepared to say that anything that happens during hostilities is the consequence of hostilities (15 Asp. Mar. Law Cas. 356; 125 L. T. Rep. 548; (1921) 2 A. C., at p. 152): “In *Ard Coasters’* case (*sup.*) I think the judgment may be put in a form which much resembles a syllogism. Patrolling for submarines is a warlike operation. The *Tartar* was engaged in such patrolling.” Then his Lordship omits to say—because it is pretty obvious—that the third member of the syllogism established that the *Tartar* was engaged in a warlike operation. Then he goes on to the second syllogism. “In the course of that operation, and while engaged in it, she ran into the *Ardgantock*. The collision is therefore the consequence of a warlike operation.” That does seem to me to say that if anything happens during a warlike operation it is a consequence of the warlike operation. On the other hand, Lord Sumner, in a passage which has been read to us by each counsel, in the case of *Attorney-General v. Adelaide Steamship Company (The Warilda)* (16 Asp. Mar. Law Cas., at p. 182; 129 L. T. Rep. 161; (1923) A. C., at p. 305), undoubtedly seems to me to take the view that it is not enough that it is “during,” but you must show that it is “the consequence of.” “When damage is done by two ships coming into collision, one being engaged in a warlike operation and the other on an ordinary commercial voyage, the collision is a risk falling on the marine policy, unless it is taken out of it by being proved to be caused by warlike operations, and this proof fails when it is shown to be caused by the action of the officer in charge of the commercial operation, all the more so if his action is negligent and blameworthy; but I think the result would be the same if his action was only an error of judgment or wrong but excusable in what is called

the agony of the moment, so long as it is his action that causes the collision effectively and proximately, for the ship engaged in the warlike operation may play a minor part, since it takes two to make a collision. I believe the whole key to these problems is to be found by remembering that negligence is directly material in collision actions when the question is how to attribute blame to persons, but is only evidentiary in insurance actions where the question is whether the event has happened which entitles the assured to be indemnified.” I read that passage as being a statement that it is not enough that it happens during the warlike operation, you must prove that it was caused by a warlike operation. That is the view which is stated by Wright, J. in his very careful working out of the results of this case, and it is a view which I myself would take to be the correct one. Whether I have taken the correct view about the apparent differences in the views of the House of Lords, the House of Lords must settle for themselves when this case reaches them.

I notice, however, that when the first case after the war came into this court I said this—part of it is now, I agree, wrong after the decisions of the House of Lords. This is in *British and Foreign Steamship Company Limited v. The King* (14 Asp. Mar. Law Cas., at p. 274; 118 L. T. Rep. 640; (1918) 2 K. B. 879, at p. 886): “I understand the plaintiffs do not dispute that it is not enough for them to prove that the loss happened in the course of a military operation, or that a military operation was one of the contributory causes which together produced the loss.” It is the last part of that statement, “or that a military operation was one of the contributory causes,” which is wrong since *Green and others v. British India Steam Navigation Company (The Matiana)* (15 Asp. Mar. Law Cas. 58; 123 L. T. Rep. 721; (1921) 1 A. C. 99), and the recent decision of this court in *Re Hain Steamship Company (Owners of The Trevanion) and Board of Trade* (*ante*, p. 520; 139 L. T. Rep. 566; (1928) 2 K. B. 534). “The military operation must be the direct or dominant cause of the loss, and no new and independent cause must operate after the military operation alleged. The question then is, Have the plaintiffs proved that the direct or dominant cause of the loss was military operations without the intervention of any new and independent effective cause?” That appears to me subject to the qualification to be derived from the *Hain Steamship Company* case (*sup.*) or *The Matiana* case (*sup.*) to be correct. It is the line which Wright, J. has followed in his judgment in this case, and it is the line which I am disposed to follow until the House of Lords tells me that I am again wrong in the views that I have formed.

I take a case: A vessel—a war vessel—is at anchor, and a merchant vessel which should pass quite clear of her suddenly sheers owing to her steering engine breaking down, without negligence, and runs into the vessel at anchor.

In my view it is impossible to say that that loss is the consequence of a military operation, because a vessel engaged on a military operation was at anchor, and without anything contributing on her part, except that she was there and the merchant ship sheers into her. I take another case—an insurance case: Suppose that in consequence of railway operations a misguided person commits suicide by jumping in front of an engine. Would that be a consequence of railway operations, or would the cause of that disaster or loss be the suicidal act of the man himself, and the presence of the train not the dominant cause of the accident? It appears to me that it would be the action of the man himself which would be the proximate cause of that loss.

For these reasons I have come to the conclusion that Wright, J. was right and, in applying the ordinary principles of marine insurance to this case, took the correct view.

Perhaps I might add this. It is said that if you look at this as a convoy case the *Western Front* was engaged in a warlike operation because, as I say, she was manned by units of the United States Navy, and she was going to a war base with a cargo intended for purposes of war. The learned arbitrator has found that the *Clan Matheson* was not engaged on a warlike operation because her position was this: She was going to a port which was both a war base and a commercial port, and was carrying a mixed cargo, of which 84 per cent. in weight was for civil purposes and 16 per cent. in weight was for war purposes. The 16 per cent. in weight included 363 tons of steel for shells, and a certain proportion of oats for the military authorities—which, it is said, may have been intended for mules and may have been intended for Highland regiments, but at any rate was intended to be used for purposes of war.

The arbitrator has found that the *Clan Matheson* was not carrying out a warlike operation, and it appears to me that whether there is enough warlike cargo on the ship to make her to be carrying out a warlike operation is a question of degree and fact for the arbitrator to determine. I notice that, in cases in the House of Lords, requisitioned vessels which were carrying cargoes entirely of iron ore to England were not considered as carrying out a warlike operation, although the inference would be pretty strong that that ore was being carried to England in time of war for warlike purposes.

I also notice that the late Lord Cave, L.C. in *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service (The Geelong)* (16 Asp. Mar. Law Cas. 33; 128 L. T. Rep. 546; (1923) A. C. 191), speaking of the cargo of *Britain Steamship Company v. The King (The Petersham)* (15 Asp. Mar. Law Cas. 58; 123 L. T. Rep. 721; (1921) 1 A. C. 99), says that it was intended for warlike purposes, and yet that the vessel was not engaged in a warlike operation.

I do not feel inclined to interfere with the findings on fact of the learned arbitrator, and

therefore, on the two points taken by the appellants, I think that Wright, J. came to the correct decision when he applied the ordinary principles of marine insurance to this case and held that the proximate, dominant, and direct cause of this loss was the breakdown of the steering gear of the *Clan Matheson*, and her subsequent sheering into the column opposite to her. In other words, he held that the collision was not a consequence of hostilities in the sense in which that phrase is interpreted in *Ionides v. Universal Marine Insurance Company* (1 Mar. Law Cas. (O.S.) 353; 8 L. T. Rep. 705; 14 C. B. (N. S.) 259), and that the second point, that the *Clan Matheson*, because she carried 16 per cent. in weight of warlike stores, must have been engaged in a warlike operation is concluded by the finding of fact of the learned arbitrator.

For these reasons I think that the appeal must be dismissed with costs.

LAWRENCE, L.J.—This appeal raises the question whether the loss of the *Clan Matheson* was a consequence of warlike operations on the part of the *Western Front* within the meaning of clause 19 of T.99, and therefore excluded from the risks undertaken by the owners under clause 18, or whether, on the other hand, the collision was a sea risk within clause 18, and outside the exception under clause 19.

It is admitted that at the time of the collision the *Western Front* was carrying out a warlike operation within the meaning of clause 19 and that the *Western Front* was not guilty of any negligence which caused the collision.

As regards the *Clan Matheson*, the learned arbitrator has found that, at the time of the collision, she was not engaged in a warlike operation. It has been held by the House of Lords in *Green and others v. British India Steam Navigation Company (The Matiana)* (15 Asp. Mar. Law Cas. 58; 123 L. T. Rep. 721; (1921) 1 A. C. 99) that sailing under convoy, and in *Britain Steamship Company v. The King (The Petersham)* (15 Asp. Mar. Law Cas. 58; 123 L. T. Rep. 721; (1921) 1 A. C. 99), sailing without lights, do not constitute a warlike operation. Counsel for the appellants indeed faintly argued that if you combined the two—that is to say, sailing in convoy and sailing without lights, it would amount to a warlike operation. In my opinion there is nothing in that contention. The main ground, however, upon which the appellants challenged the finding of the arbitrator was that the *Clan Matheson* was proceeding to a war base and was carrying, as part of her cargo, some steel which was intended for war use, and that the arbitrator was, in those circumstances, bound, as a matter of law, or principle, to hold that the *Clan Matheson* was engaged in a warlike operation.

The facts were that the steel so carried weighed 360 odd tons and constituted 16 per cent. of the total tonnage of the cargo. The

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remaining 7300 odd tons of the cargo consisted of barley and wheat which were intended for the civil commissariat, and not for war use. In the case of a vessel such as the *Clan Matheson*, carrying her cargo consisting partly of ordinary merchandise and partly of war material, and proceeding to a port which was being used—though not exclusively—as a war base, I think it is essentially a question of fact whether the carriage of such war material and the destination of the vessel cause that vessel to be engaged on a warlike operation or not. It seems to me that a case like this must be a case of degree, and one for the arbitrator. The finding of the learned arbitrator in this case was, I think justified by the facts, and having come to the conclusion that the *Clan Matheson* was not engaged in a warlike operation I do not think that his finding is open to review because it does not, in my opinion, involve either a question of law or a question of principle. Therefore I think that that contention on the part of the appellants fails.

There remains, however, the more difficult question, whether the collision was a consequence of the warlike operation of the *Western Front*. On this question I am in agreement with the decision of Wright, J. and with the judgment delivered by Scrutton, L.J. and I have very little to add.

In my opinion, what the court has to discover in the present case is what was the real cause of the collision, and not who was the cause of the collision, nor whether it was due to the negligence of those handling the *Clan Matheson* or due to any defect of the machinery.

Both vessels were sailing under convoy with a number of other vessels, and they were sailing at prescribed distances at a prescribed speed. The *Western Front*, although a warship within the decisions, was taking her place in the convoy just the same as the merchant vessels that were being convoyed. The station which she held was known to the *Clan Matheson*, just as much as were the stations of the other vessels in the convoy. At the time of the collision the *Western Front* was in her proper station, proceeding at her proper speed, and keeping at her proper distances. Suddenly, and without warning, the *Clan Matheson* sheered to port and impaled herself on the stem of the *Western Front*. Nothing that the *Western Front* could have done would have avoided the collision. The case seems to me to be analogous to that put by counsel for the Crown in the argument of two ships in the same anchorage, one being a warship engaged in a warlike operation, the other being a merchantman, and the merchantman breaking loose from her anchorage owing to a defect in her cable, and drifting on to the ram of the warship, and sinking herself. It seems to me that, in such a case, it would be strange to hold that the loss of the merchantman was a consequence of the warlike operations of the warship.

The relevant fact to be decided in this case seems to me to be whether it was the action of the *Clan Matheson* or the action of the

Western Front which brought about the collision, and not what caused the *Clan Matheson* to get into the position which made the collision inevitable, nor who, if anybody, was to blame for her getting into that position. In the case of *Re Hain Steamship Company (owners of the Trevanion) and Board of Trade* (44 Times L. Rep. 624), this court held that both ships were negligent and equally to blame, and that it was no answer to a claim made under clause 19 against the Government to say that there was also a claim that could be made against the underwriters under clause 18. Nothing of that kind has occurred. The only vessel at fault—not using that expression as applying to any negligence on the part of the owners or crew—was the *Clan Matheson*, her fault being that, as already stated, she suddenly left her proper position in the convoy and sheered across the bows of the *Western Front*.

In these circumstances, it appears to me that the collision was not in any true sense of the expression “a consequence of the warlike operation,” of the *Western Front*, but was the direct consequence of the action of the *Clan Matheson* herself.

The present case to my mind differs altogether from such cases as *Attorney-General v. Ard Coasters Limited (The Ardgantock)* (15 Asp. Mar. Law Cas. 353; 125 L. T. Rep. 548; (1921) 2 A. C. 141) and *Liverpool and London War Risks Insurance Association (The Richard de Larrinaga) v. Marine Underwriters of The Richard de Larrinaga* (15 Asp. Mar. Law Cas. 353; 125 L. T. Rep. 548; (1921) 2 A. C. 141). In each of these cases the collision was directly due to the warlike operations of the warships concerned, and I think that the result would have been the same if either, or both, of the merchantmen concerned had been disabled through a breakdown of their machinery or their steering gear. In both cases the merchant vessels had a right to be in the place in which they were when they were run down. They were sailing in the open sea and had no duty to anyone to keep on a strict course and not to sheer about as they chose, and they, by their action, did not cause the collision, which was caused purely by the warships.

To hold, in this case, that the collision was due to the warlike operation of the *Western Front* would, in my judgment, be affirming the proposition that every collision with a ship engaged in a warlike operation was the consequence of the warlike operation, which, in my opinion, is not a sound proposition.

The authorities for that proposition cited to us consisted mainly of a passage of Lord Dunedin in *The Ardgantock* case (*sup.*) and a passage in the speech of Lord Finlay in *Commonwealth Shipping Representative v. Peninsular and Oriental Branch Service (The Geelong)* (16 Asp. Mar. Law Cas. 33; 128 L. T. Rep. 546; (1923) A. C. 191), both of which my Lord has already commented upon, and I do not propose to comment again upon them.

In my opinion, neither of these learned law Lords intended to lay down as a hard and fast general proposition that every loss occasioned while a ship was engaged in a warlike operation is a consequence of the warlike operation.

In the result I agree with Scrutton, L.J. that this appeal should be dismissed.

GREER, L.J.—I regret to find myself in disagreement with Scrutton, L.J. and Lawrence, L.J., and Wright, J., but I do not propose to be guilty of the polite insincerity of saying that, as I differ from them, I must be wrong. If that were my state of mind I would not be delivering a dissenting judgment.

The logic of Wright, J.'s judgment is attractive, but I prefer the simpler proposition that underlies the decision of the learned arbitrator. We have in this case to consider the true interpretation, and correct application to the facts, as found by the learned arbitrator, of two clauses in the charter-party known as T.99, and I feel it is desirable that I should read those two clauses. The first is clause 18: "The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured or rendered incapable of service by or in consequence of dangers of the sea or tempest, collision, fire, accident, stress of weather or any other cause arising as a sea risk." Clause 19: "The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following, or similar, but not more extensive clause: 'Warranted free of'—then I leave out the immaterial words—'and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.'"

The main fact that we have to consider in this case is whether or not the collision with the *Western Front* while she was in fact performing her warlike operation and navigating in the course of performing her warlike operation right up to the moment when she made a hole in the merchant ship, was a collision that was the consequence of the warlike operation which was at the moment of the collision being performed by the warship. It seems to me that the warlike operation was going on, as I have said, right up to the time of the collision. The navigation of the war vessel at the moment when the merchant vessel was holed was part of the warlike operation which she was then carrying on, and in this connection I would call attention to the words used by Lord Sumner in the case of *Attorney-General v. Adelaide Shipping Company (The Warilda)* (16 Asp. Mar. Law Cas. 178; 129 L. T. Rep. 161; (1923) A. C., at p. 301). "By admission the *Warilda's* operation was a warlike operation throughout, and as was the whole, so were the parts. Steaming into the *Petingaudet* was one of those parts, and none the less so, whether it was due to mere misfortune, to error of judgment, or to negligent navigation." Substitute for the *Petingaudet* the *Clan Matheson*, the steaming into the *Clan Matheson* was one of

the parts of the warlike operation which was being carried on by the other vessel, the *Western Front*. It seems to me to be difficult, under the circumstances, to say that the collision which, if there had been no warlike operation going on, would have been a sea risk under clause 18, is not taken out of that clause by the operation of the f. c. and s. clause referred to in clause 19: "Warranted free of all consequences of warlike operations."

In my judgment, the fact that the *Clan Matheson* by accident was unable to steer and was in a part of the ocean where she would not have been if she had been able to steer, is not relevant to the question as to whether the collision was a consequence of the warlike operation being carried out by the war vessel. Pursuing that operation up to the moment of the collision with the merchant vessel, and then sinking her when she was lawfully upon the seas in the situation into which she came, without any blame attaching to those responsible for her, amounts, in my judgment, to a collision caused by the warlike operation of the vessel which collided with her.

I think that is a much simpler proposition to apply to cases of this sort than the proposition to be extracted from the judgment of Wright, J. It does not follow from that that it is the true interpretation of the agreement between the parties. But, in my judgment, it is, and I think it has the support—the very great support—of the authority of the House of Lords in the two cases which are known as *The Ardgantock* (15 Asp. Mar. Law Cas. 353; 125 L. T. Rep. 548; (1921) 2 A. C. 141), and *The Richard de Larrinaga* (15 Asp. Mar. Law Cas. 353; 125 L. T. Rep. 548; (1921) 2 A. C. 141). I cannot myself distinguish the cases in principle.

It seems to me that if sailing without lights in these cases was not the cause of the collision which took place, then the sailing without ability to steer, in this case, was not the cause of the collision that took place, but the cause of the collision was the action of the war vessel in the water, coming in contact with the merchant vessel in the position in which she was, without any fault on her part.

I also think that the case is covered, as argued in the reply in this case, by our decision in the recent case of *Re Hain Steamship Company (Owners of The Trevanion) and the Board of Trade* (ante, p. 520; 139 L. T. Rep. 566; (1928) 2 K. B. 534), where we held that the combined negligence of the two vessels did not prevent it from being said that the collision was a consequence of the action of the war vessel, which was one of the two colliding vessels.

I also desire to call attention to the principle that is referred to in all the judgments in that case; that where you have two causes co-operating at the same time, it follows that the result of those two causes may be properly said to be the result of either of them, and if the collision was the result of the warlike operation which was being carried on by the

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Western Front, it was none the less the result of that warlike operation because another cause also operated at the same time.

In my judgment, this appeal ought to be allowed, but it is satisfactory to feel that, whichever way of looking at this question is right, it will probably be settled by a higher tribunal.

Appeal dismissed.

Solicitors for the appellants, *Ince, Colt, Ince, and Roscoe.*

Solicitor for the Crown, *Solicitor to the Board of Trade.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Friday, July 20, 1928.

(Before ROCHE, J.)

VLASSOPOULOS v. BRITISH AND FOREIGN MARINE INSURANCE COMPANY LIMITED. (a)

Insurance (Marine)—General average—York-Antwerp Rules 1924, rule A and C, and rules 10, 11, and 20—Construction.

By the terms of a policy on the hull and machinery of the steamship M., general average was to be adjusted in accordance with the York-Antwerp Rules 1924, and it was agreed that these rules governed the rights and obligations of the parties. While loading, an accident occurred and certain expenses were incurred over and above the cost of repairs. The vessel was not in danger. Later during the voyage she met with another accident and had to put into a port of refuge. The vessel was never in immediate danger.

Held, on a special case stated, that in both cases the cost of repairs was recoverable as particular average. As regards the items over which the difference of opinion had arisen, those incurred at the port of refuge were recoverable as general average, while those at the port of loading were not. The true construction of the contract was that the parties intended they should be bound by the York-Antwerp Rules 1924, to the exclusion of the laws of this or any other country. These rules constituted an attempt to codify the law of general average by stating general principles in lettered rules A to G, and then dealt with specific cases in numbered rules not as being in addition to, or as illustrations of, the general rules, but as if the words "and in particular" followed the general rules. To come within the rules the accident had to be one which imperilled the ship or the adventure, but it was not necessary for the peril to be immediate.

SPECIAL CASE stated by an arbitrator.

The claimant was the owner of the steamship *Makis*, and the respondents were the under-

writers of a policy of marine insurance on the hull and machinery of the said vessel in favour of the claimant dated the 27th Dec. 1926. By the terms of the policy general average was to be adjusted in accordance with the York-Antwerp Rules 1924, and it was agreed by the parties to the arbitration that these rules governed their rights and obligations. The *Makis* was chartered to proceed from Hamburg to Bordeaux and there load a full and complete cargo of pit-wood and deliver the same at Cardiff to charterer's order. Clause 17 of the charter-party was as follows: "Average, if any, shall be settled according to the York-Antwerp Rules 1924." The *Makis* left Hamburg on the 8th Jan. 1927 and arrived at Bordeaux on the 10th Jan. 1927, and commenced loading the same day. About 10 a.m. on the 10th Jan. the foremast broke while a sling of pit-wood was being lowered into No. 2 hold by ship's tackle and a derrick attached to the mast fell into the hold and was damaged beyond repair. In order to carry out the necessary repairs the *Makis* had to be moved into wet-dock, and cargo had to be handled and some discharged and certain expenses incurred. The damage was repaired by the 28th Jan. 1927; loading was completed by the 28th Jan. and the *Makis* sailed for Cardiff at noon of that day. At no time during her stay in Bordeaux was the vessel in danger. This was the first casualty. The second casualty occurred on the evening of the 29th Jan. 1927 while at sea. About 6.30 p.m. the propeller fouled some submerged wreckage, the propeller-blades being seriously damaged, and the vessel was thereby rendered unfit to encounter the ordinary perils of the sea, but the arbitrator also found that there was no immediate danger. The master accordingly put into the port of Cherbourg on the 30th Jan. and the *Makis* remained there under repair till the 17th Feb. 1927. On the evening of that day she sailed for Cardiff, where she arrived on the night of the 20th Feb. and completed her discharge by mid-day of the 24th Feb. 1927. It was admitted that the cost of repairs and surveyors' fees incurred at both Bordeaux and Cherbourg were recoverable as particular average. The dispute arose over expenditure incurred at both ports under four main heads: (1) Wages and provisions of the master, officers and crew; (2) coal consumed; (3) towage in and out and other port charges; (4) handling and discharge of cargo.

The plaintiff claimed to be indemnified for the above expenditure as being general average, which the defendants denied. The arbitrator gave his award in the form of a special case in favour of the defendants, holding that the expenditure did not come under general average.

The relevant clauses of the York-Antwerp Rules 1924 read as follows:

Rule A. There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose

(a) Reported by R. A. YULE, Esq., Barrister-at-Law.

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of preserving from peril the property involved in a common maritime adventure.

Rule C. Only such damages, losses or expenses which are the direct consequence of the general average act shall be allowed as general average.

Rule X. (a). Expenses at port of refuge, &c. When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading in consequence of accident, sacrifice or other extraordinary circumstances, which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place consequent upon such entry or return shall likewise be admitted as general average.

Rule X. (b). The cost of handling on board or discharging cargo, fuel or stores, whether at a port or place of loading, call or refuge, shall be admitted as general average when the handling or discharge was necessary for the common safety or to enable damage to the ship caused by the sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage.

Rule X. (c). Whenever the cost of handling or discharging cargo, fuel or stores is admissible as general average, the cost of re-loading and stowing such cargo, fuel or stores on board the ship together with all storage charges (including fire insurance, if incurred) on such cargo, fuel or stores, shall likewise be so admitted.

Rule XI. Wages and maintenance of crew in port of refuge, &c. When a ship shall have entered or have been detained in any port or place under the circumstances, or for the purposes of repairs mentioned in Rule X., the wages payable to the master, officers and crew, together with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted as general average.

Rule XX. Expenses bearing up for port, &c. Fuel and stores consumed, and wages and maintenance of master, officers and crew incurred, during the prolongation of the voyage occasioned by a ship entering a port or place of refuge or returning to her port or place of loading shall be admitted as general average when the expenses of entering such port or place are allowable in general average in accordance with Rule X. (a).

Fuel and stores consumed during extra detention in a port or place of loading, call or refuge shall also be allowed in general average for the period during which wages and maintenance of master, officers and crew are allowed in terms of Rule XI., except such fuel and stores as are consumed in effecting repairs not allowable in general average.

Sir Robert Aske for the claimant.—All the items of expenditure came within the rules which, by the contract between the parties, governed their rights and obligations. Cherbourg was clearly a port of refuge within the meaning of rule X. (a), and the expenses claimed were admissible as general average. Similar considerations applied to the expenses incurred at Bordeaux, though there was no rule directly in point.

G. P. Langton, K.C. and F. M. Vaughan for the respondents.—The arbitrator has found as a fact that as regards the accident at Bordeaux the ship was at no time in danger, and as

regards the second accident there was no immediate danger. There being no peril threatening the common safety of the ship or adventure, there was no general average, loss or expense admissible under rule A. [*Svensden v. Wallace* (5 Asp. Mar. Law Cas. 232; 1884, 50 L. T. Rep. 799; 13 Q. B. Div. 69) was referred to.]

ROCHE, J.—The present case which comes before me for decision raises points of considerable interest and some novelty under the York-Antwerp Rules of 1924, which, so far as I am aware, have not yet arisen for decision. A case which I decided, *Anglo-Grecian Steam Trading Company v. T. Beynon and Co.* (1926, 24 Ll. L. Rep. 122), was cited as having some bearing on the matter, and is reported as having been decided under the York-Antwerp Rules of 1924, but when the decision is looked at, it appears that it was really decided under the rules of 1890, and is not a decision upon the rules of 1924. The matter arises in the following way: A ship owned by the claimant, called the *Makis*, was loading pitprops in the port of Bordeaux. While loading, an accident happened; a mast fell, and with it the derrick, into the hold. That necessitated the ship being moved into another dock, and being delayed in the port of Bordeaux while repairs were done. The cost of repairs, and all consequential expenses that arose out of the delay, are the subject-matter of what I may call the first claim in the arbitration. After the damage had been repaired the ship started on her voyage, and she met with a second mishap. Her propeller fouled some submerged wreck and the propeller-blades were seriously damaged. She therefore put into Cherbourg, and the arbitrator finds that that course was necessary for the common safety of the ship, cargo, and freight; that is to say, Cherbourg became what is commonly called a port of refuge. The expenses incurred there are the subject-matter of the second claim. The matters submitted to the arbitrator were whether under a policy of insurance (which is referred to, although not set out in the case), the various items under these two heads of claim were recoverable by the shipowner from the underwriters on the hull. It must be assumed, though it is not stated, that the policy insured the assured and gave him a right to indemnity in respect of both particular and general average. It is certain that this must be so as to particular average, because the arbitrator has awarded the cost of repair and of the necessary surveys as recoverable by the claimant from the underwriters, and that could only have been recoverable as a matter of particular average because the arbitrator also finds that no general average was due. It is also clear from the special case that general average was recoverable under the policy because par. 3 of the case reads: "General average was to be adjusted according to the York-Antwerp Rules 1924, and it was agreed by the parties thereto that the York-Antwerp Rules 1924 governed their rights and obligations." The arbitrator, having found

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that the large items of repairs and surveys were in both cases recoverable from the underwriters by way of particular average, it is not my function to decide whether some of the other items might or might not, in some circumstances, be recoverable as particular average. That question has not been submitted to me, and I cannot decide it. What I have to decide is whether the arbitrator was right or wrong in law in deciding that the other items were none of them the subject of general average contribution.

I am going to hold that all of those which were incurred at Cherbourg, the port of refuge, are recoverable as general average, but that none of those incurred at Bordeaux are recoverable as general average. That is to say, the arbitrator was right as regards the expenses at Bordeaux, but wrong as regards those at Cherbourg for reasons which I will proceed to give. The York-Antwerp Rules of 1924 mark a new departure. Previously the rules numbered (1), (2), and so on, had dealt with specific matters, particular cases, and rule 18 had constituted a general rule (I am referring to the rules of 1890) which was to the following effect: "Except as provided in the foregoing rules, the adjustment shall be drawn up in accordance with the law and practice that would have governed the adjustment had the contract of affreightment not contained a clause to pay general average according to these rules." That is to say where specific cases were covered by the rules, the rules were to apply; where there was no provision in the rules then the contract of affreightment was to be interpreted in the light of the law applicable thereto. In general, the law of the port of destination or of the port where the voyage is broken up, is the appropriate law. In the rules of 1924, not only is there no such rule as rule 18—that has disappeared—but the rules begin with general principles laid down in lettered, not numbered, rules A, B, C, &c., and preceded certain rules numbered I., II., III., &c. It is the difference of opinion regarding the relation of the lettered rules to numbered rules which has given rise to the present case. The argument for the underwriters was that there were no circumstances attending resort to the port of Cherbourg which, in English or foreign law, brought the case within the general rules A, B, &c., and, therefore, were not covered by the particular or numbered rules. On the other hand, the contention of the claimant was that although the general rules would seem to rule out the expenses at the port of Bordeaux, there was a special rule, rule X. which brought them in, and the particular must prevail over the general. This is a matter of construction, and, in my view, the true construction of the rules, general and particular, is not what either party has contended.

In my view those who drew up the rules would seem to have intended to draw up a complete code of the law of general average. Whether they have been successful is not for me to decide, and I do not decide. Nor do I

decide what the law applicable would be apart from the rules, for there is a finding that the parties by their contract agreed that their rights and obligations should be governed by the York-Antwerp Rules 1924, and I consider that the common law of this or any other country is outside the scope of my inquiry. First, as regards the port of refuge, Cherbourg, I would refer to the well-known case of *Svensden v. Wallace* (5 Asp. Mar. Law Cas. 232; 1884, 50 L. T. Rep. 799; 13 Q. B. Div. 69; affirmed 1885, 52 L. T. Rep. 901; 10 App. Cas. 404), cited to me by Mr. Langton for the respondents. To summarise what that case decided is this: That certain expenses of leaving a port of refuge, after repairs had been completed and the danger past, would not be recoverable in general average according to the law of England. I have no doubt whatever that the contract to have general average adjusted in accordance with the York-Antwerp Rules, which include such rules as the present rules X. and XI., would exclude, by reason of its express terms, the operation of the law laid down in *Svensden v. Wallace* (sup.). The contention of the claimant that all items should be allowed which can be brought within the words of any specific rule even though to allow such items may be contrary to the spirit and letter of the general rules, is based on an argument that the rules should be read as if they began with saying that general average shall be recoverable in any case to which the numbered rules apply, and went on to say, "and in addition to the above cases general average shall be recoverable in cases which fall within the general words that follow," that is the lettered rules. That is not my view. The argument for the respondents is that there is a strict definition of all cases of general average in the rules lettered A, B, C, &c., and then mere illustrations of the application of these general rules in the numbered rules. I do not think that is the true construction, either. In my judgment, the true construction is this, that certain general rules are laid down in order that if the parties choose to adopt the rules by way of contract, as these parties have done, they may not be troubled thereafter by questions as to what general law is to apply such as might arise under the old rule 18. They may have, if they choose, a self-contained code, as in the present case, and of this code it may be observed that the general rules approximate to the law of England more closely than they do to the law of any other country; and this is not surprising having regard to the predominance of this country in maritime matters. The code having provided a set of general rules which state the general principles which are to operate, then proceeds to deal with specific cases. I am satisfied that, on the true construction, they are dealt with not by way of mere illustration but in order to define and make certain what is to happen in border-line cases, that is, cases which might be held to be on one side or the other of the line which

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is to be drawn under the general rules, for example, such matters as arose in *Svensden v. Wallace* (*sup.*). I am satisfied that it was not intended that any particular rule should contradict or go contrary to the spirit and letter of the general rules. The intention, I think, is that rules A, B, C, &c., constitute the general rules for general average, and were then followed by the words "and in particular," rules I., II., III., &c., are cases of general average. That being, in my opinion, the scope and meaning of the rules, it is only necessary to specify clearly what I find about the particular items and to deal with one or two matters that arise out of the findings of the arbitrator.

I hold that as regards the port of refuge, Cherbourg, all the items in dispute are within rules X. (a), (b) and XI., taken together, and there is nothing in those items which is contrary to any general rule because there is an express finding of the arbitrator that when the ship's propeller was damaged, the ship was rendered unfit to encounter the ordinary perils of the sea, and there is a further finding that putting into Cherbourg was necessary for the common safety of the ship, cargo, and freight. Thus the consequent expenses dealt with specifically by rules X. and XI. were expenses incurred under rule A, for the common safety for the purpose of preserving from peril the property involved in the common maritime adventure, or were damages under rule C, damages, losses or expenses which were the direct consequence of the general average act of the master putting into a port of refuge.

The only special matter that has to be dealt with in this connection is the finding of the arbitrator that at the time when the propeller was damaged neither the ship nor cargo nor freight was in any immediate danger. This may be the reason why he has held there was no general average. If that was his reason, it is in my judgment erroneous in law. It is erroneous because it is putting undue emphasis on the word "immediate." It is not necessary that the ship should be actually in the grip or even nearly in the grip of the disaster that may arise from a danger. It would be a very bad thing for ship masters if they had to wait until the event happened before they were justified in committing the general average act. I need only add this, the word "peril" which means the same thing as "danger," is the word used in general rule A, just as it is the word used in the Marine Insurance Act 1906, s. 66. The word is not "immediate peril or danger." It is sufficient to say the ship was "in danger," but the peril must be real and not imaginary, and it must be substantial. It must be a danger. This is a matter of fact and the arbitrator has found entirely satisfactorily and clearly that the vessel which was unfit to encounter the ordinary perils of the sea had, of necessity, to put into the port of Cherbourg for the common safety of the ship, cargo and freight. In my judgment, that concludes the matter. Next as regards the expenses at Bordeaux. I hold that none of the

items in dispute come within rules X., XI., or XX., which were relied on to justify the contention that they were items of general average. As regards these items the argument for the claimant depends on the second part of rule X. (b). [His Lordship read the rule.] No difficulty arises for discussion down to the words "necessary for the common safety." The difficulty arises on the words that follow: "or to enable damage to the ship caused by sacrifice or accident to be repaired." The first part of the rule provides for the case where you have to discharge or handle cargo at any of the ports mentioned owing to the direct necessity of securing the common safety. The next case is where the handling of the cargo was necessary to enable damage to the ship to be dealt with which had been caused by sacrifice, that is by general average sacrifice. That case is clear. You may damage a ship in order to save the whole adventure and in such a case, quite consistently with the general rules, the shifting and handling of the cargo is to be admitted as general average. Then it is said that the words "or accident to be repaired" bring within the scope of the stipulation that the items shall be admitted in general average, all cases where the discharge and handling is due to the necessity of repairing damage due to accident so long as the repairs are necessary for the safe prosecution of the voyage, even though there is no danger—not no immediate danger—but no danger at all operating at any material time upon the ship or with regard to the adventure. That is where I think the argument breaks down and is too wide. I can conceive cases where, quite consistently with the general rules, the handling of cargo may be necessary to enable damage to the ship to be dealt with which has been due to an accident, such as, for instance, where there has been an accident which causes the ship to proceed to a port of refuge. In my opinion the whole of rule X. (b) can be given effect to without bringing in every repair of accidentally caused damage. I think it would be a violation of the true meaning of the rule to bring in repair of accidental damage and expenses of shifting cargo for that purpose, where there has been merely an accident and no danger operating on the ship as in this case, where the arbitrator finds that the ship during her stay in Bordeaux was at no time in danger. I therefore find that none of these items are recoverable as general average; that is those expenses are not within rule A, because they were not incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.

That, I think, covers all the points.

Award altered accordingly.

Solicitor for the claimant, *R. A. Clyde.*

Solicitors for the respondents, *Ince, Coll, Ince, and Roscoe.*

ADM.]

THE YOUNG SID.

[ADM.]

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Oct. 16, 17, and Nov. 26, 1928.

(Before Lord MERRIVALE, P., HILL, J.,
and Elder Brethren.)

THE YOUNG SID. (a)

ON APPEAL FROM LOWESTOFT COUNTY COURT.

*Collision—Both to blame—Appeal—Degrees of
fault varied—Both to blame in equal degrees—
Appeal allowed—Costs.*

*Where one of the parties in an appeal where
there is a finding of both to blame has suc-
ceeded, then on appeal the costs follow the
event, and the successful party is entitled to the
costs of the appeal.*

*In a collision both vessels were found to blame,
and the County Court judge apportioned
blame as to two-thirds to the appellants' vessel,
and as to one-third to the respondents' vessel.
On appeal a Divisional Court held both vessels
to blame in equal degrees.*

*Held, that the appellants were entitled to the costs
of the appeal.*

*The Canton (166 L. T. Jour. 88 ; (1928) W. N.
214) considered and distinguished.*

APPEAL from the Lowestoft County Court.

The plaintiffs (appellants) claimed damages from the defendants (respondents) in respect of injuries sustained by their drifter *Ocean Swell* in a collision with the defendants' drifter *Young Sid*, which took place in the tidal basin at Lowestoft on the 20th April 1928. The County Court judge held both vessels to blame, and he apportioned blame as to two-thirds to the appellants' vessel and as to one-third to the respondents' vessel. The plaintiffs appealed. By their notice of appeal the appellants asked that the judgment should be varied by pronouncing the *Young Sid* alone to blame. The Divisional Court held both vessels to blame in equal degrees. The circumstances of the collision are of no importance, the case being reported solely upon the question of costs.

Langton, K.C. and Naisby for the appellants.—The appellants are entitled to the costs of the appeal. Although they have not succeeded in freeing their vessel from blame, they have substantially succeeded upon their appeal, since the degrees of fault have been varied in their favour by this court. The rule in this court is well established that the successful appellant is entitled to the costs of his appeal, notwithstanding that the appellate tribunal finds that his vessel was in some degree to blame. This rule was recognised in the Court of Appeal in *The Clara Camus* (16 Asp. Mar. Law Cas. 570 ; 134 L. T. Rep. 50) by Bankes,

L.J., who said that the court saw no reason for departing from the ordinary rule. It is true that in *The Canton* (166 L. T. Jour. 88 ; (1928) W. N. 214) Lord Phillimore stated that the usual rule is that both parties should bear their own costs where both vessels were found to blame in equal degrees. But this rule is not followed in this court and the Court of Appeal : (see *The Peter Benoit*, 13 Asp. Mar. Law Cas. 203 ; 114 L. T. Rep. 147 ; *The Orduna*, 14 Asp. Mar. Law Cas. 574 ; 122 L. T. Rep. 510 ; (1919) P. 381. In *The Karamea* (15 Asp. Mar. Law Cas. 318 ; 124 L. T. Rep. 653 ; (1921) P. 76) no costs were allowed, but in that case there were special reasons which do not apply here.

Holman for the respondents.—The matter is really concluded by the observations of Lord Phillimore in *The Canton* (sup.). This court should follow the practice there indicated. In *The Peter Benoit* (sup.) it was agreed that there should be no costs. In any case the variation of the degrees of fault is not very substantial, and the event is not so clearly in favour of the appellant (since his vessel is still held partly in fault) as to justify the court in giving him the costs of the appeal.

Langton, K.C. replied.

Cur. adv. vult.

Nov. 26, 1928.—Lord MERRIVALE, P.—A question arose in this case with regard to the costs. It was an appeal from the County Court in a collision case, where, in the court below, both vessels had been found to blame, but the appellants' vessel, the *Ocean Swell*, two-thirds, and the respondents' vessel, the *Young Sid*, one-third, to blame. The appeal was against that apportionment. We found upon the hearing of the appeal, that in respect of the matters as to which the appellants had been held to blame there were errors in the judgment, and that there was not the preponderance of grounds of complaint against the appellants which had been found in the County Court. I confess my own mind inclined rather to the view that the preponderance of blame was more on the part of the respondents, than on the part of the appellants, but on considering the matter we came to the conclusion that as the matter stood—taking due account of the findings of the learned judge upon the grounds of alleged default, as to which there was evidence, we ought to hold the vessels equally to blame. Then arose a question of costs, and I do not know that there would have been any difficulty in dealing with it in the ordinary course had it not been that attention was directed to some observations in a recent judgment in the House of Lords in the case of *The Canton* (166 L. T. Jour. 88 ; (1928) W. N. 214). There Lord Phillimore, who delivered the leading opinion, considered the question of costs in a case where the *Rhesus* had been found alone to blame in this court and on appeal that decision was reversed and the *Canton* found alone to blame. In the House of Lords, the

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

vessels were held both to blame in equal proportions and the damage was to be borne equally. Then came the question of costs, and with regard to the facts in that case, Lord Phillimore, having stated that the ancient rule was that where both vessels were to blame each party should bear his costs in the court of first instance, dealt with cases where distinctions had been made upon the facts and the costs had been distributed between the parties, and used these words: "I would recommend your Lordships not to interfere with this settled rule of practice and to hold that there should be no costs either in the Admiralty Division or in the Court of Appeal, and I think that this should also be the rule in your Lordship's House when the appellant seeks for a total reversal and the result in your Lordships' opinion is that both vessels are to blame." I think when the matter is closely considered the observations there made do not interfere with what is stated to be the practice generally followed in this division, at any rate, and I think accepted as being followed in the Court of Appeal, that where one of the parties, although there is a finding of both to blame, has succeeded upon appeal, then, in respect of the appeal, the costs of the appeal, ordinarily, will follow the event of the appeal. Happily the matter does not rest upon mere convenience or practice here, because I find that there are two well-known cases—the first is *The Ceto* (6 Asp. Mar. Law Cas. 479; 62 L. T. Rep. 1; 14 App. Cas. 670), where the House of Lords came to a conclusion which warranted the course which has usually been taken here. Before Sir James Hannen, the *Lebanon* was found alone to blame. In the Court of Appeal that judgment had been affirmed, and in the House of Lords both vessels were held to blame. Although both vessels were held equally to blame as matters then stood—it was before the passage of the Maritime Conventions Act—the respondents were ordered to pay the appellants' costs in the Court of Appeal and in the House of Lords. There is also the older case of *The Tyenooord* (Swa. 347), where the Privy Council, which in those days as is well known, was the Court of Appeal in Admiralty jurisdiction, exercised its powers as to the same principle. The appellant there had been found in the court of first instance solely to blame, and the damages were equally divided, but the appellant got the costs of the appeal. I have mentioned these authorities because it is undesirable that a practice which is recognised here should be supposed to be in doubt, owing to observations in a case which does not raise the immediate issue which is in question here. Cases of equal authority with the case of *The Canton* (*sup.*) show clearly that the matter of costs is in the control of the court, and that being the case, although it be true, as Mr. Holman pointed out, that only a comparatively small amount is involved, the appellants had substantial ground of appeal and they have succeeded, and it seems to me that so far as the appeal is concerned they ought to have their costs of the appeal.

HILL, J.—I agree.

Appeal allowed with costs, and order of County Court varied by pronouncing both vessels to blame in equal degrees.

Solicitors for the appellants, *Botterell and Roche*, agents for *Chamberlin, Talbot, and Bacy*, Great Yarmouth.

Solicitors for the respondents, *Holman, Fenwick, and Willan*, agents for *Wiltshire, Sons, and Jordan*, Lowestoft.

House of Lords.

July 23, 24, 26, and Nov. 16, 1928.

(Before Lords HAILSHAM, L.C., SUMNER and ATKIN.)

GOSSE MILLARD LIMITED v. CANADIAN GOVERNMENT MERCHANT MARINE LIMITED. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Contract—Bill of lading—Carriage of goods by sea—Cargo of tinplates—Damage—Negligence in navigation of ship—Cargo-carrying ship—Exceptions clause—Liability of carrier—Carriage of Goods by Sea Act 1924 (14 & 15 Geo. 5, c. 22), Schedule, art. III., r. (2), art. IV., r. (2) (a).

By art. III., rule 2, of the Schedule to the Carriage of Goods by Sea Act 1924: "Subject to the provisions of art. IV., the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried." And by art. IV., rule 2: "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."

Tinplates were shipped at Swansea in good order and condition on board the defendants' steamship, the C. H., under a bill of lading of which the plaintiffs were the holders, to be delivered by the defendants at Vancouver. After the tinplates had been taken on board at Swansea, the steamer went to Liverpool to discharge certain lumber cargo, arriving there on the 8th Feb., and on the following day the lumber cargo was discharged. On the 10th Feb. the steamer collided with the dockhead while coming out of the dock and was damaged in consequence of which part of the cargo had to be shifted and the steamer was kept in dock until April when she resumed her voyage, arriving at Vancouver on the 17th May. When the cargo of tinplates was discharged, it was found that a large quantity of the tinplates were rusty, stained, and depreciated by contact with fresh water. The learned judge who tried the action found

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

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on the evidence that the damage to the tinplates was due to the wetting received from rain at Liverpool due to the default of the ship's officers leaving the hatches open, and that the defendants had failed to carry out the obligation imposed on them by art. III., rule 2 of the Schedule to the Carriage of Goods by Sea Act 1924, properly and carefully to load, handle, carry, keep, care for and discharge the goods carried, and gave judgment for the plaintiffs.

Held, that applying the principle laid down in The Glenochil (173 L. T. Rep. 416; (1896) P. 10) of distinguishing between want of care of cargo and want of care of vessel, it was clear that the tinplates were not safely and properly cared for or carried, and it was for the respondents to prove that they were protected from liability by the provisions of art. IV., rule 2 (a), and that the damage was occasioned through the neglect or default of their servants in the management of the ship, but even if it could be assumed that the negligence in dealing with the tarpaulin was by members of the crew, such negligence was not negligence in the management of the ship, and therefore was not negligence with regard to which art. IV., rule 2 (a) afforded any protection.

Decision of the Court of Appeal (ante, p. 385; 138 L. T. Rep. 421; (1928) 1 K. B. 717) reversed.

The Glenochil (8 Asp. Mar. Law Cas. 218, 219; 73 L. T. Rep. 416; (1896) P. 10) approved and applied.

R. F. Brown and Co. Limited v. T. and J. Harrison; Hourani v. The Same (ante, p. 294; 137 L. T. Rep. 549) approved.

APPEAL from the decision of the Court of Appeal (Scrutton and Sargant, L.JJ.; Greer, L.J. dissenting) (reported ante, p. 385; 138 L. T. Rep. 421; (1928) 1 K. B. 717).

The plaintiffs, who were engaged in the canning industry in Vancouver, British Columbia, claimed damages from the defendants for alleged breach of duty or breach of contract in and about the carriage of tinplates in the defendants' steamer, *Canadian Highlander*. In Feb. 1925 the plaintiffs ordered about 20,000 boxes of tinplates from Messrs. Baldwins Limited, South Wales, and these tinplates were shipped at Swansea in good order and condition on the above-named steamship, under a bill of lading of which the plaintiffs were the holders, to be delivered by the defendants at Vancouver. After the tinplates had been taken on board at Swansea the steamer went to Liverpool to discharge certain lumber cargo, arriving there on the 8th Feb., and on the following day the lumber cargo was discharged. On the 10th Feb. the steamer collided with the dockhead while coming out of the dock and was damaged, in consequence of which part of the cargo had to be shifted and the steamer was kept in dock until April when she resumed her voyage, arriving at Vancouver on the 17th May. There was rain on some of the days when the repairs were being done at Liverpool, and the hatchways were sometimes left open. When

the cargo of tinplates was discharged it was found that a large quantity of the tinplates were rusty, stained and depreciated by contact with fresh water. The plaintiffs contended that the tinplates were in good order and condition when shipped and that the damage was due to the defendants' failure properly and carefully to load, stow, carry, keep, care for and discharge the goods, or, alternatively, that the defendants were negligent in the loading, stowage, carriage, custody, care, and discharge of the goods. The defendants denied the plaintiffs' allegations and claimed immunity from responsibility for the damage, under art. IV., rule 2, of the Schedule to the Carriage of Goods by Sea Act 1924.

The learned judge who tried the action found on the evidence that the damage to the tinplates was due to the wetting received from rain at Liverpool due to the default of the ship's officers leaving the hatches open; and that the defendants had failed to carry out the obligation imposed on them by art. III., rule 2, of the Schedule to the Carriage of Goods by Sea Act 1924, properly and carefully to load, handle, carry, keep, care for and discharge the goods carried, and gave judgment for the plaintiffs.

The Court of Appeal (Scrutton and Sargant, L.JJ.; Greer, L.J. dissenting) held that on the facts found by Wright, J. at the trial, the damage to the cargo was due to neglect or default of the servants of the carrier in the navigation or in the management of the ship within the meaning of art. IV., rule 2, of the Schedule to the Carriage of Goods by Sea Act 1924, and that the defendants were therefore immune from responsibility for the damage to the cargo.

The plaintiffs appealed.

Jowitt, K.C. and G. St. C. Pilcher for the appellants.

Raeburn, K.C. and Sir Robert Aske for the respondents.

The House took time for consideration.

LORD HAILSHAM, L.C.—This is an action brought by the appellants against the respondents, claiming damages for injury done to their tinplates on a voyage from Swansea to Vancouver in a ship belonging to the respondents and known as the *Canadian Highlander*.

At the trial there was a great conflict as to the cause of the damage to the tinplates, but on the hearing before the Court of Appeal and at your Lordships' Bar both sides accepted the findings of fact of the learned trial judge; and it is therefore convenient to state these findings at once in order to formulate the questions of law which are raised in the appeal.

Under a bill of lading dated the 6th Feb. 1925, 5808 boxes of tinplates belonging to the appellants were shipped at Swansea for carriage to Vancouver by the *Canadian Highlander*. The whole of these tinplates were stowed in No. 5 lower hold, which is the aftermost hold

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in the ship. After loading these tinplates the *Canadian Highlander* proceeded to Liverpool in order to discharge inward cargo and to load further outward cargo. On the 9th Feb. certain lumber, forming part of the inward cargo, was unloaded from the No. 5 'tween decks at Liverpool. During the discharge of this lumber through the hatchway of No. 5 hold there was heavy rain. On the 10th Feb., whilst undocking, the *Canadian Highlander* collided with a pier and damaged her stern. As a result, it became necessary to dry dock the vessel and to do extensive repairs. During the course of the repairs it was discovered that the tail shaft liner was cracked and it became necessary to remove the shaft in order that a new liner might be fitted to it; for this purpose it was necessary to shift some of the cargo in the No. 4 hold and to remove the tail shaft liner through a door leading from the tunnel recess into No. 5 hold. The repairs continued until the 4th April, when the *Canadian Highlander* was undocked and proceeded to Glasgow, and thence to Vancouver, where she arrived on the 17th May. On her arrival it was found that the appellants' tinplates had sustained serious damage by fresh water. The learned judge came to the conclusion that during the vessel's stay in dry dock there was carelessness in moving and replacing the tarpaulins which were supposed to cover the No. 5 hold when work was being done there, and that in consequence rain got into the No. 5 hold and did the damage; and that probably there was also carelessness with regard to the use of the tarpaulins on the 9th Feb., when the lumber was being unloaded, and that on that occasion also some rain was admitted. The learned judge seems to have acquitted the ship's officers of any lack of care, and there was no evidence to enable him to decide who were the persons responsible for the negligence which occasioned the damage. From time to time the hold seems to have been entered by the stevedores' men, by members of the crew, by surveyors, and by the men employed by the repairers; and it is easy to understand that one or more of these persons may not have been sufficiently scrupulous in replacing the tarpaulins on their entrance to, or exit from, the hold, or in preventing the water which had accumulated on the tarpaulins from finding its way into the hold.

The appellants relied on rule 2 of art. III. of the rules relating to bills of lading contained in the schedule of the Carriage of Goods by Sea Act 1924, which enacts as follows: "Subject to the provisions of Article IV. the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

It was not suggested on either side that there were any provisions in the bill of lading material to be considered apart from the articles contained in the statute, but the respondents relied upon rule 2 of art. IV.; this rule provides that "Neither the carrier nor the ship shall be responsible for loss or damage arising or re-

sulting from (a) act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship."

From the statement of the facts as found by the learned judge it could not be disputed that the respondents had failed properly and carefully to carry, keep, and care for the goods carried. But the respondents pointed out that the obligation imposed upon them was expressly made subject to the provisions of art. IV., and they claimed that the loss or damage complained of resulted from an act, neglect, or default of their servants in the management of the ship. The argument at the Bar turned mainly upon the meaning to be placed upon the expression "management of the ship" in that rule. The words in question first appear in an English statute in the Act now being considered, but nevertheless they have a long judicial history in this country. The same words are to be found in the well-known Harter Act of the United States, and as a consequence they have often been incorporated in bills of lading which have been the subject of judicial consideration in the courts in this country. I am unable to find any reason for supposing that the words as used by the Legislature in the Act of 1924 have any different meaning from that which has been judicially assigned to them when used in contracts for the carriage of goods by sea before that date, and I think that the decisions which have already been given are sufficient to determine the meaning to be put upon them in the statute now under discussion.

In the year 1893, in the case of *The Ferro* (7 Asp. Mar. Law Cas. 309; 68 L. T. Rep. 418; (1893) P. 38), certain oranges had been damaged by the negligent stowage of the stevedore. It was held by the Divisional Court that the negligent stowage of the cargo was not neglect or default in the management of the ship. Gorell Barnes, J. says (7 Asp. Mar. Law Cas., at p. 311; 68 L. T. Rep., at p. 420; (1893) P., at p. 46): "I think it is desirable also to express the view which I hold about the question turning on the construction of the words 'management of the ship.' I am not satisfied that they go much, if at all, beyond the word 'navigation.'"

Sir Francis Jeune says (7 Asp. Mar. Law Cas., at p. 311; 68 L. T. Rep., at p. 420; (1893) P., at p. 44): "It would be an improper use of language to include bad stowage in such a term. It is not difficult to understand why the word 'management' was introduced, because inasmuch as navigation is defined as something affecting the safe sailing of the ship . . . it is easy to see that there might be things which it would be important to guard against connected with the ship itself, and the management of the ship, which would not fall under navigation. Removal of the hatches for the sake of ventilation, for example, might be management of the ship, but would have nothing to do with the navigation."

In the case of *The Glenochil* (8 Asp. Mar. Law Cas. 219; 73 L. T. Rep. 416; (1896) P. 10) the same two learned judges, sitting as a Divisional Court, held that the words did protect the shipowner for damage done by pumping water into the ballast tank in order to stiffen the ship without ascertaining that a pipe had become broken, and thereby letting water into the cargo. Gorell Barnes, J. says (8 Asp. Mar. Law Cas., at p. 221; 73 L. T. Rep., at p. 419; (1896) P., at p. 19): "There will be found a strong and marked contrast in the provisions which deal with the care of the cargo and those which deal with the management of the ship herself; and I think that where the act done in the management of the ship is one which is necessarily done in the proper handling of the vessel, though in the particular case the handling is not properly done, but is done for the safety of the ship herself, and is not primarily done at all in connection with the cargo, that must be a matter which falls within the words 'management of the said vessel.'" Sir Francis Jeune says (8 Asp. Mar. Law Cas., at p. 220; 73 L. T. Rep., at p. 418; (1896) P., at p. 15): "It seems to me clear that the word 'management' goes somewhat beyond—perhaps not much beyond—navigation, but far enough to take in this very class of acts which do not affect the sailing or movements of the vessel, but do affect the vessel herself." And referring to his own judgment in *The Ferro* (*sup.*), he says: "It may be that the illustration I gave in that case, as to the removal of the hatches for the sake of ventilation, was not a very happy one; but the distinction I intended to draw then, and intend to draw now, is one between want of care of cargo and want of care of vessel indirectly affecting the cargo."

The principles enunciated in this case have repeatedly been cited since with approval in this country and in America. The same two learned judges applied them in the case of *The Rodney* (9 Asp. Mar. Law Cas. 39; 82 L. T. Rep. 27; (1900) P. 112), and they were accepted by the Court of Appeal in the case of *Rowson v. Atlantic Transport Company* (9 Asp. Mar. Law Cas. 347, 458; 89 L. T. Rep. 204; (1903) 2 K. B. 666). In that case the Court of Appeal held that carelessness in handling the refrigerating apparatus of the vessel, resulting in damage to the cargo, must be regarded as falling within the expression, on the ground that the refrigerating apparatus was used for the ship's provisions as well as for the cargo, and therefore that negligence in managing it was negligence in management of the ship.

I do not think it necessary or desirable to discuss whether the Court of Appeal was right in their application of the principle in that particular case, for reasons which will appear later; I refer to the judgment only because it accepted as the basis of the decision the construction which had been placed upon the words in the case of *The Glenochil*

(*sup.*). In the case of *R. F. Brown and Co. Limited v. T. and J. Harrison; Hourani v. The Same* (*ante*, p. 294; 137 L. T. Rep. 549) the Court of Appeal had to consider the meaning to be attached to the words of art. IV., rule 2, in a case in which loss was caused by the pilfering of the stevedore's men whilst the ship was being discharged. The court held that this did not fall within the expression "management of the ship"; but both Bankes, L.J. and Atkin, L.J., as he then was, discussed the meaning to be placed on the expression. Bankes, L.J. reviews the authorities both in this country and in the United States; he points out that the principle laid down in *The Glenochil* (*sup.*) has been accepted in the Supreme Court of the United States as being correct, and he adopts and applies that principle to the case which he is then considering. The learned judge expresses the distinction as being between "damage resulting from some act relating to the ship herself and only incidentally damaging the cargo, and an act dealing, as is sometimes said in some of the authorities, solely with the goods and not directly or indirectly with the ship herself. Atkin, L.J. says: "That there is a clear distinction drawn between goods and ship: and when they talk of the word 'ship' they mean the management of the ship, and they do not mean the general carrying on of the business of transporting goods by sea."

In my judgment, the principle laid down in *The Glenochil* (*sup.*) and accepted by the Supreme Court of the United States in cases arising under the American Harter Act, and affirmed and applied by the Court of Appeal in the *Hourani* case (*sup.*) under the present English statute, is the correct one to apply. Necessarily, there may be cases on the border line, depending upon their own particular facts; but if the principle is clearly borne in mind of distinguishing between want of care of cargo and want of care of vessel indirectly affecting the cargo, as Sir Francis Jeune puts it, there ought not to be very great difficulty in arriving at a proper conclusion.

I expressly refrain from a discussion of the cases of carelessness in handling refrigerating apparatus. Your Lordships were informed that that question is directly involved in a case under appeal to the Court of Appeal, which may ultimately reach your Lordships' House, and the matter is one of such general importance that it is better that it should be specifically dealt with when it arises for decision rather than in a case in which it can only be introduced by way of illustration.

It appears to me plain that if the test which I have extracted from the earlier cases is the correct one, it follows that the appellants are entitled to recover in the present case. It is clear that the tinplates were not safely and properly cared for or carried; and it is for the respondents then to prove that they are protected from liability by the provisions of art. IV., and that the damage was occasioned through the neglect or default of their servants

in the management of the ship. In my judgment they have not even shown that the persons who were negligent were their servants; but even if it can be assumed that the negligence in dealing with the tarpaulins was by members of the crew, such negligence was not negligence in the management of the ship, and therefore is not negligence with regard to which art. IV., rule 2 (a), affords any protection. It follows that the judgment of the majority of the Court of Appeal was wrong, that the appeal must be allowed with costs here and below, and that the judgment of the trial judge must be restored; I move your Lordships accordingly.

My noble and learned friend Lord Atkin desires me to say that he concurs in the judgment I have just delivered.

Lord SUMNER.—I agree, as the cargo in question was shipped in good order and condition and was delivered damaged, in a manner which was preventible and ought not to have been allowed to occur, there was sufficient evidence of a breach by the carrier of his obligations under art. III., rule 2, of the Act of 1924, to shift to him the onus of bringing the cause of the damage specifically within art. IV., rule 2, so as to obtain the relief for which it provides.

The trial judge's finding is not very explicitly given, and the evidence as to the precise way in which the damage occurred is not explicit at all, but I accept the view, on which the Court of Appeal proceeded, that the fresh water which wetted and damaged the tinplates got through the hatch of No. 5 hold into the shelter-deck and thence reached the lower hold; that it did so because from time to time during the various operations one or more sections of that hatch had to be raised to permit egress and ingress for men, some of whom were in the shipowner's employment and some not, who had to go below for these purposes, and because the ship's tarpaulins, which ought to have been placed, replaced, and kept in the proper position, so as to exclude the rain, were not so used by reason of neglect on the part of the ship's officers or some of them in the oversight of what was going on. It is not known exactly how the rain was suffered to get in or in what exact respect the handling and arrangement of the tarpaulins was insufficient, but it is assumed that more vigilant supervision would have prevented any material admission of the rain. What fell, while timber cargo was being discharged, is admitted to have been small in quantity and almost negligible in its effect, and, although the rain was more copious while the ship was in dry dock, no one can estimate in quantity or discriminate between damage, when the 'tween-decks were being chipped, caulked, and painted, and damage when the lower hold was being entered for various purposes. We accordingly approach the question, whether this default on the officers' part was or was not default in the management of the ship, without being able to

distinguish the relative importance to the case in this connection of discharging cargo, of painting and caulking 'tween-decks, both being operations carried out by the crew, and of repairs and renewals to machinery and hull carried out by ship-repairers.

In the Court of Appeal Scrutton and Sargant, L.JJ. agreed that the exception of default in the management of the ship protected the shipowner in these circumstances, but on very different grounds. The former says (*ante*, p. 388; 138 L. T. Rep., at p. 425; (1928) 1 K. B., at p. 726): "Assuming that the words deal with the management of the ship as a physical entity, and not management of the cargo-carrying adventure, on which the shipowner and cargo-owner have agreed to use the ship, here what has been managed is the hatches of No. 5 hold, an essential physical part of the ship. I cannot understand why, on the words themselves, this is not negligence in the management of the ship, or a substantial physical part of the ship."

Sargant, L.J., without agreeing that there is necessarily management of the ship so long as a physical part of the vessel is affected, says (*ante*, p. 392; 138 L. T. Rep., at p. 428; (1928) 1 K. B., at p. 736) that the expression covers "operations with regard to the ship as a whole and for ship's purposes and not merely operations in relation to the cargo . . . although the result of the negligence may be limited to damage to cargo and may not imperil or injure the ship at all. . . . Here the operations were for the purpose of repairing damage to the structure of the ship and of scraping and painting parts of the ship, and had nothing at all to do with the care of the cargo. . . . The primary, or rather the sole, nature and purpose of the operations in which the negligence occurred concerned the ship as a whole."

For the following reasons I am unable to accept either of their views. I concur in the judgment of Greer, L.J. The intention of this legislation in dealing with the liability of a shipowner as a carrier of goods by sea undoubtedly was to replace a conventional contract, in which it was constantly attempted, often with much success, to relieve the carrier from every kind of liability, by a legislative bargain under which he should be permitted to limit his obligation to take good care of the cargo by an exception, among others, relating to navigation and management of the ship. Obviously his position was to be one of restricted exemption. If management of the ship includes any part of the ship or any operation with regard to the ship as a whole, which is carried out for ship's purposes and not merely in relation to cargo, I think that the shipowner's position would be certainly no less favourable than it was before under voluntary bills of lading, and probably more so; for on this construction the obligation of art. III., rule 2, to take charge of the cargo is practically eviscerated and its business efficacy is frustrated. In every set of circumstances, of common occurrence at any rate, the shipowner would be

relieved. Considering the provisions of the Act of 1924 and the circumstances in which it was passed, such an interpretation is admissible only if the words used are clear to that effect, and to my mind they are not.

When the Legislature gave effect in 1924 to the labours of the International Conferences on Maritime Law of 1922 and 1923, it must be taken to have been aware of the English decisions, which from *The Ferro* (sup.) in 1893 onwards had construed the words reproduced in art. IV., rule 2, and as that line of decision had covered some thirty years and the clause had remained in general use in bills of lading, I think it must be taken that the Legislature intended to confirm the construction thus judicially arrived at, except in so far as, by introducing variations in the language used, it clearly made a change. Of foreign decisions, of course, the Legislature is not deemed to take notice, and, although the conference was doubtless well acquainted with the United States cases, it has not yet been held that the Legislature of this country is deemed to know what those whose reports or conventions it affirms have been familiar with. *Primâ facie*, therefore, the interpretation of the words in question, which had been laid down in the English decisions before 1924, had the approval of the Legislature and is not to be doubted. Now *The Ferro* (sup.) had decided that negligent stowage was not neglect in the management of the ship, and the succeeding cases had brought acts, which certainly seem to strain the word "management" to the utmost, within the scope of the clause simply because they were done for the safety of the ship herself, regarded as a ship and not as a cargo carrier, and were not done primarily in the interest of some particular cargo. It seems to me that the view of Scrutton, L.J. involves a dissent from these decisions, and he expressly says of United States cases, which follow the same line, that he would have decided several of them otherwise. I do not think this is competent, unless the language or the structure of the new legislation clearly departs from the words of the old clauses. By forbearing to define "management of the ship," though "ship" is specially defined with reference to the function of carrying cargo (art. I.), and making the obligation of care in art. III., rule 2, expressly subject to the provisions of art. IV., the Legislature has, in my opinion, shown a clear intention to continue and enforce the old clause as it was previously understood and regularly construed by the courts of law.

If one examines the language of the article apart from any previous decisions, I think one fails to find in it words to support the view of Scrutton, L.J. The ship is the subject both of navigation and of management, and this lends little support to the construction that management of any part of a ship will satisfy the words. It is the whole ship that is navigated and not any part of it, even though the neglect or default may directly operate upon only a particular part of the ship or its equipment.

Why should it be otherwise with management, or why in the case of management is the clause to be read as "of the ship or any part thereof," but in the case of navigation to be read simply as it is expressed? In neither case is it material to know what the thing negligently dealt with may be, provided the operation in which the neglect occurs is either "navigation or management" but in both cases alike "of the ship." The words "of the ship" are otiose, if it is the negligent navigation or management alone that matters. If any effect is to be given to them, they qualify and define the navigation and the management referred to, and do so in each case in the same way. If the navigation is of the entire ship, so must the management be. Of course in both cases alike some one and perhaps very subordinate part of the ship or its equipment may be the object which is immediately dealt with negligently, but neglect in regard to that object must still be neglect in the management of the ship if it is to avail the shipowner as a defence.

In adopting this view of the words of the Act and of their correspondence with the construction put upon the old bill-of-lading clause from *The Ferro* (sup.) to *Rowson v. Atlantic Transport Company* (sup.) I am fortified by the weighty judgments of the Court of Appeal in *Hourani v. T. and J. Harrison* (sup.) and by a series of recent decisions in the High Court. I think it is of importance to notice how uniformly since 1893 the English courts have interpreted the decisions, down to and including *Rowson's* case (sup.), in the sense I have ventured to suggest, and how generally a similar interpretation of similar words has been adopted in the United States. Hardly anywhere, and nowhere with real authority, has Scrutton, L.J.'s construction been laid down. So uniform a current of decision can only be departed from now upon the clearest grounds. The respondents' counsel laid great stress in argument on the language used in *Rowson's* case (sup.), especially by Kennedy, J. and by Vaughan Williams, L.J., and on some differences between the English decisions and those in the United States, notably between *The Glenochil* (sup.) on the one side and *Knott v. Botany Mills* (179 U. S. 69) and *The Germanic* (196 U. S. 589) on the other. These seem to me to be differences in the wording of the reasons given, but not in the principle or in the view taken of the particular facts to which the claim is applied. No one can profess that the language used in the different judgments has been uniformly happy. No one can deny that wide differences of view may well be taken of the matters of fact which arise in this class of case, even though between them there is a strong similarity. The management of the ship "as a ship" or "quâ" ship or "quoad" ship, and "primary object" and "secondary bearing" are expressions of which I may be perhaps allowed to speak with cold acquiescence without presuming to better them, and as for the facts it is never wise to try to decide case B

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because the part of the ship mishandled is "like" the part mishandled in case A. In *Knott's* case (*sup.*) the cargo should never have been so stowed that, if the ship got down by the head for a short time, the sugar would wet the wool, nor should the cargo in *The Germanic* (*sup.*) have been discharged, regardless of compensatory adjustment, so as to upset the previous stability of the ship and damage the cargo. Both cases follow *The Ferro* (*sup.*). As for *Rowson's* case (*sup.*), I do not think the expressions relied on really differ from those of Jeune, P. and Barnes, J., nor, as it seems to me, did the learned judges think they were differing from their predecessors. As to the facts of that case and the way in which the Court of Appeal regarded them, I am quite willing to defer any observations till an opportunity arises of considering refrigerating machinery as a whole, though the view I have formed of the general meaning of the clause must, so far as I am concerned, remain.

The view of Sargant, L.J. seems to me to have been based on a misunderstanding of the facts. Because the operations were repairing damage and scraping and painting 'tween-decks, and so had nothing to do with the cargo, he considered that the neglect or default occurred in the management of the ship as a whole, though incidentally it was the cargo that suffered by them. This is not how Wright, J. regarded the case, nor in my opinion do the facts bear it out but, as far as the interpretation of the clause goes, the learned Lord Justice accepts the current of authority and not the construction of Scrutton, L.J. What did the damage was misuse of the tarpaulins. Now the tarpaulins were used to protect the cargo. They were put over the hatch, as they always are, to keep water out of cargo holds. They should have been so arranged, when the hatch boards were taken off, as to prevent water from getting to the cargo. It was not a question of letting light into the 'tween-decks; they were lit by electricity. There is no evidence that an amount of water entered that would have done any harm to an empty hold or to the ship as a ship. Water sufficient when soaked into the wood of the boxes to rust the tinplates in the course of a voyage through the tropics might well have been harmless if it merely ran into the bilges. There is neither fact nor finding to the contrary. I think it quite plain that the particular use of the tarpaulins which was neglected was a precaution solely in the interest of the cargo. While the ship's work was going on these special precautions were required as cargo operations. They were no part of the operations of shifting the liner of the tail shaft or scraping the 'tween-decks. I would add one thing more. Even if the contention was right in fact, it does not cover the damage done by the admission of rain water while the hatches were off solely for the purpose of discharging cargo. Wright, J. seems to have found, though not with much confidence, that some damage was done then. He did not say how much, for the

evidence did not enable him to do so. It is true that counsel for the appellants admitted, and the Court of Appeal thought, that it was much less than the damage done afterwards; but unless it be held that negligence merely in discharging cargo is negligence in the management of the ship it is incumbent on the shipowner, on whom the whole burden of proving this defence falls, to show how much damage was done in the subsequent operations, because it is only in respect of them that he can claim protection. This he has failed to do, and in consequence he has failed to show to what extent in money his *prima facie* liability for the whole damage ought to be reduced.

Appeal allowed.

Solicitors for the appellants, *William A. Crump and Son.*

Solicitors for the respondents, *Botterell and Roche.*

Oct. 25 and Nov. 30, 1928.

(Before Lords HAILSHAM, L.C., SUMNER, BUCKMASTER, CARSON, and WARRINGTON.)

THE IKALA. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision — Damages — Detention — Commercial vessel — No substituted vessel — Rate at which damages should be calculated.

The plaintiffs claimed damages for detention of their steamship S. as a result of a collision with the steamship I. At the time of the detention the S., a British vessel, was engaged in importing lubricating oil into this country. Shipping was then being operated under the regulation of the Government, by whom all British vessels were requisitioned; but the S. was not requisitioned, and the Government had agreed that she should not be requisitioned whilst she continued to be engaged by the plaintiffs in this service. By the terms of the licence granted by the Government the plaintiffs could only import a limited quantity of oil in any particular year, and during the year in which the S. was detained they in fact imported the full quota permitted: the S. in fact performed the same number of voyages during the year in question as she would have performed had she not been detained at all. There was no evidence that the plaintiffs had engaged any vessel as a substitute.

Held, per Lords Sumner, Buckmaster, and Warrington (Lords Hailsham, L.C. and Carson dissenting), that the case must be referred to the registrar for the purpose of assessing compensation for the loss to the appellants for thirteen days of the use of the vessel, and it would then be open to the appellants to give evidence of any circumstances which in their view

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at Law.

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tended to support their claim to be paid the extra cost of employing chartered tonnage.

Decision of the Court of Appeal (ante, p. 402 ; 138 L. T. Rep. 508 ; (1928) P. 86) affirmed.

APPEAL from the decision of the Court of Appeal (Scrutton and Atkin, L.JJ. and Eve, J.) (reported ante, p. 402 ; 138 L. T. Rep. 508 ; (1928) P. 86).

The plaintiffs, the Anglo-American Oil Company, owners of the steamship *Strathfillan*, claimed damages from the defendants, owners of the steamship *Ikala*, in consequence of a collision between the *Strathfillan* and the *Ikala* which took place in the river Mersey on the 8th Aug. 1917, for which the defendants admitted liability. The *Strathfillan* was inward bound with a cargo of oil, and after discharging part of the cargo at Liverpool proceeded with the balance to Manchester, and completed her discharge there on the 18th Aug. The registrar found that the collision repairs occupied thirteen days, and he accordingly allowed the sum of 7150*l.*, being thirteen days' detention at the rate of 550*l.*. The rate of 550*l.* was fixed by the registrar upon evidence that in consequence of the delay of the *Strathfillan*, and for other purposes, it was necessary for the plaintiffs to charter other tonnage. The rate of hire at that time for vessels carrying oil was fixed by the Ministry of Shipping at 100*l.* per day. The cost of unrequisioned tonnage which the plaintiffs could have hired was at that time 230*s.* per ton per voyage, and at that rate, allowing for the hire paid by the Government, the plaintiffs quantified their loss at 550*l.* per day. There was no evidence that any particular vessel had been chartered as substitute for the *Strathfillan*. The defendants called no evidence.

The Court of Appeal held, reversing Lord Merrivale, P., that the plaintiffs were not entitled in the circumstances to damages calculated at the rate per diem at which another vessel could have been chartered. Per Atkin, L.J.: "... whatever the general rule as to the loss of use of vessels in commercial service, there may be circumstances in which the infructuous use of the vessel for the period of detention does not give rise to substantial pecuniary loss," e.g., loss of use for a month of a harvesting machine in the winter or a snow plough in the summer would cause little or no pecuniary loss.

The owners of the *Strathfillan* appealed.

C. R. Dunlop, K.C. and R. F. Hayward for the appellants.

E. Aylmer Digby, K.C. and R. H. Balloch for the respondents.

The House took time for consideration.

LORD HAILSHAM, L.C.—The question involved in this case relates to the measure of damage recoverable against a wrongdoer for the loss of use of a chattel.

The appellants are an English company whose business consists in the importation to this country and the sale here of lubricating

oil. In the year 1917 the business of importing oil was strictly regulated by the British Government ; the question of the proper use of tonnage was of paramount importance to the nation, and the Government decided the amount which each importer should be allowed to bring in ; the actual quota allowed to the appellants was 1,188,700 barrels. The appellants owned two steamers, one of which was known as the *Strathfillan*. These two vessels were exclusively used by the appellants for the importation of oil, but were quite insufficient to carry the quantity which they were allowed to import. The British Government allotted space in liners to the appellants to the extent of 657,400 barrels, and the balance of the necessary shipping space had to be provided by the chartering of outside vessels with the permission of the Shipping Controller. On the 8th Aug. 1917 the *Strathfillan* was damaged by collision with the *Ikala* ; the owners of the *Ikala*, who are the present respondents, admitted their liability to pay 70 per cent. of the damage thereby occasioned, and the present suit is brought by the appellants to ascertain and recover that amount. The appellants delivered a claim consisting of nine different items ; the only item now in dispute is the claim for loss of use of the vessel, which was put at fourteen days and claimed at 574*l.* 15*s.* 2*d.* per day. The damages were assessed by the learned registrar and merchants ; they allowed thirteen days as the time during which the appellants were deprived of the use of the *Strathfillan* by reason of the collision, and that finding is not in issue. No evidence was called on behalf of the respondents at the reference, and the only relevant evidence was that of Mr. Balsillie, the assistant manager of the shipping department of the appellant company. After explaining the regulation of imports and the space allowed to the appellants in liners, Mr. Balsillie stated that in addition to the *Strathfillan* the appellants had a similar vessel slightly larger, "but the majority of the transport that we had to provide for our proportion was in chartered vessels, which chartered vessels were all controlled, and we had to get permission from the Shipping Controller even to charter them. If any of our own vessels were delayed that increased the quantity of chartered tonnage that we had to get." He went on to explain that when they ascertained that the *Strathfillan* would be delayed they tried to obtain permission from the Government to purchase another vessel, but that that plan failed ; that the appellant company hired extra tonnage and paid 230*s.* on a net charter form ; and he stated that the appellants' claim for detention was on the basis of what they had paid themselves to do the work the *Strathfillan* would have done. In re-examination a question was put to him in this form : "In consequence of not getting her to carry goods you had to charter at these high rates ?", to which he replied : "Yes, we had to maintain it." This answer led to a further cross-examination on behalf of the respondents, which began by the question : "Do you say

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because of the fourteen days' delay by this collision you had to charter in October?" The answer was: "Certainly, to the extent of that loss." He was asked to explain the answer, and he said: "It means this: that she was fourteen days delayed repairing the actual damage, and then there were another eleven days. There were twenty-five days' use of that vessel gone—lost for ever. Twenty-five days' loss of work puts the whole programme back, which means that we have to charter the equivalent of the work that vessel would have done during those twenty-five days, and we charge you for your proportion." A little later on he said: "Every delay had to be made up, at the cost we paid for people to do the work."

The learned registrar and merchants allowed the appellants a sum equal to thirteen days' loss of use of the vessel at 550*l.* per day. In the registrar's reasons he says: "The plaintiffs claimed for the loss of time on a commercial basis, and evidence was given that in consequence of this delay of the *Strathfillan*, and for other purposes, it was necessary to charter other vessels, and this evidence was uncontradicted. The rate of hire at that time for vessels carrying oil was fixed by the Ministry of Shipping, and the claim was made on this basis."

The respondents appealed from this decision to the President of the Probate, Divorce, and Admiralty Court, but the learned President confirmed the registrar's award. From this decision the respondents appealed to the Court of Appeal, who reversed the decision and remitted the case to the learned registrar and for the purpose of assessing the amount of compensation due to the owners of the *Strathfillan* for the loss to them for thirteen days of the use of the said vessel as a profit-earning vessel.

The Court of Appeal were struck by the fact that the appellants in fact imported into this country the whole of their quota for 1917, and that the *Strathfillan* completed her last voyage in 1917 on the 8th Dec., so that even if the voyage had been completed thirteen days earlier it would have been impossible for her to make another voyage during that year. The Court of Appeal deduced from this fact that even if there had been no collision the appellants would have been unable to make use of the *Strathfillan* during the thirteen days, and, therefore, held that it was impossible to allow to the appellants the cost of hiring a neutral ship as a substitute for that period.

In my view this decision is based upon a fallacy. It is quite true that the appellants could not have used the *Strathfillan* in any case to bring in part of their 1917 quota during that year. But the evidence showed that the *Strathfillan* was being used during the whole of 1917 and 1918, except when she was in dry dock for the repairs due to the collision and for certain alterations which the owners effected at the same time. It was proved that in Oct. and Nov. of 1917 the appellants were chartering neutral vessels to carry oil to this country; and, in my judgment, the fact that the

1917 quota was completed and that the *Strathfillan* contributed her full share to that quota is quite irrelevant. The work that she would have been doing during the period of her disablement was the work which she actually did as soon as the disablement came to an end; namely, the importation of oil for 1918.

Under these circumstances, the observations made by the Court of Appeal as to the possibility of what Lord Atkin describes as "infructuous use of the vessel" did not arise. In my judgment the measure of damage for the loss of use of a commercial chattel such as this which was being used by the injured party for commercial purposes is the commercial value to him of the chattel during the period for which he was deprived of its use. If in fact he hired another chattel to take its place the hire paid would *primâ facie* be the amount of the damage which he sustained; but if no other chattel could be found to replace the injured one I do not see that that alters the measure of damage; it merely deprives the court of one possible means of assessing it. In such a case other methods of ascertaining the loss must be employed; and the obvious method is to find out what was the market value of chattels of that kind during the time that the plaintiff is deprived of their use, and to see whether the facts prove that it was worth the plaintiff's while to pay at least that amount for such a chattel. In view of the conditions which prevailed as to tonnage at the end of 1917, the suggestion that unless the appellants prove that they actually hired a particular vessel to replace the one damaged they may have to rest content with interest on the capital cost of the damaged vessel for thirteen days is, to my mind, so repugnant to common sense and reality as to amount to a denial of justice to the injured party.

In the present case it is proved by Mr. Balsillie's evidence that the appellants were in fact chartering neutral vessels at 230*s.* a ton at this very period to do exactly this work, and it is a fair inference to draw that the work done by the *Strathfillan* was of at least this value to them. From the 230*s.* must, of course, be deducted the actual cost of running the *Strathfillan*; this is the figure which has been assessed by the registrar and merchants. In my judgment there was ample evidence to justify them in taking this course, and I agree with the learned President in thinking that there is no ground for interfering with their decision. It follows that, in my opinion, this appeal should be allowed; but as I understand that the majority of your Lordships take the contrary view the case will go back to the registrar and merchants to reassess the damages upon such evidence as the parties may be advised to adduce.

LORD SUMNER.—The learned registrar in his report states as the ground on which the damages were awarded in this case, that evidence was given that in consequence of this delay of the *Strathfillan* and for other purposes it was

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necessary to charter other vessels. This, as Scrutton, L.J. points out, was on the footing of hiring a substituted ship to take the *Strathfillan's* place, while she was under collision repair. For those actual days no ship was hired but, some few weeks after that repair was finished, the appellants chartered the *Kjopenhavn* and three other foreign ships, all then in European waters, at such substantial intervals that, if the 1917 quota of oil had to be brought in in 1917, they could have carried none of it. The case made was that, as the delay to the *Strathfillan* had to be made up at some time, a proportion of the freight paid for ships subsequently chartered, corresponding to the fourteen days' delay, was legitimately charged. The appellants' trade was that of importing lubricating oil from the United States into the United Kingdom. They kept the *Strathfillan* for this trade and never hired her out or used her in any other, nor did they ever intend to do so. Oil in 1917 was strictly controlled by the Ministry of Munitions on the principle of allocating a certain quantity for import to each company engaged in the importation, the Shipping Controller undertaking to give space in liners for a certain quantity, leaving the importers to provide tonnage for the rest of their allocated quantity either in their own ships or by chartering others as they chose. On this point the words of the appellants' witness should be quoted from the shorthand note :

Q. 12. Would this be a convenient opportunity for you to explain what were the arrangements about the transport of this oil? Were they controlled in any way by the Ministry of Munitions?

A. Yes, the whole of the lubricating oil imports in 1917 and before 1917 were controlled by the Ministry of Munitions. They stated the quantity, which would be permitted to be brought into the country, and the whole of the companies were controlled. The quantity, which was allowed to be brought in in 1917, was the quantity imported by the companies in 1915, plus 20 per cent.

Q. 13. Can you say what was the quota allowed to be imported by your company in 1917?

A. We imported 1,188,000 barrels.

On the words of this statement Scrutton, L.J. justly says, and Atkin, L.J. uses language to the same effect: "They could not import more than 1,188,700 barrels a year and they did in 1917 import that quantity. The *Strathfillan* after the collision made another voyage in 1917 to produce that quota and could not, if there had been no collision, have made a second voyage. She had no time to make such a voyage and, if she had, it would exceed the permissible quota."

I think it is plain that, as the evidence was given and unless it is altered, the entire 1917 quota was brought in and, as it had to be brought in in 1917, none of the foreign vessels chartered after the *Strathfillan* collision could have carried any part of it. That work was completed by the voyage that she made after her repairs were completed. Accordingly the assumption of fact, on which alone the report was founded, failed entirely.

It was evident that the appellants had suffered some presumable damage from the loss of use of their ship, and the Court of Appeal, instead of entering judgment for the respondents, made the order now under appeal, remitting the case to the registrar to assess the compensation due for the loss for fourteen days of the use "of the vessel as a profit-earning vessel."

The words "profit-earning vessel" of course mean as a vessel out of whose use they might obtain in the course of their trade a measurable profit. It does not suggest that a profit as carriers of oil for hire is to be looked for, since she was only used for carrying the owners' own oil.

The order was an open one and leaves the appellants quite free to try again. If the registrar's decision was not to stand, I do not suppose they could have been more favourably dealt with, and it is clear to me that it could not. The evidence as given did not, for the reasons stated by Scrutton, L.J., support the finding.

Two contentions, as I understood it, were advanced for the appellants, the first that the evidence, as given, was a slip on the part of the witness, which misled no one and was indeed otiose in any case, since the registrar from his general experience knew the true facts; the second that in any case "a commercial measure" of damage ought to be adopted, namely, what the ship was worth to the owners, which as she was bought and maintained to save them from having to pay hire was the same thing as the current rate of hire, which otherwise they must have paid. In so far as we are asked to say that the expression of this evidence, as given, was a mere slip and therefore to reverse the order of the Court of Appeal, I do not agree. To say "allowed to be brought in in 1917," when what was the truth, as everybody knew, and what was meant was "allowed for 1917 to be brought in when they chose," is a surprising slip of the tongue and I should have expected it to have been at once corrected at the instance of the appellants' counsel or of the court—it was of course no affair of the counsel for the respondents—but, instead of this, the very expression is taken up and repeated in the examining counsel's next question. Further, it was not the appellants' case, before this evidence was taken, that other ships were chartered because of this delay to this ship. The chartering was merely said to have been "owing to shortage of tonnage." During the evidence, in answer to the question "in consequence of the delay did you have to do anything with regard to supplying the loss caused by her delay?" the witness said, "Yes, in addition to the loss of the use of the *Strathfillan*, the ravages of the submarines were very bad at this time." Chartering only began on the 9th Oct., the cost of which was claimed on the basis that it was "what we paid others to do the work the *Strathfillan* would have done." To say the least of it the witness was not very

decided in his support of the present case, and when in the last question in re-examination he was given a chance of mending matters—"in consequence of not getting her to carry goods you had to charter at those high rates," and the answer came, "Yes, we had to maintain it" (that is to maintain the service), further cross-examination at once began, which the registrar would obviously not have allowed unless this question and answer had been new matter. As the evidence stands, I cannot dispose of this point as a harmless slip of the tongue on the part of the witness or a play upon his words by the Court of Appeal. If this case is to be made, evidence should be given, by the same witness or by others, which will do it clearly. As for the knowledge already possessed by the registrar, no one recognises more fully than I do how greatly the dispatch of business in the registry is facilitated by the knowledge that the tribunal is already possessed of much information and invaluable experience, but reliance on this really rests on the tacit consent of the parties, and must not be pressed so far as to excuse the absence of necessary evidence. In the registry the right to take judicial notice in regard to matters constantly before the tribunal probably extends a good deal further than would be the case in the King's Bench Division, but I do not think that the registrar can be called on in 1927 to take judicial notice of the precise regulations applied by a temporary Government department in 1917 to changing circumstances, which must have required alteration from time to time, nor do I expect that the registrar would claim that in this particular matter he was confident that he could do so. No doubt at the further hearing evidence will be forthcoming.

It is inadvisable to say anything now of the facts that may be proved or to prescribe a measure of damages applicable to evidence not yet given. I only wish to say two things. If, as was the case at the previous hearing, the appellants' case is to be that the delay upset the general current of their trade, which had to be maintained in spite of it, I think that the extent and cost of this upset must be proved and must be causally connected with the collision in accordance with the ordinary rules of law as to damage. A ship's day is not like a unit of currency, always good for so many shillings. It has to be proved that, in doing the shipowner the wrong of laying his ship idle at the time in question, work, which she would otherwise have done during the time, went undone to his measurable loss or was only done by resorting to other expedients at a measurable outlay. I do not, any more than the Court of Appeal did, expect or think it would be satisfactory that no sum or that only an insignificant sum should be recoverable, and, if the evidence can be properly given, which the appellants appear to have thought they had really given on the previous occasion, it may be unnecessary to reconsider the question of damages at all.

I think the appeal should be dismissed and I move your Lordships accordingly.

My noble and learned friend Lord Buckmaster desires me to say to your Lordships that he concurs in the opinion that I have just read.

LORD CARSON.—I agree with the conclusion arrived at by the noble Lord on the Woolsack. It is I think evident that the main contest raised by the respondents before the registrar and the President was that as the appellants were not in a position to hire out the *Strathfillan* but could only use her for the carriage of their own oil the decision of *The Susquehanna* (*ante*, p. 81; 135 L. T. Rep. 456; (1926) A. C. 655) applied and that the proper measure of damages to allow was interest on the capital value of the vessel. I observe also that in the respondents printed case in this House that contention was put forward in the forefront of the reasons stated. No such contention has been, however, argued before your Lordships. It is, as I understand the judgment of the Court of Appeal and of your Lordships who take a different view from that at which I have arrived, that the owner is entitled as damages to the loss which he sustains by losing the use of his profit-earning vessel in the trade of carrying his own goods of sale for thirteen days, though I cannot find how it is suggested that measure is to be measured. Now the registrar has found and made his assessment of damages on the basis that in consequence of the delay caused by the accident it was necessary for the appellants to charter other tonnage to enable the appellants to carry on their business and to the extent of the expense incurred for the thirteen days for which they had lost the use of the *Strathfillan*. On appeal to the President, who confirmed the finding of the registrar, the President stated that "the evidence given before the registrar in the present case satisfied him that the plaintiffs were importing lubricating oil on a quantified scale for sale under stabilised conditions and at stabilised prices and that in order to import the full quantities allotted to them they necessarily employed extra tonnage equivalent to that of the *Strathfillan* and paid for the whole at the authorised rate of 230s. per ton per voyage." That there was evidence to support the finding of the registrar and the conclusion of the President seems to me clear. It has been already partly quoted by the noble Lord on the Woolsack, and I would only like to add other quotations from the evidence of Mr. Balsillie in his direct examination. "(Q.) Did you hire extra tonnage? (A.) Yes." Again: "(Q.) Have you prepared your claim for detention on the basis of the cost to you of these chartered vessels? (A.) Yes. What we paid others to do the work the *Strathfillan* would have done, and the incidental expenses which accrued during the time." And again: "(Q.) To summarise the matter before I go into the detail of it, but for this collision what would the vessel have done? (A.) She would have completed discharging all her cargo, bunkered, loaded empty barrels for safety purposes, and

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proceeded out to load another cargo of lubricating oil for us." Now in addition to this evidence which was not contradicted, we were informed that the charter-parties which were in evidence showed that from Aug. to Nov. four ships were chartered of an aggregate tonnage of 13,000 tons, and that such ships were making voyages as the log-books showed, which in some cases could only terminate in 1918, though whether such cargoes were part of the 1917 quota or of the 1918 quota does not appear, nor do I think it is material. It was, in my view, clear on the evidence that continuous voyages were in progress after the 8th Aug., and that the *Strathfillan*, if available, would have been continuously employed and would have been able to commence her last voyage in 1917 thirteen days earlier than she did, and would thus have made an earlier delivery of oil in 1918. Under these circumstances I cannot myself see why it should be necessary to point to the exact ship which supplied the tonnage necessitated by the loss of the use of the *Strathfillan*. It follows as a reasonable deduction, especially when you consider the difficulties under which the business was carried on during this war period, which was graphically described by Mr. Balsillie when he said: "The tonnage position was very desperate at this time."

The Court of Appeal seem to have passed their judgment and to have disregarded Mr. Balsillie's evidence on the ground that as the *Strathfillan*, after the collision, made another voyage in 1917 she could not if there had been no collision have made a second voyage that year as the quota for 1917 could not be exceeded and had been all imported.

The evidence as to the quota is very meagre, but I can find no evidence that it had necessarily to be delivered in 1917, and on the other hand we find, as I have already pointed out, that some of the hired vessels were starting on voyages which could not be completed until 1918, though it is not stated in respect of what quota such voyages were made, and I can see no grounds whatever for suggesting that by reason of the limitation of the quota there was any probability that the *Strathfillan* would under the circumstances have been at any time "infructuous," as suggested by Atkin, L.J. I am therefore of opinion that the appeal should be allowed and the assessment of the registrar restored. I said during the hearing that I found a difficulty in understanding what the measure of damage was which the Court of Appeal had laid down by the formal judgment as it now stands, but if I understand the opinions of the majority of your Lordships correctly, it is intended that the whole matter should be open in the inquiry before the registrar on such evidence as may be adduced.

LORD WARRINGTON.—This is an appeal from an order of the Court of Appeal reversing an order of the President, by which he confirmed the report of the registrar and merchants assessing the amount of the damages to which

the owners (the appellants) were entitled owing to the detention of their ship during the execution of repairs occasioned by a collision with a ship belonging to the respondents.

By the order of the Court of Appeal the report was referred back to the registrar "for the purpose of assessing the amount of compensation due to the owners of the steamship *Strathfillan* for the loss to them for thirteen days of the use of the said vessel as a profit-earning vessel."

The registrar and the learned President in effect allowed as an item of special damage the net cost of hiring other tonnage to take the place of the *Strathfillan* during the period of detention—which was fixed at thirteen days—and the real question is whether there was any evidence on which a finding that the said tonnage was in fact hired in consequence of the ship's detention could properly be arrived at.

The material facts are these:

The collision occurred on the 5th Aug. 1917, and the repairs necessitated by it commenced on the 14th Aug. 1917 and were completed by the 31st Aug. It is agreed that of this period thirteen days only are to be treated as lost by reason of the collision. The ship was out of service for a period of twenty-five days altogether, but the extra period of twelve days resulted from the execution by the owners of certain alterations voluntarily undertaken by them.

During the year 1917 abnormal conditions prevailed. The trade in lubricating oils in which the *Strathfillan* was engaged was controlled by the Government, and a limit was set on the quantity particular merchants were entitled to import. The quota allowed to the appellants for the year 1917 was 1,188,700 barrels. The Shipping Controller undertook to give them space in liners for 657,400 barrels, leaving them to find tonnage for the remaining 531,300 barrels. This they did, partly by means of ships of their own and partly by chartering other vessels. The *Strathfillan* was one of their own ships used for this purpose. The rate of hire fixed by the controller was necessarily a very high one, viz., 230s. a ton per day deadweight capacity. The appellants' trade consisted in the importation and sale of their own oils, and, inasmuch as so far as they used their own vessels, the carriage was effected at the actual cost to them, which was much less than the costs of chartering other ships, it was to their advantage to use their own ships to their utmost capacity. But in the result, the transport they had to provide by chartering exceeded that provided by their own ships. In 1917 they chartered nine vessels, five before and four after the date of the collision. The first charter effected after that date was on the 9th Oct. 1917. The quota for the year 1917 was in fact imported. Whether this had to be effected and was effected within the calendar year or whether some latitude was allowed and a part was actually landed after the end of the year is left in doubt. Nor was any evidence given as to the quantity of oil

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remaining to make up the quota at the time the detention occurred.

Seeing that the entire period of detention was twenty-five days, it is a little difficult to suppose that the appellants really went through the process of calculating how much extra tonnage would be necessitated by the thirteen days in question and fixed their hirings accordingly. In fact, I think, if the way the claim was launched and the evidence tendered in support of it are carefully considered, they did no such thing.

The appellants' claim was formulated in a document headed "Statement in support of loss by detention," printed in the Appendix. In this document it is not alleged that any hirings, which would not otherwise have been effected, were necessitated by the detention of the *Strathfillan*, but the claim is obviously based on the theory that, inasmuch as to use their own ship was cheaper than to use hired tonnage, a proportionate part for the thirteen days of the tonnage actually hired under whatever circumstances should be assumed to be substituted for the *Strathfillan* so that the extra expense might be treated as damages for loss of use of the vessel.

I now turn to the evidence given by Mr. Balsillie, the only material witness called by the appellants. In his examination in chief, he says: "If any of our own vessels were delayed that increased the quantity of chartered tonnage that we had to get," and again, at the bottom of the same page, in answer to the question "Have you prepared your claim for detention on the basis of the costs to you of these chartered vessels?" he says: "Yes, what we paid others to do the work, the *Strathfillan* would have done." In fact, his evidence in chief is based on the theory on which to my mind the "statement" above referred to is based. It is in re-examination that the point now made is raised, and that by a leading question: "In consequence of not getting her to carry goods you had to charter at those high rates? Yes, we had to maintain it." He is then further cross-examined, and I think the result of this is to make him fall back on the old theory that part of the chartered tonnage must necessarily be treated as substituted for the *Strathfillan*.

I am clearly of opinion that this evidence was not sufficient to establish the contentions that the appellants found it necessary to provide extra tonnage equivalent to thirteen days' use of the *Strathfillan*, and that in consequence of such necessity they did in fact provide it.

But this does not dispose of the question. Though there was no sufficient positive evidence of any chartering effected for the purpose of supplying the tonnage lost by the detention of the *Strathfillan* the circumstances proved might have been such that the tribunal would have been justified in drawing the inference that a proportion of the chartered tonnage did in fact supply the tonnage lost by the detention.

Both the learned Lords Justices in the Court of Appeal expressed the view that not only did

the circumstances proved fail to justify such an inference but that they actually negated it. After the collision the *Strathfillan* made one round trip. There was no time to make another before the end of 1917, and there would not have been time even if the detention had not occurred. It is said that this conclusion was based upon an erroneous view of the meaning of the expression "the quota for—or in—1917" and that in fact the quota might have been completed by another voyage of the *Strathfillan* if she had not lost the thirteen days. All I can say is if there was any such misapprehension it was due to the way in which the case was presented to the tribunal. It is idle to say that the registrar and merchants had outside knowledge of their own on which they were entitled to act. The report contains no indication of their having possessed any such knowledge, all they say is that in consequence of the delay of the *Strathfillan* and for other purposes it was necessary to charter other vessels. Even, therefore, if they possessed and were entitled to act on outside knowledge—that they were so entitled I am not prepared to admit without further authority than the mere statements of counsel to that effect—there is no reason to suppose that such outside knowledge influenced their conclusion.

In my opinion, the evidence before the tribunal was not sufficient to justify the inference in question, and the order of the Court of Appeal was right and ought to be affirmed and the appeal to this House ought to be dismissed with costs.

But under that order the case is referred back to the registrar for the purpose of assessing compensation for the loss to the appellants for thirteen days of the use of the vessel, and it will be open to the appellants to give evidence of any circumstances which in their view tend to support their claims to be paid the extra cost of employing chartered tonnage. It is only in the absence of evidence enabling him to estimate the loss that the registrar may have to fall back upon interest on capital value as was done in the case of *The Susquehanna* (ante, p. 81; 135 L. T. Rep. 456; (1926) A. C. 655).

Appeal dismissed.

Solicitors for the appellants, *Thomas Cooper and Co.*

Solicitors for the respondents, *Godfrey Warr and Co.*, agents for *Batesons and Co.*, Liverpool.

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 2, 6, and 7, 1928.

(Before SCRUTTON, LAWRENCE, and SANKEY,
L.JJ.)

LIND v. MITCHELL. (a)

ON APPEAL FROM THE KING'S BENCH DIVISION.

Insurance (Marine) — Ship — Mortgage — Interest of mortgagee — Policy — Perils of the sea — Negligence of master covered — Ship holed by ice — Unreasonable abandonment by master — Absence of motive to destroy ship — Liabilities of underwriters — Marine Insurance Act 1906 (6 Edw. 7, c. 41), s. 55, sub-ss. (1) and (2), s. 60, sub-s. (1), s. 78, sub-s. (4).

A wooden ship, of which the plaintiff was the mortgagee, was insured by the defendant under a policy which covered loss by perils of the sea or fire and also, under clause 8 of the Institute Time Clauses, "loss . . . caused through the negligence of master, mariners, engineers or pilots."

On her voyage to Newfoundland in bad weather she encountered heavy ice, with the result that she was holed and began to leak. The master, being of opinion that a gale was imminent and that the vessel would sink, decided to abandon her, and in order to prevent her from being an obstruction to navigation set her on fire. In an action by the mortgagee on the policy,

Held, that although on the facts the abandonment of the vessel was unreasonable, the perils of the sea had begun to operate before the master abandoned the vessel. Those perils were the dominant cause of the loss, which was a loss proximately caused by a peril insured against within the meaning of sect. 55, sub-sect. (2) (a), of the Marine Insurance Act 1906, although the loss would probably not have occurred but for the misconduct and negligence of the master or crew, and the underwriters were accordingly liable.

Decision of Wright, J. affirmed.

APPEAL from a decision of Wright, J.

The plaintiff, G. J. Lind, a broker of Oporto, claimed to recover against the defendant as underwriter under a policy of marine insurance effectedd on the wooden schooner *Gordon E. Moulton*. That policy, which was dated the 7th March 1914, and was for 1200*l.*, part of 2100*l.*, was a time policy on hull, and (or) materials subject to the Institute Time Clauses, free of particular average, with leave to carry liquor, and the period of the insurance was for twelve calendar months from the 25th Feb. 1924 to the 24th Feb. 1925, both days inclusive. By clause 8 the policy also covered "loss of or damage to hull or machinery . . . caused

through the negligence of master, mariners, engineers or pilots."

The claim was for a total loss of the vessel on the 1st March 1924 in the Bay of Fundy by perils insured against. The facts, which are fully set out in the judgment of Scrutton, L.J., were shortly these.

The vessel, when proceeding to Newfoundland, encountered a heavy gale in the Bay of Fundy as the result of which she was driven against ice and seriously damaged, causing her to leak. After the crew had been working at the pumps for a considerable time the master decided that he could no longer save her, and as she was bound to sink he decided to abandon her, but before doing so set fire to her in order that she might not be a danger to other vessels.

By his defence the defendant pleaded that the vessel was not lost by perils of the sea or fire within the meaning of the policy, but that she was abandoned and set fire to and burnt by the master wilfully and wrongfully and (or) without lawful excuse.

Wright, J. held, that there had been no fraudulent throwing away of the ship, but that the master had prematurely abandoned her, and that even if the abandonment was fraudulent the plaintiff, who was an innocent mortgagee and no party to the fraud, would not be debarred from recovering from the defendant under the policy because he would be entitled to show that the loss was due to an actual peril of the sea.

The Marine Insurance Act 1906 provides :

Sect. 55 (1). Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against. (2) In particular (a) the insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew.

Sect. 60 (1). Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable. . . .

Sect. 78 (4). It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss.

The defendant appealed.

Clement Davies, K.C. and Van den Berg for the appellant.

Dunlop, K.C. and James Dickinson for the respondent.

SCRUTTON, L.J. — The very careful and thorough argument of counsel for the appellant has satisfied me that we cannot interfere with the equally careful and exhaustive judgment of the learned judge below, though no doubt the case raises some questions of interest. I do not propose to repeat all the facts which appear in

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

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that judgment. But, shortly, the position is this: The ship in question is a three-masted schooner of the type specially identified with Newfoundland, a wood vessel, and, at the time in question, was four or five years old; not an old ship. That class of vessel was largely used for the carriage of salt cod from Newfoundland to the Mediterranean, where their tastes ran in the direction of salt cod; but that class of business was seriously interfered with so far as these Newfoundland schooners were concerned by Spanish sailing vessels. I mention the original trade because it accounts for the fact that the person claiming under this policy, who is the mortgagee of the ship in question, lives in Portugal; obviously his connection with the ship is because of the previous salt cod trade carried on with Portugal and many countries in the Mediterranean. The ship was owned, apparently, by a number of small shareholders in Newfoundland, but the managing owner was a member of the Moulton family, who appear to give their name to a large number of these small schooners.

When the salt fish trade became precarious an excellent substitute was found by the managing owner in the direction of running spirits into the United States. It appears from the correspondence that a large number of Moulton schooners were chartered to various philanthropists, who were providing the United States with whisky, on the very satisfactory terms of \$2000 a month, the charterer finding all the crew's wages and provisions and doing the repairs. This particular ship was not in that fortunate position because, apparently, owing to the lack of business ability of the master, the charter had only been made for \$750 a month, as compared with \$2000 which some of the other Moulton schooners had been getting. The vessel had spent a considerable portion of time in 1923 and 1924 lying at "Rum Row," that being part of the open sea more than twelve miles from the coast of the United States, where ships with spirits do congregate, hoping that somebody will be able to get their whisky ashore in the United States. This ship had lain in the open sea for some considerable number of months, including the winter, and no doubt had got rather knocked about.

In Feb. 1924 she was returning to a port, or small place called Burgeo, on the coast of Newfoundland, which apparently has some connection with Mr. Moulton, the managing owner, and with a company through which the mortgagee supplied schooners with various requisites. She had some bad weather; she lost her mainsail coming across the mouth of the Bay of Fundy; and when she came along Nova Scotia and Cape Breton there was a good deal of ice. For some days she went through what is called slob ice, that is to say, comparatively soft, small ice. On Thursday, the 28th Feb. 1924, she encountered a gale, in which she had to lower all her sails and run with bare poles. There was a line of big packers to leeward; she apparently bumped along this ice, and I think

it is quite clear that she strained herself or damaged her side along that ice in such a way that she began to leak very considerably.

I fear there is a great deal of exaggeration in the evidence given about this damage. One of the witnesses says that she had two holes, each of which was 2ft. long by 1ft. wide, and yet contrived to go along quite cheerfully with those two holes for two or three days. That, of course, is ridiculous. But all the witnesses appear to say that they had to pump very hard; sometimes it is put as pumping every ten minutes. But, at any rate, a considerable quantity of water was entering the ship through perils of the sea. At the end of Thursday, the 28th, the weather had got better. There was a following wind, and, still pumping constantly, the vessel made about five or six miles an hour at some time across the strait or arm of the sea which leads between Cape Breton and Newfoundland. She got along on the Friday and on the Saturday still pumping until at some time which is quite uncertain, because all the witnesses disagree as to when it was, the following wind dropped. The weather is described as calm, and I suppose the sea became calm. The vessel was then, according to the captain's statement, somewhere within fifteen miles of Burgeo.

The captain's account of what happened is this, that the glass began to rise; that the weather was bad in the north-east; that he, who had been at sea for a good many years, and a good many years in that locality, formed the opinion that the rising glass there meant what it sometimes means in England, a strong north-east wind coming; he thought that the sky to the north looked like it and that his leaking ship with the mainsail gone was likely to be blown out to sea by the north-east wind in a condition in which she would probably have sunk with all hands on board. He therefore formed the view, it being calmer at the time according to him, that he would abandon the ship which he thought would be lost in the gale which he thought was coming; and so the crew got into the boats with all their property. The only thing that they seem to have left behind is the log. They rowed the fifteen miles, or rather they rowed and sailed, because the captain says that they sailed with a north-east wind. The captain then did a thing which strikes anybody who does not know anything about it as odd: he set the ship on fire.

Anyone familiar with shipping knows that one of the dangers of the North Atlantic consists of derelict wood ships floating awash; and frequently war vessels are sent out to try to find them and then sink them. There are several expressions used in the correspondence, I think by persons other than the captain, in which they say that they supposed what was done was to try to make sure that this abandoned wood vessel should not go floating about and constitute a danger to navigation. That is why the captain said he did it, and that is the only possible explanation of what looks at first sight to be a very odd thing, that a

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man leaving a ship which he thought was going to sink should set her on fire.

The captain and crew leaving the ship somewhere after midnight, the time being a little uncertain and the evidence on the point quite contradictory as to whether they had any or no sails up, the next morning a steamer belonging to the Newfoundland railways, the *Glencoe*, came out from Burgeo. She saw ahead of her a fire; she steered her course towards it, and got to it about an hour and twenty minutes after she had left Burgeo. We do not know the speed of the ship, and therefore we cannot get any very clear idea as to how far the ship was then off Burgeo; but, anyhow, the steamer got to her within an hour and twenty minutes of leaving Burgeo. They found her floating high in the water. The master and crew said that they went down the accommodation ladder into the boats, and this looks as if the vessel were high in the water. They saw on her port side damage which looked like chafing of ice, but she did not appear to be awash or as if she had a great deal of water in her. She was then heading out to sea with an east wind behind her.

On that naturally the people who had insured her became rather suspicious; there had been too many ships which had disappeared in calm weather sufficiently near the land for the crew to row ashore, and there had been a number of cases in which this court had found that the ship was scuttled, there having at the time been a heavy drop in the value of shipping, and it being of great pecuniary benefit to the assured that the vessel should go to the bottom; it was much better for the owner that she should go to the bottom, and that he should get the high value insured in the policy than that she should stay afloat at a time when the value of shipping had fallen. The mortgagee assured, who had insured the vessel for a year at the time, brought an action claiming that the ship was lost, the underwriters having refused to pay, and so the whole matter was investigated before Wright, J.

The policy was a time policy beginning on the 24th Feb., about five or six days before the vessel was lost. She was insured against perils of the sea and fire, and by the Institute Time Clauses, under clause 8 of which she was also insured "specially to cover loss of vessel directly caused by accidents in loading, discharging or handling cargo or caused"—not "directly caused"—"through the negligence of master, mariners, engineers or pilots." The underwriters resist the claim on the ground that there is no evidence that the proximate or direct cause of her loss was any of those matters.

The law is clearly stated in the Marine Insurance Act 1906, and it is therefore unnecessary to go into the previous cases which the Act replaces. Sect. 55 of the Marine Insurance Act 1906 says: "(1) . . . The insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which

is not proximately caused by a peril insured against. (2) In particular—(a) the insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew. . . ."

First of all, in most of the scuttling cases one has had to consider the provision that the insurer is not liable for any loss attributable to the wilful misconduct of the assured. That disappears from this case, because a shorthand note has been read to us in which counsel for the defendant began his case before the learned judge below by saying that he did not allege any misconduct in either the assured, the mortgagee, or in the managing owner, and this case can only be conducted in this court on the basis on which it was conducted in the court below. That part of the section therefore disappears; the loss was not "attributable to the wilful misconduct of the assured."

Then we come to the next part of the section: "He is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew." In this case since the *Glencoe* saw this vessel she has never been seen again, and when the *Glencoe* saw this vessel and for some two days before I have no doubt that she was making water in considerable quantities owing to stranding on or collision with ice, which would be a peril of the sea, and, in spite of the argument of counsel for the appellant, I have no doubt that this vessel went to the bottom ultimately through the incursion of water through a strained hole which was originally caused by a peril of the sea—namely, collision with ice.

But, as I understand it, the argument which is presented to us is this: that the loss must be proximately, that is, directly, caused by a peril insured against, and that in this case the direct cause of the loss was the abandonment by the master—and not the fact that water which had been entering before that abandonment continued to enter after that abandonment—and that no proper steps were taken to prevent it from entering, or to take the vessel to a port where she would have been safe while the leak was repaired. That argument is grounded upon the decision of the House of Lords confirming the decision of this court in the case of *Samuel and Co. Limited v. Dumas* (16 Asp. Mar. Law Cas. 305; 130 L. T. Rep. 771; (1924) A. C. 431). In that case the entry of the water which ultimately sank the ship began with and had no existence before the deliberate act of the master in turning on taps or opening taps and valves connected with the sea. In this case, of course, the position is obviously different, for before the act which is complained of—namely, the abandonment—took place, there had been the peril of the sea which was causing the water to enter, and what is complained of is that the

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entry of water was not stopped and no steps were taken to stop it by continuing the voyage to port.

As I understand it, the argument for the appellant endeavours to appropriate the term "wilful misconduct of the assured" where it appears in the first part of the sub-section, and say that if he proves wilful misconduct, as distinct from negligence, of the master, that will relieve him from any question of perils of the sea caused by negligence of the master. I do not find any distinction made in the sub-section between "misconduct" and "negligence" except that they are both covered by the sub-section. The sub-section is to apply if "the loss would not have happened but for the misconduct or negligence of the master." But in case this matter goes higher, I desire to say that I entirely agree with the view of the learned judge below that, suspicious as the case may be, there is no evidence on which one would be justified in finding intentional casting away of the ship, wilful and deliberate misconduct, conduct akin to scuttling by the master. Wilful casting away is a criminal offence and the man who alleges it must prove it, and he must prove it with evidence as if he were alleging a criminal offence. Having read the evidence carefully, I can find no evidence on which a jury would be entitled to convict the master in this case of wilfully and deliberately abandoning the ship not from any consideration of the existing danger from her leaks but simply because he wanted to get rid of her.

One of the matters which influences me in that decision is the complete absence of motive of the master. In all the scuttling cases one has been able to prove a distinct advantage to the assured from the vessel being cast away, such as heavy over-insurance, impecuniosity of the assured, and matters like that. In this case it is not alleged that the assured or the managing owner was guilty of misconduct or gave any instructions for misconduct. The master is not insured; he will get nothing by the vessel going to bottom, except that he will lose his employment. I entirely fail to see any evidence on which one can find that the abandonment of the ship was a wilful casting away by the master.

Next one comes to the question of fact: Was this, in the language of sect. 60 (1) of the Act, which deals with constructive total loss, a reasonable abandonment of the ship "on account of its actual total loss appearing to be unavoidable"; that is to say, total loss probable from the leak appearing, and judged to be unavoidable, and therefore a reasonable abandonment of the vessel which it is reasonably thought will anyhow be lost by perils of the sea? I am satisfied that the abandonment was unreasonable. The vessel was within fifteen miles of her home port. The lifeboat, into which the crew got, according to the evidence was able to sail and row in with a north-east wind. If the lifeboat could sail, the schooner could equally have sailed with the north-east wind. The schooner was still floating high in the water

seven or eight hours after she was abandoned. I assume in my judgment that the abandonment by the master was unreasonable.

I desire to put out of the way one matter which is suggested in some of the text-books with reference to sect. 78 of the Act. Sub-sect. (4) says: "It is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss." It has been argued, therefore, that if the agents of the assured do not take all measures that are reasonable, the underwriter is not liable. I agree on that point—and therefore exclude it from the case—with the view taken by Lord Sumner in *British and Foreign Marine Insurance Company v. Gaunt* where he says (15 Asp. Mar. Law Cas. 305; 125 L. T. Rep., at p. 497; (1921) 2 A. C., at p. 65): "There remains an argument based on a reading of sect. 78 (4) of the Act which is very novel. It is one of the disadvantages of codification that new terms used or even unfamiliar sequences of propositions suggest that the law has been changed, where those familiar with the old decisions would not have suspected it. The argument affords a striking instance of this. The section obviously refers to suing and labouring. It cannot possibly be read as meaning that if the agents of the assured are not reasonably careful throughout the transit he cannot recover for anything to which their want of care contributes. The point therefore fails." I agree with that view and therefore I shut out any argument based upon sect. 78.

Then we have this: There has been negligence of the master, not negligence of the assured. There has been negligence of the master which has resulted in the continuing action of a previously existing peril of the sea. In my view, that is covered, if it were necessary to cover it, by clause 8 of the Institute Time Clauses. The word "directly" is left out, and the underwriter insures against loss of the vessel "caused through the negligence of master, mariners, engineers or pilots." Now if it were true—and I do not think it is—that under the existing law but for that clause you would treat the direct cause of the loss as being the premature abandonment and not the entry of sea water from a previously existing peril, in my view that clause requires the underwriters to pay where the negligence of the master has caused the loss of the ship. I do not think that without that clause there would be any answer to the claim against the underwriters. I think that sect. 55 (2) (a) shows there would not be, and that for the reasons which I have given in the previous part of the judgment, the judgment in *Samuel and Co. Limited v. Dumas* (sup.) does not apply to a case like this, where a peril of the sea has endangered the ship and the negligence of the master afterwards results in proper measures not being taken to save the ship.

For these reasons, which, as far as the law is concerned, I have given at some little length because they are slightly different from those

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of the learned judge below, I agree with the conclusion at which the learned judge has arrived that the plaintiff in this case makes out his case against the underwriters and that the underwriters do not show any sufficient defence to the claim. The appeal therefore must be dismissed with costs.

LAWRENCE, L.J.—I agree and have nothing to add.

SANKEY, L.J.—I agree, and only desire to add a few words.

First of all, I hold the same opinion as that expressed by the learned judge where he says, "Under all the circumstances I do not feel—much as I am affected by suspicion—that I can find that there was a fraudulent throwing away of the ship in this case." It appears to me, therefore, that the correct inference to be drawn from the evidence is this, that the perils of the sea had begun to operate before the master abandoned the vessel; she had been exposed to the ice, she had been exposed to heavy storms, and there was evidence that she was already making water, though, not, as I think, to the exaggerated extent that some of the witnesses say, but she had been making water. In my view, therefore, those perils of the sea were the dominant cause, and, having regard to sect. 55 (2) of the Marine Insurance Act 1906, which has already been read, I think the underwriters are liable in this case, because there was a loss proximately caused by a peril insured against, although perhaps the loss would not have happened but for the misconduct and negligence of the master or crew.

I do not think it is necessary to go further than that for the purpose of my judgment, but as counsel for the appellant has argued the point with regard to "wilful negligence," I desire to say a few words about that point. I first look at the finding of the learned judge; he says: "This ship sank, according to the evidence, and everyone is in agreement, because she had been holed in the ice. That was the real and only cause of her loss." I do not propose to read again clause 8 of the Institute Time Clauses under which the insurance was to cover loss of the vessel caused through the negligence of the master; but, if I understand counsel's argument, it is this: He would say that there are three states of mind which he imputes to an event; one which is merely an error of judgment, another which amounts to negligence, and another which amounts to criminality. Now he says that this is not a case of mere error of judgment; this is not a case—having regard to the facts found by the learned judge—of criminality; and therefore it comes within the second category of a state of mind induced by negligence. But as far as negligence is concerned, there are two degrees of negligence, one of which he says is wilful negligence, which is not covered by the clause in question.

Whether it is possible to draw that distinction I am not concerned to discuss in this case. As I have already said, sect. 55 (2) seems to me

to render this discussion unnecessary. I think there is no evidence here which would support the argument of counsel for the appellant; I think the master was undoubtedly negligent. I think he abandoned the ship prematurely and unreasonably, but I cannot think that those findings amount to something which comes between the negligence for which the insurers are responsible, and the criminal negligence for which they are not.

It is to be observed that the learned judge finds that there is no evidence, and no suggestion, of any motive for doing it; all the facts seem the other way. Quite apart from sect. 55 (2) of the Marine Insurance Act 1906, I think clause 8 applies to the facts of this case; but, as I have ventured to say, I do not think that is necessary here for the decision, because I think it is governed by, and provided for, in the section above named.

For these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Ballantyne, Clifford, and Co.*

Solicitors for the respondent, *William A. Crump and Son.*

Dec. 13 and 14, 1928.

(Before SCRUTTON, GREER, and SANKEY, L.J.J.)

JAMES FINLAY AND CO. LIMITED v. N. V. KWIK HOO TONG HANDEL MAATSCHAPPIJ. (a)

ON APPEAL FROM THE KING'S BENCH DIVISION.

Sale of goods—C.i.f. contract—September shipments Java sugar—Bill of lading—Dates of shipment incorrectly stated—Right of buyers to repudiate contract—Measure of damages—Sale of Goods Act 1893, s. 53, sub-s. (2).

It is an essential part of a c.i.f. contract that true and accurate documents relating to the goods to be shipped in compliance with the contract should be tendered to the buyer. The damages to which, upon default being made by the seller, the buyer is entitled, are the difference between the contract price of the goods and the market price obtained for the goods, and there is no duty on the part of the buyer to minimise those damages by bringing an action against his sub-buyers.

APPEAL from the decision of Wright, J. (reported *sup.*, p. 500; 139 L. T. Rep. 582; (1928) 2 K. B. 604). The facts, as stated by the learned judge, were these.

The plaintiffs were a company carrying on business as merchants in India and elsewhere, having a house in London, and the defendants were Java merchants engaged in the sale and shipment of sugar. The plaintiffs claimed damages as buyers against the defendants as

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

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sellers under three contracts made in Jan. and Feb. 1920 for 300 tons of Java sugar for each of the months July, Aug., and Sept. 1920, c.i.f. Bombay. The contracts were made through brokers at Samarang, and shipments were to be made at the rate of 100 tons a month under each contract. There was no dispute regarding the July and August shipments; the dispute related to the September shipment. The contracts contained the following provision regarding payment: "Buyers are to open a credit (or credits) on Messrs. James Finlay and Co. Limited, London, which credit is to be confirmed by the bank at buyers' expense, by cable if necessary, and the sellers or their agents are to draw thereunder in three months' sight drafts, for the due payment of which drafts at maturity the buyers remain responsible." The plaintiffs in the ordinary course of their business made three sub-contracts with certain buyers in Bombay at various prices slightly higher than the prices in the contract between themselves and the defendants. These sub-contracts were also c.i.f. contracts and provided for equal shipments in July, August, and September of a certain quantity of sugar, and it was provided by clause 7 in each of the sub-contracts that "the bill or bills of lading shall be conclusive evidence of the date of shipment." The defendants duly delivered the July and August instalments and arranged to ship the September instalment (the one in dispute) in the British India Steam Navigation Company's steamship *Sealdah*, from the port of Cheribon, in Java. The *Sealdah* arrived at Cheribon at 1.30 p.m. on the 30th Sept. 1920, and though ready to receive cargo received none on that day. Loading commenced at 7 a.m. on the 1st Oct., continued on the 2nd Oct., and the *Sealdah* sailed for Bombay on the 3rd Oct. 1920, arriving there on the 9th Nov. 1920, and completing discharge on the 15th Nov. 1920. The price of sugar in Bombay had fallen, and the buyers under the sub-contracts began to raise objections, alleging that the goods tendered were not a September shipment, and refused to take delivery. The plaintiffs, therefore, had to sell the sugar by auction at a price considerably less than the contract price with the defendants and suffered a loss of over 9400l.

The bills of lading were signed by the ship's agents, Messrs. McNeill, at Samarang, there being no branch at Cheribon, the actual port of shipment. They were "shipped" bills of lading bearing date Samarang, the 30th Sept. 1920, and purported to show the goods as "Shipped in good order and condition (by the defendants) on board the steamship *Sealdah* lying in the port of Cheribon for carriage to Bombay." No goods, however, were shipped on that date.

Though the contract between the plaintiffs and defendants provided for the opening of a credit, none was in fact opened in respect of the first two shipments. It was not till the end of Sept. 1920 that the plaintiffs were asked to do so by cable, and this they did by a cable sent on the 30th Sept. and addressed to the

brokers at Samarang. Drafts dated the 30th Sept. 1920 were accordingly drawn by the defendants payable to the Hong-Kong and Shanghai Banking Corporation, whose agents at Samarang were also Messrs. McNeill, and purported to be drawn under a telegraphic credit dated London, the 30th Sept. 1920. There was no question of any delay in cabling the credit, and it was certain that the cabled credit was not received at Samarang till the 2nd Oct. The drafts, therefore, could not have been drawn on the 30th Sept.

After making careful and lengthy inquiries the plaintiffs came to the conclusion that the shipment in question was not a September shipment, and in 1922 served a notice of arbitration upon the defendants under the arbitration clause of the contracts. This clause read as follows: "Any dispute arising out of this contract is to be settled by arbitration of London brokers in the usual manner, and this submission may be made a rule of the High Court of Justice or any division thereof." Prolonged litigation followed: an award was made in Jan. 1923: the award was set aside by a divisional court in Nov. 1923: the parties then agreed to waive the arbitration clause and have the questions, whether the defendants had fulfilled their contracts and whether the plaintiffs were not entitled to damages for breach of contract, determined by action in the courts. In the course of the proceedings the matter went before the House of Lords, where it was decided that the contract was one which was to be construed by English law: (137 L. T. Rep. 458; (1927) A. C. 604.).

Further delay arose because the defendants obtained an order for a commission to Java to take the evidence regarding a custom alleged by the defendants that though the shipment was not made in September, they were still entitled to maintain that they had fulfilled their contract. That custom was thus stated in the amended pleadings: "Further, or in the alternative, by the custom of the port of loading, should a steamer which has contracted to take cargo for shipment during a particular month arrive at the loading port, at which such cargo has been declared ready for shipment by the shippers, at any date during the month, and the cargo to be loaded on such steamers is ready in lighters during the month, and loading takes place within a reasonable time after the vessel's arrival, then, notwithstanding that such cargo may not be loaded during the contracted month, it is accepted that the shipper fulfils his engagement in respect of the shipment period, and, therefore, all bills of lading for the cargo may bear the date of the month on the contract, notwithstanding the fact that the steamer may not have loaded during such month." It appeared, however, that this practice or custom was abolished or discontinued some time in 1921, apparently because the banks, or the American banks, had become aware of it, and had protested with that effectiveness which banks can exercise.

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Wright, J. held that a c.i.f. contract was not only a contract for the sale of goods which must be shipped as called for by the contract description, but was also a sale of documented goods. The c.i.f. seller was bound to procure and tender the shipping documents; in particular a bill of lading which would, among other things, show the date of shipment, that being a condition of the contract. An implied condition of the contract was that the bill of lading so tendered should be a true and accurate document and correctly state the date of shipment. It was on the faith of the bill of lading that the buyer was called upon to pay the price and accept the goods, and he had the right, under such a contract, to reject the goods and to refuse to pay the price if shipment was not made in the contract month. The effect of misdating the bill of lading was to deprive him of that right, and in such a case the incorrectness of the date of shipment was not a mere technical breach. The measure of damages fell within sect. 53, sub-sect. (2) of the Sale of Goods Act 1893, "the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract." It was not necessary for the buyer to bring actions against his sub-buyers as a condition precedent to an action for damages for breach of contract.

The defendants appealed.

Jowitt, K.C. and *Van den Berg* for the appellants.

Le Quesne, K.C. and *D. B. Somervell* for the respondents.

SCRUTTON, L.J.—If we were going to differ from the view of the learned judge below, I should prefer to take time to consider the form in which I should put my judgment, and if we were obliged to accede to the invitation of counsel for the appellants to explain how the House of Lords, who decided the case of *Williams v. Agius*, decided *Re R. and H. Hall Limited and W. H. Pim (Junior) and Co.'s Arbitration* (139 L. T. Rep. 50), again I should think it respectful to that tribunal very carefully to consider the language in which my judgment should be put. But as we propose to affirm the judgment of the learned judge below, and as in my view the question of the reconciliation of *Re R. and H. Hall Limited and W. H. Pim (Junior) and Co.'s Arbitration* (*sup.*) and *Williams Brothers v. E. T. Agius Limited* (110 L. T. Rep. 865; (1914) A. C. 510) only arises very indirectly, if at all, in this case, I will give my judgment at once.

The point is a comparatively short, interesting, and possibly difficult one as to the measure of damages, and it arises in this way: A Dutch firm sold sugar to a well-known English firm carrying on business in India, Messrs. James Finlay and Co. The contract was for shipment of a quantity of sugar in three months, one-third of it to be in September. The question only arises as to the September shipment, and it is well settled, since the

case of *Bowes and others v. Shand and others* (3 Asp. Mar. Law Cas. 461; 36 L. T. Rep. 857; 2 App. Cas. 455), that these conditions as to the time of shipment are vital conditions with regard to the sale of goods. It is useless, if you have contracted to sell a September shipment, to tender goods shipped in October and to say that that difference in time is only a very little one. The term as to the time of shipment is of the essence of the contract.

The Dutch firm had, on the 30th Sept., sugar which would have satisfied this contract ready for shipment at a port in Java, and the ship on which they were going to ship it arrived on that date at the port and lay there, but none of the sugar was shipped on board the ship during the month of September; consequently the Dutch firm broke their contract of sale with Messrs. Finlay. But more happened than that, because, this being a c.i.f. contract, the sellers had not only to ship the goods under a contract that they should be carried to the port of destination named in the contract, but they had also to furnish the buyer with certain documents. In the first place they had to furnish him with a contract of carriage relating to the goods specified in the contract, so that if these goods were lost during the voyage by matters for which the shipowner was responsible, the buyer would be able to recover his loss from the shipowner. They had also to furnish to the buyer a policy of insurance covering goods which were goods complying with the contract, so that if the goods were lost during the voyage by matters coming within the policy, the buyer who did not get his goods could recover the value of them from the underwriters. And it is as much a part of the contract that the seller should ship the goods as that he should provide the buyer with the documents.

It is not necessary to discuss whether it is accurate to say that a c.i.f. contract is a sale of documents or a sale of goods. In view of the fact that the goods may be lost before the documents are tendered and before the property has passed, there is a good deal to be said for the view that at any rate a very large proportion of the contract is a sale of documents. But at any rate it is an essential part of the contract that accurate documents relating to goods complying with the contract should be furnished to the buyer.

After and possibly before the war a very lax practice had been growing up, by which goods that should be shipped at the end of the month, and were, in fact, shipped after the end of the month, had provided for them a bill of lading dated in the month of shipment, when it should have been dated after the month of shipment. Sometimes that was done because the shipper gave an indemnity to the shipowner, and the shipowner did what he ought not to have done honestly, and, relying on the letter of indemnity, misdated the bill; sometimes it was done by alleging that there was a custom that you might in certain circumstances

describe goods as shipped in September which were not shipped in September, but which were ready for shipment or were in lighters to be shipped, or other varieties of custom. But whatever was the reason of the practice it was a most undesirable one. It is not one that I should suspect a well-known company like the British India Steam Navigation Company of approving for a moment, and I have no doubt that they dealt properly with what has been disclosed in this case as to the action of their servants. But for some reason or other the people who shipped on behalf of the Dutch company, actually, I think, the Handels Bank, got mate's receipts dated the 30th Sept., although the goods were not in the custody of the ship on that day, took from the ship a bill of lading dated the 30th Sept., although no goods were shipped on board the ship on that date; and under their contract with their buyers, Messrs. Finlay, they had to provide them with documents. They had to provide them with the bill of lading so that they might get delivery from the ship, they had to provide them with a bill of lading, also attached to the draft, so that the payment might be made against documents showing that the goods shipped were goods complying with the contract; and the Dutch firm sent forward through the bank who discounted the draft to them with documents attached, a bill of lading wrongly dated, and they sent forward to India, so that the people in India might get delivery of the goods, a bill of lading wrongly dated. The result was that Messrs. Finlay received a bill of lading apparently in order, apparently showing goods shipped during September, and paid the contract price. The market had fallen heavily, and consequently they paid much more than the market value of those goods at that time, and if the truth had been told on the bill of lading—that is to say, if the bill of lading had been truly dated—they would have rejected the goods and kept the price in their pocket, being a considerable sum more than the value of the goods which were tendered to them owing to the fall in the market.

Messrs. Finlay had, in fact, sold some part—how much is not quite clear—of the 300 tons of the three September shipments, and when they tendered the bills of lading to their sub-purchasers the latter refused to take them on the ground that the goods had not been shipped in September. Whether the sub-purchasers had any information which justified that view, or whether they merely refused them because the market had fallen and they had a general and possibly well-founded suspicion of all bills of lading dated on the last day of the month owing to the practice that had been prevailing, does not appear; but they did reject the bills of lading, and so far as these goods were concerned they were right, because the goods were not shipped in September and they were not goods that they were obliged to take. In the sub-contract there were provisions that in the case of rejection the goods should be sold by auction, and the price obtained should be the

measure of damage as compared with the contract price, and accordingly under the sub-contracts Messrs. Finlay might sue the sub-purchaser. But there were circumstances giving rise to suspicion, and Messrs. Finlay sued the Dutch firm for breach of contract, and in the course of the case it became apparent that there were very good grounds for the suspicion of the Indian purchasers, and, in fact, upon hearing the evidence—the captain of the ship being called, and no one being called who represented the Dutch firm at the port of shipment—the judge came to the conclusion that the suspicions of the Indian firms were well founded, and that the goods had not been shipped in September; and the learned judge gave them as damages, the difference between the price that they had paid under the contract and the value of the goods at the time of delivery in Bombay.

The argument on the other side was: "That is quite a wrong measure of damages. The learned judge should have approached the problem in this way: You have got October shipment. If you had paid you would have got September shipment. The value of the two was the same, and you have lost nothing because you have got goods of exactly the same market value as you would have got if the goods had been shipped in September." The learned judge rejected that view, and took the view, as I understand it, that it was a substantial term of the contract, or a condition vital to the contract, not only that you should ship goods in September, but that you should deliver to the person whom you asked to pay for those goods genuine documents, such as bills of lading, showing the right day of shipment—that is to say, a shipment in September. And, as I understand, he took this view: "If you had complied with your contract and tendered bills of lading giving the true date of shipment, namely, October, Messrs. Finlay might and would have rejected them and quite rightly. In that event they would have kept in their pocket the price that they had to pay under the contract; you would have got goods worth so much, and the loss of the market would fall very properly upon you, the Dutch firm, because you had not complied with the conditions which would enable you to get the contract price, and you would have got goods which were worth the market price. On the other hand, the buyers in that case would not have paid the contract price, because the contract had not been fulfilled and they were not called upon to pay it, and the money would stay in their pocket; and it is because it has not stayed in their pocket—that is to say, the difference between the contract price and the market price has not stayed in their pocket—but has gone to you, and has gone to you because you have broken your contract by presenting a bill of lading which is not a genuine document in the sense that it accurately represents goods complying with the contract, that that is the amount which necessarily follows from your breach of the contract."

I think I have correctly stated the view that the learned judge has taken, and I agree with it, and should have stated it in the same way myself.

The buyers, Messrs. Finlay, are not claiming the difference between the market value of the goods delivered and the price they would have got under their sub-contracts. If they had been claiming that, then I think the question which has been discussed between counsel and the court as to the exact meaning of the case of *Re R. and H. Hall and W. H. Pim (Junior) and Co.'s Arbitration (sup.)*, as compared with *Williams Brothers v. E. T. Agius Limited (sup.)* would have been interesting, and we might have been compelled to give counsel for the appellants the amount for which he asked. But as the buyers are not claiming the difference between the market price and the sub-contract price, but are only claiming the difference between the market price and their contract price with the Dutch firm, it appears to me that that question does not directly arise, and the only way in which it may arise is that it may be, and is said, in fact: "When we broke our contract by delivering to you wrong bills of lading, it was your duty to minimise the damages, and one of the ways in which you could minimise the damage was that you had a contract with sub-contractors under which you could have passed off these goods at a price which would have left you with no damage." Messrs. Finlay's answer to that is: "It is quite true that we had a contract under which the Indian buyer was bound to accept the date in the bill of lading as conclusive, but for us to bring an action against the Indian buyer to recover the price of goods that we knew not to be in accordance with the contract, because of that term, would not be in the ordinary course of business and would ruin our credit in India, and as a matter of business, and of the standard of morality which should attach to an English firm of standing, we decline to bring an action against an Indian firm to compel them to take goods which we know are not in accordance with the contract. It would be different if we did not know, and it was in doubt, and we could say: 'Yes, we do not know which way it is, and you do not know, but here is a contract that the bill of lading date is to be taken'; that would be a different matter." I personally cannot think that a man who has broken his contract can compel his buyer who has not broken his contract to take action to minimise the damages of a person who has broken his contract, by claiming money to which he knows he is not entitled, which will ruin his credit in the business world.

Therefore, it appears to me that it is impossible to say that there was a duty to minimise these damages by resorting to the contract with the sub-buyers. I hope that the House of Lords, who alone can do it, may soon get an opportunity of explaining how their decision in the case of *Re R. and H. Hall and W. H. Pim (Junior) and Co.'s Arbitration (sup.)*

is to be reconciled with their decision in *Williams Brothers v. E. T. Agius (Limited) (sup.)*. The House of Lords cannot overrule its decisions. There is an interesting passage in one of Lord Sumner's judgments which says that there are many unreported judgments of the House of Lords which people are violating every day, but that these judgments of the House of Lords remain law and cannot be altered even by the House of Lords itself; and before the decision in *Re R. and H. Hall and W. H. Pim (Junior) and Co.'s Arbitration (sup.)*, I had been brought up, as most of the members of the Bar have been brought up, to understand that as a general rule you could not use a sub-contract entered into by a buyer either to increase or to minimise the damages he claimed; it was an accidental matter with which the seller had nothing to do. I found it in *Rodocanachi, Sons, and Co. v. Milburn Brothers* (6 Asp. Mar. Law Cas. 100; 56 L. T. Rep. 594; 18 Q. B. Div. 67), which was a decision of the Court of Appeal. Some people doubted it, and I found that the House of Lords affirmed it in *Williams Brothers v. E. T. Agius Limited (sup.)*. In an unreported case in which my brother, Greer, L.J., was counsel, they again repeated the language of *Williams Brothers v. E. T. Agius Limited (sup.)*, and affirmed *Rodocanachi, Sons, and Co. v. Milburn Brothers (sup.)*, and in *Slater and Co. v. Hoyle and Smith Limited* (122 L. T. Rep. 611; (1920) 2 K. B. 11), the same principle was applied, that unless you could get the seller contemplating, so that he makes himself liable to pay, the possibility of a sub-contract under which a claim may be made on the buyer, you would have to disregard that sub-contract, as being an accidental matter with which the seller had nothing to do, whether it was used to increase or to diminish the sum claimed; and it was one of the many instances in English law where the measure of damages by law did not award the real loss that the plaintiff had suffered, but it was still a rule of English law.

Now it appears to me at present, although it is not necessary to express any final opinion on the matter, that *Re R. and H. Hall and W. H. Pim (Junior) and Co.'s Arbitration (sup.)* can only be explained in connection with *Williams Brothers v. E. T. Agius Limited (sup.)* by the particular terms of the contract in that case. It is well known to anyone who is concerned with commercial affairs that many of the trade associations have set up and recognised a form of dealing with a number of purchasers and sub-purchasers which it is quite difficult to relate to any legal principles, and that when A. sells to B., and B. then sells those goods to C., and so on through the rest of the alphabet, the trade associations have set up a form of contract by which Z., at the end, can sue A., Z. having no contract with A. whatever. Now, of course, that is very difficult to fit in with legal principles, but when you get a contract between A. and B., drawn up by the Corn Trade Association, a number of terms are introduced as to what C., D., E. and F., and all the

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rest of the alphabet up to Z. can do, and it is quite possible to say to A.: "You must have contemplated that B. was going to re-sell, because a number of terms are agreed as to what is to happen to the rest of the alphabet who have bought from B."; and as far as I can understand at present, you can only justify *Re R. and H. Hall and W. H. Pim (Junior) and Co.'s Arbitration (sup.)*, after the decision of *Williams Brothers v. E. T. Agius Limited (sup.)* and the other Court of Appeal decisions, by saying that it is founded upon the fact that the contract entered into by the seller contemplated a series of "string" contracts with subsequent sub-purchasers, and that A. must therefore be taken to have contemplated that the result of his breach of his contract with B. might lead to claims on B. by sub-purchasers, although as a matter of fact with the machinery of the Corn Trade Association it would not lead to a claim on B., but would lead to a claim by Z. on A., the seller. As I have said, it does not seem to me, in the view that I take of the way in which the learned judge has arrived at the damages, to be necessary to say anything final about that, but that seems to me at present to be the only way in which the decision in *Re R. and H. Hall and W. H. Pim (Junior) and Co.'s Arbitration (sup.)* can be justified, having regard to the two previous decisions of the House of Lords of which I have spoken.

For those reasons, I think that the view taken by the learned judge below was right, and that the appeal should be dismissed with costs.

GREER, L.J.—I agree. This appeal raises a question as to the measure of damages arising out of the breach of three contracts whereby the defendants in the action, the present appellants, sold to the plaintiffs in the action who are the respondents to this appeal, certain quantities of Java sugar, to be shipped in the months of July, August and Sept. 1920. Taking the three contracts together, the contracts called for the shipment in each month of 300 tons of Java sugar, to be shipped to a port in India, and the contracts were contracts on what are known as c.i.f. terms, the price being given at a price per hundredweight, cost, insurance and freight, shipment during the months of July, August and Sept. 1920, 100 tons monthly. That is on one of the contracts, each of the contracts being the same with regard to the c.i.f. terms, and the monthly shipments, and with regard to payment. The terms of payment were that buyers were to open a credit or credits on Messrs. Finlay and Co., London, which credit is to be confirmed by the bank at buyers' expense, by cable if necessary, and the sellers or their agents are to draw thereunder in three months' sight drafts, for the due payment of which drafts at maturity buyers remain responsible. The terms as to payment were slightly modified by a letter which records the terms of an agreement authorising the sellers to "value on the buyers at three months' sight, payable in London for the invoice cost of the following lots of Java

sugar," and then it mentions these contracts. "Bills of lading of such shipments are to be filled up to the order of Messrs. James Finlay and Co., Limited, Bombay, and certificates of origin and bills of lading in duplicate to be forwarded direct to Messrs. James Finlay and Co., Limited, Bombay. All the drafts are to be advised to, and the remaining bills of lading and invoices delivered up to us against our acceptance. And it is hereby agreed with you and as a separate engagement with the *bonâ fide* holders respectively of the bills drawn in accordance with this credit that the same shall be duly accepted on presentation and paid at maturity." The effect of these terms was that the bill of lading was to be made out to the purchasers, and the sellers were to be in the same position, as if they had paid cash at the time that the bill of lading was made out, because they had a guarantee that the bills would be accepted.

Now what happened in relation to the September shipment was this: The goods were not shipped in September; they were shipped on the 1st or 2nd Oct., and in some way or other which is unexplained mate's receipts were made out dating the shipment as on the 30th Sept. How that came to be done we do not know, and it would not be right to assume for the purposes of this case that that was done for any purposes of fraud by the people who in fact did procure those mate's receipts. We know nothing about it, and I agree with counsel for the plaintiffs' argument that it is not right that any court should deal with a matter of that sort on the assumption that it is fraudulent, when fraud is not proved, and the people charged with the fraud have not had the opportunity of dealing with it. But that, I think, is immaterial to the result of this case, because in fact the result of the mate's receipts being wrongly dated was that when the agent of the ship at Samarang came to draw up the bill of lading, he took from the mate's receipt a date which was wrong. Whether he knew it to be wrong or not we do not know, and it must not be assumed that he did know that there was anything wrong with the date on the mate's receipts. Now that being the case, it is quite clear that the bills of lading contained a false date, and a date which was not only inaccurate, but was false in a material respect having regard to the terms of the contract, which called for shipment in September. I am not prepared to say at present what I would hold if the question were whether the buyer is entitled to reject a cargo of goods bought, because the bill of lading mentions the fifth day of the month, whereas it was in fact the sixth day of the month when the goods were shipped; but I am clearly of opinion that a buyer would be entitled to reject, if he knew of it, on a contract of this sort which called for September goods, a bill of lading which falsely stated that the goods were shipped in September when in fact they were shipped in October, and that is as far as it is necessary to go for this case.

We have listened to a vigorous and very lucid argument from both counsel for the appellants, to the effect that the learned judge has taken the wrong measure of damages, and that if he had taken the right measure of damages he would have given 1s. or 40s.—merely nominal damages.

Now the plaintiffs put their case in this way: They say in their pleadings: "It was an express or implied term of the contracts that the bill or bills of lading tendered thereunder should be correctly dated, namely, on the completion of the shipment of the said goods," and in the second part of the statement of claim they claim the difference between the contract price and the value of the goods which were in fact delivered to them and for which they accepted the bills of lading upon the assumption that the bills of lading correctly stated the date of shipment. The plaintiffs say: "The defendants' position is this: There is in this contract not merely a promise to ship in September, but there is a distinct and separate promise to hand to us a bill of lading which will truly state that the goods have been shipped in September; and our claim is not merely a claim for damages for breach of contract to deliver to the ship during the agreed month, but is for damages for breach of the promise to give us a true bill of lading." It seems to me that that is the answer to the vigorous argument of counsel for the appellants, that the two things which you have to compare are the condition in which the plaintiffs would be so far as money is concerned if the whole of the contract were performed, on the one hand, and the condition in which they would be if the whole of the agreement or contract were not performed, on the other hand. I think that what you have to compare is what would have been their best position as far as money is concerned, if the particular term of the agreement which is relied upon had been performed, and what would be necessary to put them, so far as money is concerned in the same position, by awarding damages for the breach of contract. The learned judge has acted in accordance with that measure. He has said: "If the promise that there should be truly stated in the bill of lading the date of shipment had been kept, we should have been, say the plaintiffs, in this position, that we should have known that we were entitled to reject the goods, and anybody in our position would have rejected the goods. By that breach of contract in sending forward a bill of lading making a false statement as to the shipment, you have deprived us of that position." I suggest to the appellants that if the promise with which I have been dealing to tender a true bill of lading had been in a separate contract, the position would have been unarguable. It seems to me that it makes no difference that the term is in the same contract as contains the obligation to ship in September.

I agree with counsel for the appellants that the result of this is to give to the plaintiffs in this case exactly the same damages as they

would have received if they had successfully brought an action for damages for fraudulent misrepresentation, but it does not follow that there may not be terms in a contract which put the plaintiffs in the same position, if those terms are broken, as that in which they would be if they were entitled to base their claim upon false representation. However, that is the view which commends itself to my mind, though I must say, not without hesitation, and I have listened with great interest to the vigorous argument which has been put forward to the contrary. I ought to say that in my judgment, although the view that we are adopting in this case may seem to be inconsistent with the judgment of McCardie, J. in the case of *Taylor and Sons Limited v. Bank of Athens*; *Pinnock Brothers v. Same* (128 L. T. Rep 795) it may be that that case is distinguishable upon the ground that the claim which the buyers took to arbitration was not a claim based upon a breach of contract in putting forward a bill of lading with a wrong date, but one which is stated at p. 795 in these words: "The buyers went to arbitration upon their claim for breach of contract against the sellers. The arbitrators have rightly found that the sellers committed a breach of contract in not shipping the goods within the proper period." I agree that if there were no question involved of a distinct breach of contract in tendering a wrongly dated bill of lading, the position would be quite different; and the argument of counsel for the appellants convinced me that in those circumstances and in respect of such a claim, nothing but nominal damages would be recoverable; and that would be in accordance with the view taken by McCardie, J. in the case which I have just mentioned.

But there is another point upon which it is necessary to say something. I agree with my Lord that once you get the position of the buyers as I have stated it, it does not seem necessary to go any farther and consider the sub-contracts at all, because if the term of the contract which requires a true bill of lading had been duly performed, there never would have been any question of having any goods to use for the purposes of the sub-contract. But counsel for the appellants says: "At any rate you have to consider it from the point of view of minimising damages; and, assuming that the measure would be otherwise correct, still, the plaintiffs having taken the goods must do their best to minimise the damages, and they ought therefore to have forced their sub-purchasers to take these goods and pay for them, or if they would not do that, then the plaintiffs ought to have brought the sub-purchasers into court and made them pay the damages which necessarily resulted from their refusal." For myself, I have come to the conclusion that the sub-contractors would have had no answer to the claim if it had been made, but I do not say that the claim is necessarily one that ought to be regarded by everybody as a claim which could not receive

any answer; and Messrs. Finlay were faced with the position that in order to recover these damages and so minimise the damages recoverable from the defendants, they would have had to embark upon litigation in India. I see nothing immoral or unconscientious in an endeavour, if it had been made, to hold the Indian purchasers to their bargain. They had, in my judgment, bought goods on different terms from the terms under which Messrs. Finlay had bought them; they had bought them as goods certified by a bill of lading to be delivered in September; and they would have been perfectly entitled, as a matter of business morals, to have said: "You made that bargain, and you must stick to it, and if you do not you must pay damages." But I think at the same time it is a wholly unreasonable thing to say that that would be the ordinary course of business, which they ought to pursue in order to diminish the damages. People have not got to consider merely what is right in a strict court of conscience, but they have got to consider what is the effect of their conduct upon their business relations with other people, and I can have very little doubt that it would not have suited their business to have taken the extreme course which is suggested; and, in my judgment, it is not in the reasonable course of business to require them to do what is suggested in order to diminish damages, if *prima facie* they are entitled to recover damages from the defendants.

I have had the same difficulty as Scrutton, L.J. has, of knowing what is the right way to reconcile the two judgments of the House of Lords in *Williams Brothers v. E. T. Agius Limited* and *Re R. and H. Hall and W. H. Pim (Junior) and Co.'s Arbitration (sup.)*, which are apparently in conflict, but I have little doubt that when the question comes before the House of Lords they will be able to reconcile those apparently irreconcilable decisions. I do not imagine that they are really irreconcilable; but fortunately this case does not call upon us to enter upon that not very easy question, and therefore I say nothing about it except this, that I should like to say that the judgment in *Hall's* case commends itself to my mind as containing a reasonable and sound view of what ought to be the law on the subject of taking into account such contracts in estimating damages arising out of the breach of the principal contract.

For those reasons I agree with my lord that this appeal should be dismissed with costs.

SANKEY, L.J.—I agree. By a contract of the 30th Jan and the 2nd Feb. 1920, the plaintiffs agreed to buy, and the defendants agreed to sell, certain quantities of white Java sugar for shipment from Cheribon to Bombay. It was a c.i.f. contract, and not only are c.i.f. contracts contracts for the sale of goods, as has been decided in *Arnhold Karberg and Co. v. Blythe, Green, Jourdain and Co.* (13 Asp. Mar. Law Cas. 235; 114 L. T. Rep.

152; (1916) 1 K. B. 295), but everyone knows that there are certain specific documents which are part of this contract, one of which is the bill of lading, and there is an obligation under such a contract to give an accurately dated bill of lading.

Now in this case, by some unfortunate circumstances which we do not know, the bill of lading which was given was inaccurately dated. It was dated the 30th Sept., whereas the goods were not put on board until the month of October. No fraud can be imputed to the defendants; they are not charged with fraud; it is not suggested that they did anything wrong; and I assume for the purposes of my judgment that they are blameless in that matter. But it is admitted, and it has to be admitted, on their behalf, that they did break one of the fundamental conditions of the contract, namely, the condition or obligation to give an accurately dated bill of lading. In this case I think it is easier to go to first principles, perhaps, than to go to decided cases. What happened? As a result of the inaccurately dated bill of lading the purchasers took the goods. The sugar in question came into their possession; but although they paid for what they contracted to get, they did not get what the sellers had contracted to give them. They got something different; they got October sugar instead of September sugar. One might illustrate it by putting the case of some entirely different article, as, for example, the case suggested during the argument, of a man who, having purchased a pair of trousers, when he opened the parcel got a hat. But in this case the plaintiffs had paid the defendants for something which, although they had contracted to get, the defendants did not deliver to them. In those circumstances, what is their remedy, or what is the measure of damages? They, in fact, sold what was delivered to them, although it was not the sugar that they actually contracted to buy, and which the buyers had contracted to deliver to someone else, and they obtained a certain price for it.

What is the position? The sellers have got the full price of the article, and they have delivered something which is of far less value; and the learned judge has said that the measure of damages is the difference between the sum which the purchasers got for the article which they actually had delivered to them, and the price that they paid for the article which under contract the sellers were bound to give them. I think that is right, and I think the measure of damages in a case like this is the difference between what the buyer had in fact paid or had to pay to the seller and the market price he obtained for the article in question. I think that must be so, having regard to the incidence of a c.i.f. contract. I do not think, in deciding that, that we are in any way in conflict with any of the cases which have been decided. With regard to the case of *Taylor and Sons v. Bank of Athens (sup.)*, which was a decision of my brother McCardie, J., as pointed out by Greer, L.J., there the

cause of action sued upon was entirely different from the cause of action sued upon in the present case. The cause of action in the present case is damages for not having what the contract gave them the right to have—namely, an accurately dated bill of lading.

One point that has pressed me throughout has been the question whether the plaintiffs were not under an obligation to minimise damages, and that to some extent lets in the vexed point about the measure of damages, which I suppose most people thought had been finally laid to rest in *Williams v. Agius*, where Lord Haldane said: "In the judgment delivered by Lord Esher"—that is, in the case of *Rodocanachi v. Milburn* (sup.)—"he laid down that the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as, for instance, a contract entered into by the plaintiff with a third party."

Certainly the recent case of *Re Hall and Pim (Junior) and Co.'s Arbitration* (sup.) might appear to be in conflict with that. It was a case which, if I may recall the picturesque language of counsel for respondents, has "astonished the Temple and surprised St. Mary Axe." I am not quite sure whether that is correct when I look at the ground upon which that case was decided. It seems to me to be a case which was decided upon the particular and peculiar facts set out there. For example, Lord Haldane said: "I think further that the contract and the conditions which it incorporates show that it was contemplated that the cargo might be passed on by way of sub-sale if the buyer did not choose to keep it for himself, and that the seller contracted to put the buyer in a position to fulfil his sub-contracts if he entered into them." Again, although not quite as strongly, Lord Dunedin says the same thing, and Lord Shaw says: "My principal reason is that I think that the two parties had actually provided for the very case of sub-sales, which has caused the extra losses"; and Lord Phillimore puts it even more strongly when he says: "This being so, the respondents as sellers must be taken to have consented to this state of things and thereby"—and this perhaps is the strongest expression—"to have made themselves liable to pay to the appellants their profit on a re-sale."

Speaking personally, I am not at all sure that all those things could not have been said in the case of *Williams v. Agius* (sup.) as well, but at any rate the latest decision, as it appears to me, does proceed upon those specific facts, and those specific terms in the contract entered into between the parties. But even if that is not so, I do not find myself in agreement with counsel for the appellants that in this case the purchasers were bound to sue their sub-contractors and rely upon the "conclusive evidence" clause. I ventured to put to him, in the course of the argument, certain considerations as to whether a person would be entitled to refuse to plead the Statute of

Frauds or the Statute of Limitations. Well, those are rather different, those cases. There a person is relying upon a statutory enactment; but in the present case I do not think it would have been reasonable to ask the purchasers to sue their sub-contractors, and to insist upon the "conclusive evidence" clause, when, by the hypothesis, they knew by that time that it was quite untrue. It might have minimised the damage to this extent, that the Indian sub-purchasers would have had no defence, but I do not think that a person is obliged to minimise the damage on behalf of another who has broken his contract, if by taking steps to minimise the damage he would—as I think he might probably have done in this case—materially injure his commercial reputation. I do not think you can ask A. to minimise damages to B., who has broken his contract, if by so doing A. is going to—I will not say ruin himself, but get a deservedly bad name in the trade.

I have come to the conclusion, in a really difficult case, that the learned judge was perfectly right, and I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Ballantyne, Clifford, and Co.*

Solicitors for the respondents, *Sanderson, Lee, and Co.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Oct. 17, Nov. 23, 1928, and Jan. 25, 1929.

(Before Lord MERRIVALE, P. and HILL, J.)

THE VECTIS. (a)

ON APPEAL FROM THE CITY OF LONDON AND MAYOR'S COURT.

Collision—Barge lying at tier with anchor exposed contrary to local river by-laws—Negligence—Sailing barge carried by tide against exposed anchor—No damage if anchor carried in accordance with by-laws—Position of anchor known to the master of the sailing barge—Both to blame.

There is no inconsistency between the decision in The Monte Rosa (7 Asp. Mar. Law Cas. 326; 68 L. T. Rep. 299; 1893, P. 23) and The Dunstanborough (1892, P. 363N), and other decisions where vessels guilty of contributory negligence have been held both to blame under the Admiralty rule of apportionment of blame. Thus where a vessel, having grounded without negligence in a navigable fairway, was carried

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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by the rising tide into contact with the anchor of another vessel which was being negligently carried in a position in which but for the anchor being so carried no damage would have been done, both vessels may be found guilty of negligence and blame apportioned if the court comes to the conclusion that the position of the anchor was known to those in charge of the former vessel and that there were measures which they could and ought to have taken to prevent the collision.

APPEAL from the City of London and Mayor's Court in its Admiralty jurisdiction.

The appellants (plaintiffs), owners of the sailing barge *Hydrogen*, appealed from a decision of the judge of the City of London Court, who held that a collision between the *Hydrogen* and respondent's barge *Vectis*, which took place in Milton Creek, River Swale, was caused by the negligence of those in charge of the *Hydrogen*, dismissed their claim for damages and entered judgment for the defendants.

The following statement of facts is taken from judgment of the learned County Court judge :

"The *Vectis* was lying in Milton Creek, near Sittingbourne, on the afternoon of Sunday, the 5th June, on the west side close to the wharf, called Burleighs Wharf, third bottom out. Its anchor was on the stem in a certain position which constituted a breach of the regulating by-law 5 of the Milton Creek Conservancy By-Laws, which says this : ' . . . the anchors of [any vessel lying alongside a wharf and any vessel or vessels lying outside of her] shall be slacked on to the inside bow, and no boats or projections shall be permitted on the outside of any such vessel.' Now as the *Vectis* lay there she was subject to this by-law, and there was an infringement of that by-law in that certain part of the anchor was not on the inside but was on the outside. The object of the by-law is, of course, obvious. In case any vessels should come into collision there would not be an obstruction such as an anchor, which might do serious damage to a vessel striking it. That was the position of the *Vectis*.

"Then on the same Sunday afternoon, the *Hydrogen* arrived, coming up the creek on the tide, and it came up the creek as far as it was able to on that tide, and then took the ground on the east side of the creek almost opposite the *Vectis*. Its head was fast in the mud and later on it sat down entirely on the mud. The relative position of the two vessels was this. The stern of the *Hydrogen* was about half a length further down the creek than the stem of the *Vectis*. The *Hydrogen* lay there until the tide made on the following morning. The crew came out about 3.20 to go on board, but they had to wait until four o'clock before there was water to enable them to get on board, and then the vessel was still aground ; and then, as described by the master of the *Hydrogen*, about 4.30 the tide came up with a rush and carried the stern round, the head remaining on the

mud, and the stern was carried round and it struck the head of the *Vectis* and damage was inflicted by the anchor. If the anchor had not been in an improper position there is no doubt there would have been no damage. There would have been a harmless bump, such as frequently occurs.

"The first question I have to determine is whether there was negligence on the part of the *Hydrogen*. There was, in my opinion, negligence on her part. In the first place his barge is in a position where it is intended to move with the tide, and there is a stationary barge, the *Vectis*, opposite, and if he so manages or navigates his barge so as to come in contact with the stationary barge it is impossible to say he is not guilty of negligence.

"As regards the specific negligence of which he is guilty it is not necessary to say much. He is charged in the preliminary act in general terms ' with not preventing her stern swinging ' and so on. It was suggested on behalf of the *Vectis* that he might have put a rope out. It appears he could have moored to a ring which was somewhere about opposite her about amidships or possibly a little higher up. It was said in answer to that—if she had done—first of all it was not necessary, and secondly, the rope might have broken, and some evidence was called to show it might.

"But these are mere possibilities.

"It is not enough for me that evidence was given that the vessel might have slid down and the rope might have broken. It seems to me something effective might have been done with that rope. Further, the anchor might have been used. It is impossible for me to acquit the *Hydrogen* of negligence in the circumstances."

The learned County Court judge then proceeded to hold the *Hydrogen* alone to blame for the collision upon the authority of *The Monte Rosa* (7 Asp. Mar. Law Cas. 326 ; 68 L. T. Rep. 299 ; (1893) P. 23).

The plaintiffs appealed.

Dunlop, K.C. and *Bateson* for the appellants. —The County Court judge was wrong in holding that the damage was caused by the negligence of the master of the *Hydrogen*. He was wrong in applying the principle of *res ipse loquitur* against the plaintiffs, and holding that the burden was upon them to show that the collision and damage could not have been avoided by the exercise of care and skill. What happened was *prima facie* evidence of negligence in the defendants : (*Scott v. London Dock Company*, 13 L. T. Rep. 148 ; 3 H. & C. 596). The real point is whether there was any negligence in those in charge of the *Hydrogen*. It is submitted that there was none. Even if there was any negligence, the County Court judge was wrong in applying *The Monte Rosa* (*sup.*). He ought to have applied the Admiralty rule and held that both vessels were to blame. There is really no inconsistency between *The Monte Rosa* (*sup.*) and *The*

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Dunstanborough (1892) P. 363N). *The Monte Rosa* (sup.) was, in any case, decided before the present rule was stated in the Maritime Conventions Act 1911. Had it been decided after 1911 it might have been decided differently.

Stephens, K.C., Trapnell, and W. M. Walker for the respondents, argued that the damage was solely caused by the negligence of those in charge of the *Hydrogen*.

Dunlop, K.C. replied.

Reference was made in the course of the argument to the following cases: *The Hornet* (7 Asp. Mar. Law Cas. 262; 68 L. T. Rep. 236; (1892) P. 361), *Cayzer, Irvine, and Co. Limited v. Carron Company (The Margaret)* (5 Asp. Mar. Law Cas. 371; 1884, 52 L. T. Rep. 361; 9 App. Cas. 873), *Admiralty Commissioners v. Steamship Volute (owners)* (15 Asp. Mar. Law Cas. 530; 126 L. T. Rep. 425; (1922) 1 A. C. 129), *Davis v. Mann* (10 M. & W. 546), *Cork Steamship Company Limited v. Kiddle (H.M.S. Active)* (1920, 2 Ll. L. L. Rep. 505), *H.M.S. Sans Pareil* (9 Asp. Mar. Law Cas. 78; 82 L. T. Rep. 606; (1900) P. 267), and *The Hero* (12 Asp. Mar. Law Cas. 10; 105 L. T. Rep. 87; (1911) P. 128).

Cur. adv. vult.

LORD MERRIVALE, P.—The litigation between the parties here arises out of a casualty which occurred in the course of the navigation of barges upon Milton Creek, a tidal channel, through which at high tide communication by water can be had between the Kentish town of Sittingbourne and the estuary of the Thames. The casualty itself was not serious, the sailing barge which was getting under way was swung round on a sudden swell of the incoming tide so that her starboard quarter brought against the fore part of the outer barge in a tier of three on the other side of the creek, and by reason that the anchor of the barge at moorings was set across her stem with the fluke and stock exposed on the starboard side, the stock drove through the starboard quarter rail of the *Hydrogen* and caused damage.

Milton Creek is under the control of conservators. In 1899 they were incorporated by statute, and in 1906 they made by-laws by one of which it is provided as to any vessel lying alongside a wharf and any vessel or vessels lying outside of her that “the anchors of such vessels shall be slacked on to the inside bow and no . . . projections shall be permitted on the outside of any such vessel.”

The damaged craft was the sailing barge *Hydrogen*, and her owners became plaintiffs in an action in the Admiralty jurisdiction of the mayor's court against the owners of the barge at moorings, the sailing barge *Vectis*. The plaintiffs in their action allege negligent and unlawful exposure of the anchor of the *Vectis* in a manner calculated to cause damage, and damage ensuing. The defendants allege that the plaintiffs' damage was due to negligence on board the *Hydrogen*; that the

Hydrogen was negligently allowed to swing on the flood tide; that she ought to have been secured to the shore by moorings to prevent such swinging; that before getting under way plaintiffs' servants ought to have seen the position of the anchor and dealt with it; and that they took the risk of fouling the anchor voluntarily.

At the hearing the defendants relied on the judgment of Gorell Barnes, J., as he then was, in the case of *The Monte Rosa* (7 Asp. Mar. Law Cas. 326; 68 L. T. Rep. 299 (1893); P. 23), a case where in the navigation of the Thames risk was voluntarily incurred of striking an anchor improperly carried, placed at the stem of the steamship, and it was held that the sole cause of the damage was the negligent navigation of the tug. The defendants relied on the judgment of Sir Francis Jeune, as he then was, in a somewhat earlier case of *The Dunstanborough* ((1892) P. 163N), where a steamer's anchor improperly carried having damaged a barge which was lying unattended in proximity to her, steamer and barge were held both to blame. In the present case the learned judge in the court below reserved judgment and eventually held—with serious misgivings as he states—that the case fell within the authority of *The Monte Rosa* (sup.) and gave judgment for the defendants, finding that plaintiffs' crew alone to blame for the collision. On the appeal very able arguments were addressed to the court by counsel of much experience in Admiralty on behalf of each party, on the various nice considerations which arise when two vessels have been in collision, and there being cross charges regard has to be had to the question of antecedent and subsequent injury, proximate and remote causes of injury, contributory negligence which excludes a claim for compensation, and the common negligence of plaintiffs and defendants in the transaction at issue which, in Admiralty, leaves them each contributory to the damage which their combined negligence has caused. The attention of the court was properly called to a long series of authorities in the law. As to the authorities, whether those considered below or cited before us, my own view of the matter is that they leave the case a fairly simple one, if only the material facts are distinctly ascertained.

The singular character of the creek as a place of navigation for barges is a not unimportant factor. It is not an arm of the sea or a navigable stream in any ordinary sense of the words. Sittingbourne, to which it gives access, is an inland town to which barges can proceed from the tidal waters of the West Swale twice in the day when the creek fills at high tide. Between tides this channel is dry except for a runlet of fresh water at the lowest level. According to the evidence the area of the tideway is limited by mud banks which in places slope somewhat steeply. The full distance between the wharves at the material point seems from the chart to be about 200ft. The width at which at high water barges can be navigated was variously stated.

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On the westward of the creek at the material time three barges were moored in a tier, the *Vectis* outward. They would probably occupy not less than 25ft. of width. The *Hydrogen* was some 40ft. from the wharf or bank opposite, and it was said 60ft. from the *Vectis*. She is a barge of 94ft. 8in. length, and 22ft. 6in. beam, and a maximum draught of 8ft. Barges are not unlikely, it appears to get aground along the creek even at high tide. The *Hydrogen* grounded on a Sunday afternoon, and her master expected to proceed on the early morning tide next day. As the tide rose the *Hydrogen's* crew were getting her under way to complete her trip to Sittingbourne when a sudden swell of the tide, as was said, took charge of her, and flung her across the Creek, so causing the collision. The negligence on the part of the *Vectis* in the disposal of her anchor is undisputed. As to the *Hydrogen* it is said that knowing the anchor was in a position which might involve danger to his barge in such circumstances as in fact occurred, her skipper took the risk of fouling her; and that in a situation in which the flowing tide might throw his barge across the Creek, and so bring her quarter in contact with the anchor of the *Vectis*, he neglected to secure his barge by a rope or ropes made fast on the bank so as to prevent such an occurrence. The burden of proof in respect of these allegations is on the defendants, and if they leave the issue or issues in doubt they fail.

The learned judge says in his judgment that the master of the *Hydrogen* saw the anchor of the *Vectis* in its dangerous position. "The anchor is there improperly," the learned judge says in his judgment. "It is well within the knowledge of the master of the *Hydrogen*. He saw it was there; he said he never thought about the anchor, but he took the chance of clearing the vessel. He said he hoped he would clear . . . he took the risk. The anchor, he said, never crossed my mind. I thought I should never touch the *Vectis's* stem. I thought I might strike the curve of the bow." Whether the knowledge thus imputed to the master of the *Hydrogen* was knowledge that the anchor was dangerously placed before he set about getting under way on the Monday morning; whether there was any practical danger if no sudden tidal wave occurred, and whether such a surge of the tide was a common incident of navigating the creek, and known to the master of the *Hydrogen*, the judgment does not say, and I can only surmise.

Whether barges taken up and down the creek on the tide are usually tied up to the bank or a wharf if they happen to go aground for want of depth of water at some point in the two miles or more of transit cannot be stated with any certainty upon the evidence. A witness of some apparent experience who was called said that to use ropes in such a way would be highly dangerous. Whether such a rope or ropes could hold the *Hydrogen* I do not know. Having been aground, lodged in the mud, it is said that her stern slipped down a ten-foot mud bank, while her stem was still held on the

ground. If in face of such difficulties the learned judge had found definitely that it was negligent not to tie up the *Hydrogen* to the bank or wharf, and that if the barge had been so secured the danger of the collision would not have occurred, the case would have stood on definite findings. What the learned judge says there is this: "It appears that the master of the *Hydrogen* could have moored to a ring somewhere about opposite her amidships, or possibly a little higher up . . . It seems to me something effective might have been done with that rope." As to a further suggestion of the defendants that an anchor could have been utilised, he adds this: "Further, the anchor might have been used." These are not the affirmative findings which the defendants require in order to make good their charge of negligence in respect of mooring or making fast.

As I have already said, I do not think the question of the alleged relative negligence of the parties is necessarily a question of technical difficulty. The judgment in *The Monte Rosa*, upon the findings made by the learned judge, seems to me to be consistent with the general run of authority, and not inconsistent with the judgment in *The Dunstanborough*. This later judgment the learned judge had had under consideration in a Divisional Court in the case of *The Hornet* (7 Asp. Mar. Law Cas. 262; 68 L. T. 236; (1892) P. 361) not long before he heard the case of *The Monte Rosa*. The view the learned judge took, as is concisely indicated in an observation he made in the course of the hearing, as well as by the judgment, was that those in charge of the plaintiff's vessel, seeing the anchor of the *Monte Rosa* in a wrong position, chose to run against it. "The anchor," he said in his judgment, "was a source of danger which was apparent to them, and yet they were guilty of negligence in not avoiding coming in contact with it."

Long before the case of *The Monte Rosa* (*sup.*) Lord Blackburn, in the House of Lords, had epitomised the rule of law on the matter in question, in his opinion in *Cayzer, Irvine and Co. v. Carron Company* (5 Asp. Mar. Law Cas. 371; 1884, 52 L. T. Rep. 361; 9 App. Cas. 873). The noble Lord made this statement: "Where the cause of the accident is the fault of one party, and one party only, Admiralty and common law both agree in saying that that one party who is to blame shall bear the whole damage of the other. Where the cause of the accident is the fault of both . . . the rule of the common law says . . . neither shall recover. Admiralty says, on the contrary: "If both contributed to the loss it shall be brought into hotchpot and divided between the two."

In the same case Lord Watson dealt with the cross charges of negligence, and the conditions under which negligence is held to be "contributory." "Assuming" he says, "There was a breach of the rule, and culpable negligence on the part of the *Clan Sinclair*, the consequence of that neglect could have been avoided by ordinary care on the part of the *Margaret*. The *Margaret* knowing what the breach of rule of

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the *Clan Sinclair* was, might with ordinary care have avoided the collision, and, therefore, she was alone to blame." The case of *H.M.S. Sans Pareil* in 1900 (9 Asp. Mar. Law Cas. 78; 82 L. T. Rep. 606; (1900) P. 267) illustrates the operation of the broad principle so stated. In the case of *The Hero* (12 Asp. Mar. Law Cas. 10; 105 L. T. Rep. 87; (1911) P. 128) where there were mutual acts of negligence, the negligence of both parties "in the very matter of the collision" they were held jointly liable for the damage caused.

Lord Phillimore, in his opinion in the House of Lords of *H.M.S. Active* in 1920 (*Cork Steamship Company Limited v. Kiddle (H.M.S. Active)* 1920, 2 Ll. L. L. Rep. 505) explains the cases in which negligence of nor party may be actionable and involve liability although it is not concurrent in time with the negligence of the other. "One may be consequent on the other," he says. "And it is possible to give weight to an act of negligence which embarrasses the other party while at the same time not acquitting the embarrassed party."

The various authorities above cited are dealt with in the judgment in the case of *The Volute (Admiralty Commissioners v. Steamship Volute (owners))*, 15 Asp. Mar. Law Cas. 530; 126 L. T. Rep. 425; (1922) 1 A. C. 129) where the effect of contributory negligence in claims for damages in Admiralty is considered at large, and the causative effects of antecedent and subsequent and severable negligence, are apportioned. The judgment in *The Volute*, however, does not purport to enunciate any new principle, and so far as the older authorities are concerned I do not know that the relevant rule can be found more concisely stated than it is summed up in Lord Halsbury's Laws of England (Shipping and Navigation, Part XI.; S. 749). "Lord Salvesen thus differentiates non causative from causative negligence in this statement: "In cases of antecedent and subsequent fault or negligence a party by his antecedent fault is not supposed to have even partly caused the damage by collision if the other party afterwards could have avoided the damage by the exercise of reasonable skill and care."

As the present case stands there is no distinct finding as to whether the master of the *Hydrogen* could in the circumstances which existed, have avoided the damage that barge suffered by the exercise of reasonable care and ordinary skill.

In my opinion the judgment appealed from must be set aside. The facts, however, are not so ascertained by findings, or so clearly apparent in the evidence, that some other judgment can be founded upon them. The case ought therefore to be further heard. How, when, and where, is matter for the careful consideration of the parties. No question of principle is at stake, and the cost and labour which have already been bestowed on the case are out of all proportion to the amount involved.

HILL, J.—I agree and but for the fact that in argument a number of general questions

were fully discussed I should be content to say I agree, but in order to clear my own mind I have written out my judgment on the questions raised and I think it better that I should read my judgment.

The collision in question was between two barges. They were both accustomed to use Milton Creek, a creek of the River Swale. It dries at low water. Barges in the ordinary course of navigating it ground and float again. There are a number of wharves along the creek at which barges lie. The *Vectis* came up the creek on the afternoon tide of Sunday the 5th June and moored head down, third barge out of three alongside a wharf on the Milton or west side of the creek. She there lay with her starboard side to the channel. Later, on the same tide, the *Hydrogen* bound for a destination further up the creek, sailed up and, in winding, grounded forward and, though she tried to haul herself afloat by means of a rope passed to the *Vectis*, she failed to move and, as the tide ebbed, she grounded throughout her length, heading up the creek. She was on the Sittingbourne or east side of the creek. As she lay the stern of the *Vectis* was about abreast of the midships of the *Hydrogen*. At some time after the attempt to haul the *Hydrogen* off, the master and crew of the *Vectis* went on shore, leaving the anchor of the *Vectis* in a position which was contrary to the Milton Creek bye-laws; it should have been slacked on to the inside, i.e., the port bow. It was in fact, tight up, with the shank across the stem and the stock projecting on the starboard side. In this position it was rigid. It was not suggested that it was wrong to leave the *Vectis* unattended. The crew of the *Hydrogen* also went ashore, in the *Hydrogen's* boat; the master remained on board. On the Monday morning, while there was still no one on board the *Vectis*, the crew of the *Hydrogen*, when the tide permitted, came on board the *Hydrogen*. About half an hour later, the tide swing the *Hydrogen* athwart, the forefoot still remaining on the ground, and the starboard quarter of the *Hydrogen* came in contact with the *Vectis* forward, and the stock of the *Vectis's* anchor pierced the *Hydrogen's* starboard quarter rail. Fenders had been put out by the crew of the *Hydrogen* and no damage was done to the *Vectis*, and the only damage done to the *Hydrogen* was by contact with the stock of the *Vectis's* anchor.

The negligence of the *Vectis* being clear, the judge applied his mind to two questions: (1) Was there negligence on the part of the *Hydrogen*? (2) if there was, ought the loss to be divided, or must the plaintiffs—the owners of the *Hydrogen*—entirely fail? On the first question he found against the *Hydrogen*. On the second, he expressed himself as faced with a serious conflict of judicial decisions in the cases of *The Dunstanborough (sup.)* and *The Monte Rosa (sup.)*, and, with hesitation, followed *The Monte Rosa*, and, having stated certain conclusions of fact, held that the plaintiffs were not entitled to recover.

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On this appeal the first question is whether there was any evidence on which the judge could find that the contact of the *Hydrogen* with the *Vectis* was wrongful and caused by negligence on the part of the *Hydrogen*. This involves the question whether the judge rightly directed himself in this matter. The other questions arise only if the *Hydrogen* was rightly found guilty of negligence. They are (1) whether the judge rightly directed himself as to the law, and (2) whether, if he did, he found, and had evidence on which he could find, the facts necessary to the result in law at which he arrived, namely, that the owners of the *Hydrogen* could recover nothing.

As to the *Hydrogen's* negligence, the judge began by treating the case as one to which the principle *res ipsa loquitur* applied. He said: "His barge is in a position where it is intended to move with the tide, and there is a stationary barge, the *Vectis*, opposite, and if he so manages or navigates his barge so as to come in contact with the stationary barge it is impossible to say he is not guilty of negligence." I do not think that that is a correct view of this case. It was not suggested in evidence that the *Hydrogen* did anything wrong in sailing up the creek as she did. All that was in the ordinary use of the creek. As all who use the creek know, vessels bound for the upper wharves sail up as far as they can with the tide and ground and proceed on the next tide. It was not suggested in cross-examination that, if there was a risk of grounding near other vessels lying at a wharf, the navigating vessel ought to anchor or moor before she reached that spot. It is probable that, under such conditions, no vessel could ever get to the upper parts of the creek. The case, therefore, was not a case where a vessel voluntarily and negligently takes up a position too near a vessel moored. After the *Hydrogen* once grounded she was not at any material time under way, with unrestricted power to control her own movements. With the making tide she became waterborne aft but continued to be held forward, and it was due to that fact that she swung athwart. She was not being navigated at all. She could not prevent herself floating aft first. The tide might or might not swing her athwart; it would depend upon the time at which she floated forward. The mere fact of contact in the circumstances of this case was not, in my judgment, *prima facie* evidence of negligence. It was necessary to go further and inquire whether the *Hydrogen* neglected some precaution which a vessel in her position ought to have taken, having regard to the *Vectis*. The duty of the *Hydrogen* would vary according as those in charge of her knew or did not know of the dangerous position of the *Vectis's* anchor. But for the anchor, as the judge finds, there would only have been a harmless bump such as frequently occurs. Apart from knowledge of the dangerous position of the anchor, I can see no reason for saying that there is negligence in not preventing a harmless bump between barges. Such bumps are frequent in the ordinary work-

ing of barges, and in this narrow creek were probably incidental to the ordinary use of the creek. They involve neither *damnum* nor *injuria*. Further, there was no evidence that it was usual for vessels grounding in the creek to put out moorings. The master of the *Hydrogen* said that it was not usual. Mr. Harvey, the surveyor, said the same thing. The master of the *Vectis* did not say that it was usual; he only said that he sometimes did it for his own convenience, when about to leave the barge unattended.

But, of course, if it is known that special circumstances exist which involve the risk that a barge ordinarily harmless may be harmful, a duty may arise to take extraordinary means to prevent harm.

Two questions therefore arose for decision: (1) Did the master of the *Hydrogen* know of the dangerous position of the anchor, and, if he did, had he that knowledge at any time when he could have taken precautions, if there were any which could be taken; and (2) were there any precautions which he could and ought to have taken. On neither of these points is the finding of the judge clear. As to knowledge, he says: "This anchor is there improperly. It is well within the knowledge of the master of the *Hydrogen*. He saw it was there." The judge had just before cited passages from *The Monte Rosa* (*sup.*), and I think that the fair meaning of the judge's words is that the master of the *Hydrogen* was aware of the dangerous position of the anchor. Moreover, I think that there was evidence on which the judge could so find. But there is no finding as to when the master of the *Hydrogen* became aware of the dangerous position of the anchor. There was, I think, evidence on which it could have been found that he became aware at some time on Sunday, but none on which it could be found that he became aware before the crew in the boat left the *Hydrogen* on that afternoon. There is, therefore, no evidence on which it could be found that on Sunday the master ought to have done anything. After the boat left he could do nothing until it returned on Monday morning. The boat returned when the *Hydrogen* was still "just aground." The crew was on board half an hour before the *Hydrogen*, as it turned out, began to swing. The tide (apparently held up by a north-west wind) was late, and then came with a rush. The question seems to me to be whether in that half hour the master of the *Hydrogen*, assuming that he knew of the dangerous position of the anchor, could and ought to have taken precautions to avoid the risk of contact with the anchor.

On this matter of the *Hydrogen's* negligence there is no satisfactory finding by the judge.

Starting with the view that the contact was in itself evidence of negligence, the judge naturally treated the case as one in which the burden was on the *Hydrogen* to show that nothing the *Hydrogen* could do would have prevented the contact. He goes somewhat further. But there is no definite finding that

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the *Hydrogen* could and ought to have done something which would have prevented the contact and neglected to do it. Still less is there a definite finding that he could have done it after he knew of the dangerous position of the anchor. What the judge says, and he says it without reference to any particular time, is this: "It was suggested on behalf of the *Vectis* that he might have put a rope out. It appears he could have moved to a ring, which was somewhere about opposite her (*i.e.*, the *Hydrogen*), about amidships or possibly a little higher up. It was said in answer to that: the rope might have broken, and some evidence was called to show it might. But these are mere possibilities. It is not enough for me that evidence was given that the vessel might have slid down and the rope might have broken. It seems to me something effective might have been done with that rope. Further, the anchor might have been used." As to the anchor, one asks when and in what direction it ought to have been laid out; but it is unnecessary to consider that further, for the point was given up by counsel for the respondents. As to the mooring, I cannot treat the words of the judge as a finding that a rope, if got out, would have been effective to hold up the stern of the *Hydrogen* and prevent her swinging athwart, nor as a finding that a rope could have been got out with that effect on the Monday morning. It is at most a finding that a rope could at some time have been carried to the ring, a finding which meets Mr. Dunlop's point that to moor to the ring on the wharf would have been a trespass. But there is no other definite finding. The judge was, I think, bound to consider the evidence and arrive at a definite conclusion on the other points, before he could hold the *Hydrogen* negligent.

The only positive evidence for the *Vectis* on this matter of moving was that of her master. (Q.) "If there had been a rope out would he have been so likely to come into you?—(A.) Not so likely. That would have been a prevention." And (Q.) "I do not know if that man wanted ropes out. If it was my barge she would have had a rope out." And (Q.) "Therefore there was no reason why she should put out a rope.—(A.) Only for safety. (Q.) What was the danger?—(A.) You never know whether a barge will run astern after they float and the wind blows them astern." On the other hand, the master of the *Hydrogen* said that no rope he had could have held the *Hydrogen's* stern. In judging of this, a number of facts have to be considered, the nature of the ground, the force of the tide, the weight of the *Hydrogen*, and the angle of the rope had one been put out. The *Hydrogen* when she grounded was about 40ft. from the wharf, the length was 94ft. 8in., her beam 22ft. 6in. She carried 210 tons of coal. The ring was abreast or a little forward of her midships, *i.e.*, it was at least 47ft. from a point abreast her stern. According to the evidence of Mr. Harvey, the bottom was mud of a very greasy character and vessels taking the banks invariably slide;

he said: "If ropes are put out it is a dangerous thing to do. Either the ropes will part or tear something out." The master of the *Hydrogen* said that the *Hydrogen* did slide. (Q.): "It (a rope) would still have had the effect of preventing the vessel's stern coming off as far as it did?—(A.) No, sir, because the ground dropped away from under the vessel and caused her stern to slip. (Q.): That is exactly what you could have prevented.—(A.) No, I had no rope aboard to do it. (Q.): You had plenty long enough?—(A.) Oh, yes." And, again: "In the course of Sunday afternoon the ground broke away. It would have broken the rope, the angle would have been so great"; and "It would have been of no service if I had a rope out owing to the angle of the vessel. The tide coming in would have forced the vessel out and would have broken the rope." The tide is a very strong feature in this case. (Q.): "Have not you got on board your craft some sort of rope that would have held it up?—(A.) No, sir, we have almost as good mooring-ropes as the next best boat in her class." That the *Hydrogen* did slip is both probable by the fact that, as she lay on the Sunday, both masters thought that there would be sufficient room for her if she did swing. She certainly did slip if the estimate of either master of the distance between the two barges when the *Hydrogen* grounded and the estimate of the master of the *Hydrogen* of the distance of the wharf from his port side are even approximately correct. The distance between the two barges on the Sunday is put by the master of the *Hydrogen* as about 100ft., and by the master of the *Vectis* as about 130ft. Even at 100ft. the *Hydrogen* could not swing her stem across the stern of the *Vectis* unless she slipped. And if on the Sunday the *Hydrogen* was about 40ft. from the wharf on her port side, and the *Vectis* was third barge out from the wharf on her port side, it equally follows that the *Hydrogen* must have slipped; the creek from wharf to wharf is 250ft.; with every allowance the beam of four barges added to 40ft. leaves more than 100ft. between the starboard side of the *Hydrogen* and the starboard side of the *Vectis*. Whereas at the time of contact, the stern of the *Hydrogen* overlapped the stern of the *Vectis*. It is not, however, clear, upon the evidence, when the *Hydrogen* slipped.

From what I have said it is manifest that there was much to be considered before it could be found that the *Hydrogen* was negligent in not putting out a rope. It has not been considered. On the other hand, I do not think that it would be right to say that there is no evidence upon which the *Hydrogen* could be found to blame, so as to justify this court in entering judgment for the plaintiffs. The case must be retried and the facts ascertained.

When the facts are once ascertained, there is, in my opinion, no difficulty about the law. If the master of the *Hydrogen* knew of the dangerous position of the anchor and having that knowledge had the time and the means to avoid contact with it and ought as a reasonably

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careful man to have used those means and did not use them and in consequence the *Hydrogen* came in contact with the anchor, then, it being admitted that there was no duty on the *Vectis* to have any one on board to let go the anchor, the master of the *Hydrogen* had only himself to thank for the damage and the plaintiffs cannot recover. But unless these facts are proved, the plaintiffs are entitled to recover in full.

For the purposes of this appeal it is, in my opinion, unnecessary to consider in detail the authorities, cited in argument, where both ships were being navigated and each was negligently navigated. In such cases more difficult questions may arise as to whether both negligences combined to cause the collision. Such were the problems upon which *The Volute* (*sup.*) has given us guidance. But it cannot be doubted that when a position of danger negligently created by B. is fixed and known to A. and A. by taking reasonable care can avoid receiving or doing damage and does not, and there is no other negligence of B., then A. as plaintiff cannot recover and as defendant is solely liable. To give an illustration, ship B is negligently at anchor in an improper place; ship A under way in daylight sees B and sees her position and sees her in plenty of time and is not hampered in her own navigation by the position of B and yet runs into B. I have no doubt that A cannot recover and is solely liable. That is only the principle of *Davies v. Mann* (10 M. & W. 546) applied to ships.

Such a case is an illustration of the first proposition on p. 136 of *The Volute*. The proposition is there stated so as to cover the case where defendants' negligence is subsequent and severable. But it applies equally to cover the case where plaintiff's negligence is subsequent and severable. The true aspects of the principle are stated in the fifth and eighth propositions of Lord Esher in *The Bernina* (6 Asp. Mar. Law Cas., at p. 257; 56 L. T. Rep. 258; 12 Prob. Div., at p. 61). Stating the principle as it applies to the present case it is this—A. is suing for damage received by collision. B. was negligent but his negligence had brought about a state of things in which there would have been no damage if A. had not been subsequently and severally negligent. A. recovers nothing. The principle is illustrated by *The Hornet* (Sir F. Jeune, P., and Barnes, J., 7 Asp. Mar. Law Cas., at p. 262; 68 L. T. Rep., at p. 236; (1892) P., at p. 365): "Assuming that there was no one there (*i.e.*, on the barge) and that the stern (*i.e.*, of the barge) did come out, we cannot bring ourselves to think that that raises any case which would make the barge liable as well as the tug, on the ground that there was contributory negligence; for, whichever way it is put it appears to be clear that the absence of the persons on the barge had nothing to do with the collision. There was plenty of light, and the *Hornet* could see perfectly well where the barge was." In the course of argument, Barnes, J. had asked

whether the principle of *Davies v. Mann* (*sup.*) did not apply. It was upon this principle that *The Monte Rosa* (*sup.*) was decided. The *Volute* does not say that it was wrongly decided, and certainly does not question the principle upon which it was decided.

Even the slight doubt expressed by Lord Birkenhead (15 Asp. Mar. Law Cas., at p. 535; 126 L. T. Rep., at p. 430; (1922) 1 A. C., at p. 137) may be accounted for. It seems to have been overlooked that the judge's findings of fact, as stated (7 Asp. Mar. Law Cas., at p. 327; 68 L. T. Rep., at p. 300; (1893) P., at p. 28) included a finding, not that the tug might have seen the anchor, but that the position of the anchor was known to the tug.

In my opinion, when the facts of the two cases are considered, it is a mistake to suppose that there is any conflict between the decisions in *The Dunstanborough* (*sup.*) and *The Monte Rosa* (*sup.*). The reason is that the point in which they are supposed to be in conflict did not arise in *The Dunstanborough*. In *The Monte Rosa* it was found that there was, in fact, no negligence in not lowering the anchor after the tug sheered towards the steamer because there was no time to do it. The only negligences to be considered therefore were (1) the negligence in carrying the anchor in an improper position, a position which, as was found, was known to the tug, and which must have been known to the tug all the way from Gravesend to Bugsby's Reach, and (2) the negligence of the tug in sheering towards that anchor. In *The Dunstanborough* it is obvious that, if the point had been contested, it must have been found that there was negligence in not lowering the anchor before or as soon as it touched the barge. For the steamer was being discharged and it was as she rose that the fluke of the anchor fouled the barge. If, as soon as the fluke had touched the barge, the discharge had been stopped or the anchor lowered, no damage would have been done. It is not surprising, therefore, that no evidence was called for the steamer, and that the argument was that the barge was guilty of contributory negligence, followed by an attempt to show that the Common Law and not Admiralty Law applied. It would have profited nothing for the steamer to argue the main point on which the steamer succeeded in *The Monte Rosa* (*sup.*). If as soon as the anchor touched the barge, the barge could have avoided the damage by veering, so could the steamer by lowering the anchor or stopping the discharge. The damage was caused by a combination of negligences. I think *The Plym* (9 House of Lords, 489), which was cited in argument, may be supported on similar grounds; if the man in charge had been awake it may well be that he could have done something as soon as the wash of the steamer's propeller began to act upon the barge.

It is only necessary to add that in my view the matter we are now considering is wholly unaffected by the Maritime Conventions Act. The Act in sect. 1 (1) deals with cases whereby

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fault damage is caused and proviso (b) is: "Nothing in this declaration shall operate so as to render any vessel liable for any damage to which her fault has not contributed." "Fault" here means, as it meant in sect. 25 (9) of the Judicature Act 1873, negligence neither more nor less. The basis of an action of collision, whether on land or sea, whether at Common Law or in Admiralty, is damage caused by negligence. The investigation of the facts is often simpler at Common Law, for when it is found that the plaintiff's negligence has been a cause, you need inquire no further; he fails. Whereas in Admiralty you have to inquire further, for if both negligences have in combination been the cause, damages have to be apportioned. But in determining whether both negligences were the cause or only the negligence of one, you have to apply the same principles in Admiralty as at Common Law. I agreed that this must be tried somewhere.

Appeal allowed.

Solicitors for the appellants, *W. and W. Stocken.*

Solicitors for the respondents, *J. A. and H. E. Farnfield.*

House of Lords.

Jan. 31, Feb. 1, and March 11, 1929.

(Before Lords BUCKMASTER, DUNEDIN, SUMNER, BLANESBURGH, and WARRINGTON.)

FRENKEL v. MACANDREWS AND CO. LIMITED. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Bill of lading — Deviation clause — Damage — Ship on agreed route — Usual route — Not on direct route — Exceptions clause — Claim by shipper of goods — Shipowners protected from liability for loss.

The plaintiff claimed to recover from the defendants, the shipowners, damages for loss of a parcel of oil shipped at M. under a bill of lading which described the shipment as a shipment in the defendants' ship to L. with liberty to touch at any ports whatsoever, though it might be outside the route, without being considered a deviation. The shipowners relied on the deviation clause and the exceptions clause in the bill of lading as protecting them from liability, but the plaintiff said that they were not so protected because when the loss occurred the defendants were not carrying the goods on the bill-of-lading voyage, but were carrying them by means of an unauthorised deviation. For a considerable time the defendants had been pursuing from M. to L. or other ports of this country, two distinct routes for the ships of their line, one "via Levante,"

which meant going north-east up the coast of Spain calling at various ports and then coming back from the furthestmost port down the Mediterranean and through the Straits of Gibraltar to this country, and the other one, called "Directo," coming direct from M. to L. or other ports in this country. Both routes were well known to the representatives of the plaintiff at M. They knew that sometimes the route of the ship would be "via Levante," and sometimes it would be "Directo," and in this particular case, when they delivered their goods to the ship to be carried under this bill of lading, they knew that the route of that ship would be "via Levante."

Held, that a bill of lading having to be construed in relation to the circumstances in which it was entered into, those circumstances in the present case included the practice of the sailings of the respondents' vessels by two customary routes. There was no need, in these circumstances, to examine the effect of the deviation clause, since the route covered by the bill of lading was one of the two customary routes.

Decision of the Court of Appeal (sup. p. 479; 139 L. T. Rep. 327) affirmed.

APPEAL from the decision of the Court of Appeal (Scrutton, Greer, and Sankey, L.JJ.), reported sup. p. 479; 139 L. T. Rep. 327.

The plaintiff claimed a sum of 2293l. in respect of the loss of olive oil sent from Malaga to Liverpool on a steamship, the *Cervantes*, belonging to the defendants.

The plaintiff was the owner of 134 barrels of olive oil shipped on the defendants' ship *Cervantes* at Malaga under two bills of lading, dated the 11th April 1927, one for 110 barrels for delivery via Liverpool to Bradford, and the other for twenty-four barrels for delivery at Liverpool. The plaintiff said that the goods were shipped in good order and condition and were not so delivered. Alternatively he said that the damage was due to negligent stowage, or to the unfitness of the ship.

The defendants did not admit that the goods were shipped in good order and condition. They also relied on the exceptions clauses in the bills of lading which they said protected them from liability. Further, they pleaded that the damage, if any, which was not admitted, was caused by perils of the sea, in that the defendants' ship *Cervantes*, after sailing from Malaga on the 11th April 1927, with the barrels of oil on board, met a gale on the 12th April, and owing to the violent motion of the vessel the barrels broke loose, and could not be secured, and some of the oil was lost, and they said that that loss was caused by perils of the sea, which was within the exceptions in the bills of lading. The plaintiff, however, pleaded that after loading the plaintiff's cargo, the *Cervantes*, without justification, deviated from the contract voyage, and the perils of the sea were met with after the unauthorised deviation, and therefore the defendants could not rely on the provisions of the bills of lading.

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

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The Court of Appeal held, reversing the decision of Rowlatt, J., that as between the parties in this case the bill of lading could be read as meaning that the goods were destined for Liverpool, by one or other of the usual routes, and even if the plaintiff had not known which way the ship was going on this occasion, still, as the ship was taking one of the known and usual routes to Liverpool, it was not deviating at the time of the loss. The ship-owners were, therefore, protected by the exceptions clause in the bill of lading.

The plaintiff appealed.

Dunlop, K.C. and *Harold Stranger* for the appellant.

Clement Davies, K.C. and *Cyril Miller* for the respondents.

The House took time for consideration.

LORD BUCKMASTER.—The appellant, who is a merchant at Malaga, on the 11th April 1927, shipped twenty-four barrels of olive oil in the steamship *Cervantes*, one of a fleet of steamers owned by the respondents trading between Malaga and this country. The terms of the bill of lading are as follows: "Shipped by Leon Frenkel in the steamship *Cervantes*, with destination to Liverpool, with liberty to touch at any ports whatsoever, although they may be outside the route, without it being considered a deviation; to enter and leave ports without pilot; to assist and tow vessels in any circumstances; to discharge, reload, tranship, send to destination by any means of transport, all responsibility of the ship ceasing on discharge from dock."

The ship proceeded to Cartagena and thence to a series of other ports on the Mediterranean coast, reaching as far as Palamos, close to France, and she then returned, calling at various ports on her way, but not calling again at Malaga, and so to Liverpool. Between Malaga and Cartagena she encountered heavy weather, with the result that the barrels of oil were sprung and the oil was lost, whereupon these proceedings were instituted by the shipper, claiming damages for the loss. He alleged originally that the ship was not seaworthy, but that point has been disposed of adversely to him and is no longer supported. The real question in the case is whether it was a deviation from the route, not permitted by the bill of lading, to call at Cartagena, since if that were so the fact that the oil was lost in the course of that journey would entitle the appellant to the remedy which he seeks.

The respondents, however, allege that in the circumstances of the case the route authorized by the bill of lading was that in pursuance of which they proceeded up the Mediterranean coast, and that to call at Cartagena was well within the permission of the deviation clause.

The point is important. A bill of lading, like every other contract, must be construed in relation to the circumstances in which it was entered into, and the respondents say that in the present case those circumstances include the

practice of the sailings of their vessels, which was well known to the appellant.

The facts clearly establish that such practice was this. The respondents' steamers are in the habit of going from Liverpool up the Mediterranean coast, picking up a cargo from port to port, either as they journey up or journey down, and then returning to Liverpool. In certain cases they call at Malaga after they have called at the Mediterranean ports. In other cases, as in the present, they call at Malaga first and then pursue their way to the other ports. The distinction between the two routes is well known and is covered by advertisements issued in the local papers at Malaga, stating that the voyage of any particular vessel is either "via Levante" or "Directo," according as they are proceeding up the Mediterranean before going to Liverpool or going to Liverpool direct. This information is also contained in their shipping cards, and although there is no proof that the appellant himself was actually informed upon the point, since he was not at Malaga when the cargo was shipped, there is no doubt that the information was in the possession of his agents and that when they shipped the oil they did so in a steamer which they knew was going to Liverpool "via Levante," and not direct. It is impossible to say, in these circumstances, that there is any definite customary route. The customary route is one of two routes, and the figures showed, as to the different voyages, that the one was nearly as customary as the other. The bill of lading does not in terms say that the ship was lying at Malaga or was bound for Liverpool, but says that Liverpool was her destination, and so far as that is concerned, that destination is consistent with either of the two course being pursued.

If, notwithstanding these facts, the fair construction of the bill of lading is that the route was direct to Liverpool, the appellant would be entitled to succeed, for an agreed term in a bill of lading must prevail over an agreement contrary to its terms. The true remedy in such a case is rectification of the document, and no such claim is made here. The appellant contends that the authorities conclude the matter of construction in his favour, and of these the most important are *Leduc and Co. v. Ward and others* (6 Asp. Mar. Law Cas. 290; 58 L. T. Rep. 908; 20 Q. B. Div. 475) and *Margetson and others v. Glynn and others* (7 Asp. Mar. Law Cas. 148; 66 L. T. Rep. 142; (1892) 1 Q. B. 337). In the former case goods were shipped, for delivery at Dunkirk, on a vessel lying at Fiume and bound for Dunkirk with liberty to call at any ports in any order. Instead of proceeding direct for Dunkirk, the vessel sailed for Glasgow and was lost off the mouth of the Clyde. Proceedings were taken by indorsees of the bill of lading against the shipowners for non-delivery of the goods. The bill of lading was in the usual form and Lord Esher, M. R. points out that such a form provides for a particular voyage, and that unless it does so it would be impossible for the owner of the goods to know at what

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time he could calculate on their receipt. He continues (20 Q. B. Div., at p. 481): "It is obviously a most important part of the contract of carriage by sea that the route by which the goods are to be brought should be determined." And further he adds that "if the only voyage mentioned is from the port of shipment to the port of destination, it must be a voyage on the ordinary track by sea of the voyage from one place to the other."

Fry, L. J. speaks in the same terms. In his judgment (58 L. T. Rep. at p. 911; 20 Q. B. Div., at p. 484) there is contained the following important passage: "It is said that there is an American authority which shows that notice to the shipper of the route by which the ship is going to sail will rebut what is said to be an implied term of the contract, viz., that the vessel will proceed by the direct route to the port of destination. In the first place it should be observed that this seems to have been a mere *obiter dictum*; but assuming that, apart from the Bills of Lading Act, such notice would have had any such effect, which I am far from saying, I think it impossible, having regard to the provisions of that Act, to suppose that any effect could be produced by such notice to the shipper with respect to a contract by bill of lading which is by statute made assignable to a third person; for to hold that it could have such effect would be to hinder that assignability of the contract which the legislature designed to effectuate."

The words in that case, however, differ from those in the present. There is a marked distinction between a vessel lying at one port and being bound for another and a vessel having an ultimate destination, which as far as the goods are concerned, might be either a port or an inland town.

The case of *Margetson and others v. Glynn and others* (sup.) is a decision to the same effect.

In that case the terms of the bill of lading provided that the goods were shipped on the steamship Zeta "now lying in the port of Malaga, bound for Liverpool, with liberty to proceed to and stay at any port or ports, in any rotation, in the Mediterranean, Levant, Black Sea, or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever." The oranges were shipped at Malaga and the ship instead of going to Liverpool direct went to Burriana on the north-east coast of Spain and then back again and proceeded to Liverpool. As a consequence of the delay thus caused, the oranges were rotten. Lord Esher, M.R. says (7 Asp. Mar. Law Cas. at p. 149; 66 L. T. Rep., at p. 143; (1892) 1 Q. B., at p. 339): "The voyage described is from Malaga to Liverpool, and, if there were nothing else in the bill of lading, the ship would be bound to go from Malaga to Liverpool, according to the ordinary sea course for a steamer from the former port to the latter." And he then says that the liberty to deviate is a liberty with regard to that voyage and that

it is not liberty to go another voyage but to call at those ports which are in the course of the voyage though not exactly the sea course that the ship would take.

Bowen, L.J. and Fry, L.J. agreed with this judgment and neither there nor in the House of Lords (7 Asp. Mar. Law Cas. at p. 366; 69 L. T. Rep. 1; (1893) A. C. 351) was any serious doubt raised as to the meaning of the voyage that was contracted for in the bill of lading, although the practice of vessels to coast along the Mediterranean was referred to both in the arguments and in the judgments. So far as the principle laid down in these cases is concerned it is, to my mind, this, that the route of a vessel declared to be lying at one port and bound for another must be construed as a direct route and the circumstance of knowledge that it was not or might not be direct will not affect that construction. That this doctrine is confined within these strict limits is shown in the case of *Evans v. Cunard Steamship Company* (18 Times L. Rep. 374). In that case oil was shipped at Bari on the Adriatic to be delivered at Liverpool. The bill of lading provided that the ship was at liberty to proceed to her port of destination, first turning to or staying in any port or ports in order, in a variety of named places, including the Black Sea, the Levant, the Adriatic, and the Mediterranean, in any order of rotation and whether in or out of the customary or advertised routes, without the same being a deviation. The vessel instead of proceeding direct to Liverpool completed her voyage by proceeding to Fiume and other Adriatic ports and thence to Constantinople. The heat caused the casks to leak and the oil was lost.

Wills, J. said that the evidence showed that the only practical way to get a cargo from Bari to London was by the Adriatic round by the Levantine or Black Sea ports, and that that was in fact the agreed voyage and that Constantinople was on the customary route. He accordingly held that the deviation clause applied.

In the Federal courts there are two cases reported in the 2nd Series of the Federal Reports for the year 1925, *W. R. Grace and Co. v. Toyo Kisen Kabushiki Kaisha*, at p. 889, and *Rosenberg Brothers and Co. v. United States Ship Board E.F. Corporation*, at p. 893.

In the first of these cases goods were shipped from Antofagasta to Honolulu. The ship proceeded to San Francisco and thence to Portland, and after leaving Portland she was destroyed by fire and the cargo was lost. It was stated that this was a deviation from her proper course and that the usual and customary route from the nitrate ports of Honolulu was northerly to San Francisco. The shipowner answered that the particular route was well known to the shippers when the goods were shipped. It was held that the deviation was permitted but the foundation of the judgment appears to be this: that the customary route had been changed to the knowledge of the shipper and that, therefore, the presumption

that the old route was the right one could not be followed. Whether that case be accurately decided according to our law or not, it is not necessary to consider, for it is not the present case.

In the second case, where it was held that the deviation clause was not a protection, the learned judge said that the rule was that a deviation clause must be considered in reference to a particular voyage between the ports of departure and the destination named in a bill of lading, and to have no application to any port or ports not naturally and usually ports of call on the proposed voyage. This does not assist the present case, where there was not a port of departure and a port of destination so named in the bill of lading, for the place of departure is not mentioned, the word Malaga only occurring in the following connection: "The master or agent signs two bills of lading of one same tenor; one being accomplished, the other to stand void and of no effect. Malaga, the 11th April 1927."

Nor was there a customary route, but one of two routes, either of which might be taken, and this is left open on the bill of lading, which would cover either route. So far as the original parties to the bill of lading are concerned, the actual route was well known, while as to third parties the form of the bill of lading made it necessary for them to ascertain, as they readily could, which route in fact the goods would travel, for either was included in the bill of lading.

There is no need in these circumstances to examine the effect of the deviation clause, since if, as I think, the route covered by the bill of lading was via Levante, the question does not arise.

For these reasons I think this appeal should fail.

LORD DUNEDIN.—Notwithstanding the personally testified ignorance of the appellant, I am completely convinced that those who were acting for the appellant and with his authority at Malaga knew perfectly well that the route to be taken by the *Cervantes* was to proceed up the coast of Spain, and then to turn back to the Straits of Gibraltar, and so on to Liverpool. The regular custom of the vessels of this line was to make a round voyage of the ports on the east side of Spain, and Malaga might be touched either on the outward or on the return journey.

The *Cervantes* on the occasion of the voyage in question was to touch at Malaga on the outward voyage and not on the return, so that if goods were to go by that ship, they must needs be taken by being carried eastwards. On this occasion the *Cervantes* was on its usual route.

The bill of lading discloses these facts:

- (1) That the ship is the *Cervantes*.
- (2) That it is one of the ships belonging to the MacAndrews Line.
- (3) That the destination of the goods is Liverpool, to which port they may be sent by any means of transport.

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The route of the ship is not specified, but is spoken of as "the route."

There is also a deviation clause.

The appellant's argument is based on authority and on authority alone. He says it is settled especially by the cases of *Leduc and Co. v. Ward and others* (sup.), and of *Margetson and others v. Glynn and others* (sup.); that the route means the direct geographical route from Malaga to Liverpool and that the deviation clause is of no value to sanction going to a port which, so far from being on that route, is in a contrary direction. It may be at once conceded that these cases had settled that the respondents could not get any assistance from the deviation clause. If the vessel was not on what is termed "the route" in the bill of lading, the deviation clause will not help them. It is, therefore, necessary to see what was exactly decided by these two cases as to the route to be followed by a vessel.

In *Leduc's* case (sup.) the bill of lading was as follows: "Shipped . . . on the steamship *Austria* now lying in the port of Fiume and bound for Dunkirk with liberty to call at any ports in any order . . . to be delivered . . . at . . . Dunkirk," &c.

The ship proceeded to go to Glasgow and was lost off the Ailsa Craig just before she got there. It was not pretended that the ship was on its proper route. The whole argument turned on the expression "with liberty to call at any ports in any order." It was pointed out that the argument of the shipowner would lead to a liberty to go to any port in the world. The courts held that ports meant ports which could fairly be called ports on the route; that no one could suppose that the route from the Mediterranean to Dunkirk lay round the West of Scotland and that consequently as the ship was off the route, liberty to call at ports did not save the shipowner. The decision, it is obvious, except in so far as the deviation clause is concerned, does not touch the present case, because in that case there was no question as to what was the route, and no averment that the vessel was on its route, while here there is.

The real strength of the case for the appellant rests not on the decision, but on some of the expressions used by the learned judges. Lord Esher, after making it clear that the bill of lading contained the contract, to the terms of which contract the plaintiff as indorsee was entitled to appeal, goes on to point out that the contract must be for a particular voyage because unless it was so, business in general, and insurance business in particular, would be impossible. He then says: "The ordinary form of bill of lading states that the goods are shipped on such a ship lying in the port of shipment and bound for the port of destination, and if the ship is to go to other places between those ports the names of them are inserted. Those terms appear to me to describe a voyage, and, such being the description of the voyage, what is the true effect of the document with regard to the voyage so described? A bill of lading is a common mercantile document, which has been

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used for hundreds of years, and I think that business men and courts of law have always interpreted it in one way, namely, that, if the only voyage mentioned is from the port of shipment to the port of destination, it must be a voyage on the ordinary track by sea of the voyage from the one place to the other."

There are several observations to be made on these remarks of the learned judge; not by way of criticism of the remarks themselves, but on their proposed application to the facts of the present case. There is no statement here that the ship is lying at Malaga and bound for Liverpool. Obviously the ship was not necessarily bound for Liverpool, because of the permission given to forward the goods to Liverpool by any other means of transport. Therefore the rigid result which Lord Esher draws from the words quoted cannot be sought in the present case. Then, as to the words, "the ordinary track by sea," I think these words must be construed *secundum subjectam materiam*. There was no question raised as to any but one route from Fiume to Dunkirk. It is, I think, clear that the words cannot be pressed to the extent that the only route is the shortest and most direct geographical route. There may be, in my view, either alternative routes or a customary route which in either case might displace the geographical route.

In *Evans v. Cunard Steamship Company (sup.)* the bill of lading bore "Shipped upon . . . the *Vera* . . . lying in this port (the port of Bari on the Adriatic) bound for the port of Liverpool." The vessel proceeded on a round voyage for Constantinople. The defendants proved that the vessels of this line invariably called at Bari on the outward and not on the homeward voyage. Wills, J. in giving judgment for the defendants, said, "The description of the particular voyage agreed upon must be the keynote to which the bill of lading must conform. What, then, is meant by the 'voyage from Bari to Liverpool'? Lord Herschell says the expression must be understood in a business sense. In *Glynn v. Margetson and Co. (sup.)* there was no evidence as there is in this case that the only practicable way to get a cargo from Bari to Liverpool is by a more or less uncertain route via the Adriatic round by Levantine or Black Sea ports." That case puts an end to the idea of the geographical route being the only route. It lets in the evidence of what the route under the circumstances of the ship really was.

Many cases may be figured where there is more than one route which might be used by a ship. It might be a choice between the Suez Canal, the Panama Canal or round Cape Horn. In such a case even if the port of starting and of destination were stated, it would be necessary to make inquiry to find out which was the usual route.

Then, as to custom, it is worth while noting how even Lord Esher, in *Leduc's case (sup.)* alludes to custom. He is speaking of an

American case which had been quoted, and which was said to decide that the shipowner might be allowed to prove that the person to whom he gave the bill of lading knew that the ship was going on another voyage. Let it be remembered that the case before Lord Esher was the case of an indorsee. He then says: "If that is the effect of what the court which decided the case said, it was apparently said in a case where it was not necessary to decide the point, for it seems that there was proof of a custom to deviate which justified the deviation."

And in the case of *James Morrison and Co. Limited v. Shaw, Savill, and Albion Company Limited* (13 Asp. Mar. Law Cas. 504; 115 L. T. Rep. at p. 511; (1916) 2 K. B., at p. 797), Phillimore, L.J. said: "It may be, if it is customary for the line to which the ship belongs, to the knowledge of the shipper, to touch at some intermediate port, not mentioned in the bill of lading, that touching at this port may be regarded as part of the customary course of navigation." The same case gives an illustration of alternative routes between the same two ports. The voyage was between a port in New Zealand and London, yet the course outward bound was by the Cape of Good Hope and homeward bound by Cape Horn. The deviation there was to a place which lay on neither route and so the decision followed *Leduc's case (sup.)*.

I must particularise that when the knowledge of the shipper is spoken of I am so far only taking that as evidence of the customary not as a collateral agreement for route, deviation.

I come next to the case of *Margetson and others v. Glynn and others (sup.)*. The bill of lading there stated that the goods were:—

Shipped on board the steamship *Zeta*, "now lying in the port of Malaga bound for Liverpool," &c.

The appellant very naturally appeals to this case because the place at which the goods were shipped was Malaga, as here, and the place of their ultimate destination was Liverpool, as here, but in that case there is not a vestige of averment that there is any customary route between Malaga and Liverpool, except the direct route. The expressions "lying in" and "bound for" occur, and bring it straight within Lord Esher's observations. The whole argument was based on the scope of the deviation clause.

I am accordingly of opinion that neither *Leduc's case (sup.)* nor *Margetson and others v. Glynn and others (sup.)* closes the door against the respondents. I think "the route" in the bill of lading means the customary route, and that by this line the regular customary route for a ship which touched at Malaga on the outward route of a round voyage was to continue eastward as the *Cervantes* did. I think the respondents are entitled to show that by evidence, and they have shown it; consequently there was no deviation and the judgment of the Court of Appeal is right.

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LORD SUMNER.—The question here is whether the shipowners have so deviated from the contracted voyage as to disentitle themselves to the protection of their excepted perils. The bills of lading now in suit are in Spanish with a few English clauses in the margin, but the English translation has been agreed, and it is agreed also that they are governed by English law. The most material clause, divided into sections, is as follows: "Shipped by Leon Frenkel (1) in the steamship *Cervantes* with destination to Liverpool (2) with liberty to touch at any ports whatsoever, although they may be outside the route, without it being considered a deviation (3) to enter and leave ports without pilot (4) to tow and assist vessels in any circumstances (5) to discharge reload tranship send to destination by any means of transport (6) all responsibility of the ship ceasing on discharge from deck (7) twenty-four barrels of olive oil."

This is how one bill of lading runs; the other was of identical tenor but the quantity was 110 barrels with destination Bradford. There is no statement, such as is common, of the port where the ship is lying, or that she is "bound for" another port, and, although the general structure is that of a transit, more or less indicated, with four liberties added, the sentence is not wholly or even mainly framed to describe a route with an optional variation of that route, which is nevertheless to be subordinate to it. I do not think that the rules of construction applicable to deviations, would apply without modifications to the liberties to tow and to tranship, and certainly they do not to the liberty to dispense with pilotage, yet all alike are uttered, so to speak, in one breath and to some extent at least appear to stand on the same footing.

Grammatically both the word "shipped" and the words "with destination to" refer to the barrels of oil as to which the statements in the sentence are made, and it is plain that in the case of the bill of lading for 110 barrels this is the substantial and not merely the formal construction. Further, the words "tranship, send to destination" point to a destination of the goods for some place, to which the ship is not or may not be bound. Nothing expressly shows that this liberty is only to be exercisable when the ship herself is accidentally prevented from getting to the destination of the goods or to the termination of her own voyage as originally contemplated.

In the rest of the bill of lading the words "at destination" occur twice, and the words "port of destination" twice. I need only say that I think none of these phrases carry the words "with destination" Liverpool or Bradford, as the case may be, any further. Certainly they are not enough to show that the words "with destination to Liverpool" are an expression of the *terminus ad quem* of the ship's voyage.

Each bill of lading bears the words "Malaga" just before a date, which is clearly the date

when the master's signature, immediately following, was affixed. As a matter of construction I think "Malaga," so placed, means only the place where the bills of lading were signed and does not in itself also mean that Malaga is the place where the goods were shipped. For anything that the document says to the contrary shipment might have been at a neighbouring loading place. Torre del Mar for example. It happens not infrequently that goods are shipped in one place and signed for in another for reasons of business convenience, but if such be the fact the voyage does not simply commence at the place where the bills of lading are signed. The matter is one for proof. Accordingly, in these bills of lading I think it is clear that the voyage is not stated in terms. It is easy to surmise from them what the voyage was to be; it is easier still to infer where the goods were probably laden and to what port it was expected that the *Cervantes* would carry them, but the bills of lading do not express the ship's contract voyage. Yet until a contract voyage is established, questions of deviation do not arise. Evidence was needed to prove what that voyage was and that evidence was tendered and was admitted without objection. Its effect was that the ship, having shipped the oil at Malaga was to proceed "via Levante," calling at various ports as far eastward and north-eastward as Palamos, and returning thence, calling at other ports, until, having passed Malaga without calling again, she proceeded "Directo" for the United Kingdom. No question arises here as to the precise meaning of "via Levante" or as to the ports to be called at and the order of the calls, which that expression may connote. This was shown to be a usual commercial route for the *Cervantes* to follow under the circumstances and to be the route which had been advertised for her for this voyage some time beforehand, and it was one which I think was reasonable under the circumstances. I cannot see that it is the less a reasonable and usual commercial route, though the evidence referred only to the ships of the respondents' own line. Their prominent position in this trade, the number of ships they run, and the length of time that this kind of practice has been followed by them all go to prove this conclusion. The evidence further shows that these facts were well known to those of his employees, to whom the plaintiff confided this part of his business, and the usual and reasonable commercial character of such a voyage was thereby strongly confirmed, since no objection was taken. I do not consider that any estoppel or collateral agreement arose in consequence of this knowledge, so as to furnish a defence independently of the terms of the bills of lading, but this was not necessary.

If a voyage via Levante became in fact the contract voyage, to which the contracts of carriage apply, or if, commercially, it was a due performance of whatever was agreed, the action fails, for the ship did not depart

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from a voyage so described and the bill of lading exceptions accordingly covered the loss sued for. At the bar, however, it was contended that *Margetson and others v. Glynn and others (sup.)* bound your Lordships to find that there had been an unauthorised deviation and that the exceptions did not apply.

The authority of that case is unquestionable but the limits of the decision are also clear. The termini of the bill of lading voyage were expressly stated. The shipowner's claim was boldly made that a liberty to deviate, framed in almost universal terms, entirely overrode those limits and prevented what the ship actually did, or indeed almost anything else of the sort that the captain chose to do, from being an unauthorised deviation. The House decided that he was wrong and that the liberty did not cover the deviation, the principle being that these two parts of the bill of lading, the described voyage and the liberty to deviate, must be read together and reconciled and that a liberty, however generally worded, could not frustrate but must be subordinate to the described voyage. It follows that as soon as it is established in the present case that the described voyage was not departed from, there is no need to resort to or to interpret the liberty to deviate at all. Reliance was, however, placed on various sentences in the judgments of Lord Herschell and Lord Esher, chiefly the latter, as authority for saying that, when the beginning and end of the voyage have been ascertained, the law would not permit an intermediate divagation of the ship in a direction opposite to that of the named destination, since that would contradict the description of the voyage, and even amount to an abandonment of it. I think that this is a misunderstanding of these judgments. They were, of course, directed to the case in hand, and were not intended to lay down a general rule to fetter all freedom of contract between shippers and shipowners. It is additionally evident that this was so, because no material was before the House to show how far the exigencies of navigation and the usages of trade permit or require elasticity in the route by which a ship is to reach her journey's end. It was indeed argued that all ships in the Mediterranean trade did as the *Zeta* had done, but, apart from suggestions to this effect made to, but not accepted by, the Spanish witnesses on commission, evidence was given of the conditions of the voyage described and, except such as could be taken judicial notice of, the court had no information. The deviation was one which not only took the ship to Burriana, a long way to the east and north-east of Malaga, but one of which every league had to be retraced, and this, with a cargo of ripe fruit, necessarily involved deviation consisting in the delay to proceed promptly towards the destination, apart altogether from the line of route. Both judgments endeavour to keep the door open to a certain measure of departure from the strict "sea-track" without its being considered a deviation. These expressions were not meant to state the limits of permissible

departures, but to indicate the kind of facts to be taken account of, when proved, with a view to the recognition of a liberty. Lord Herschell speaks of certain ports being in the way of the voyage "in a business sense." Lord Esher mentions various circumstances as to season and safety that may be material. It would have been enough for the decision to have said "Malaga to Liverpool is not Malaga to Burriana and back to Liverpool." The mention of other matters, all of them depending on facts relating to the circumstances of trade and navigation and varying somewhat as time goes on and progress takes place, really shows how clearly these great authorities desired to guard themselves in view of the fact that on many grounds deviation from the sea-track might still not be beyond the ordinary route, though in the case in hand they had not been put in evidence. Such things must be matters of degree and may not always be equally important for all classes of ships, all kinds of cargo, or all periods of trade. In more recent years to sail in the direction opposite to that of the destination has been held not to have been a deviation from a named voyage, where it was commercially impractical to do otherwise (*Evans v. Cunard Steamship Company*, 18 Times L. Rep., 374) and a departure from the direct line from San Francisco to Honolulu by proceeding to Portland, Oregon, merely in order to earn a subsidy for the shipowner, has been held justifiable by usage in *Grace v. Toyo Kaisha* (7 Fed. Rep., Ser. 2, p. 889), and the fact that a general ship is seeking parcels at various ports in a gulf, the Persian Gulf, where she can find them, has been treated as being available to justify a departure from a named terminus under the authority of a wide deviation clause: (*Hadji Ali Akbar and Sons Limited v. Anglo-Arabian and Persian Steamship Company Limited*, 10 Asp. Mar. Law Cas. 307; 95 L. T. Rep. 610).

The conclusion of the Court of Appeal, with which I concur, that the agreed voyage was one which included the passage on which the oil was damaged, makes it unnecessary to discuss now the terms of the liberty to deviate, and I will only say that, if, as I suppose is the case, parties may, if they can find apt words to do so, contract themselves even out of *Margetson and others v. Glynn and others (sup.)*, and make the liberty to deviate control the terms of the described voyage, the words used here, viz., "at any ports whatsoever, although they may be outside the route," seem to go far, and possibly far enough to achieve this object.

I think that the appeal should be dismissed.

LORD WARRINGTON.—The appellant (the plaintiff in the action) shipped on board the defendants' ship *Cervantes* at Malaga 134 barrels of olive oil under two bills of lading with "destination" in one case to Liverpool and in the other to Bradford. The olive oil would not be properly described as perishable

goods. The goods were lost at sea, and the appellant sued the respondents for their value. The loss was covered by the exceptions in the bills of lading, but the appellant insisted that these did not protect the respondents, inasmuch as, at the time of the loss, the ship was not on the agreed voyage, or on any permitted deviation therefrom.

This view was accepted by Rowlatt, J., who tried the action, and he entered judgment for the appellant. He thought the case depended on the effect of the deviation clause, and as to this he considered himself bound to follow a decision of Hill, J. The respondents appealed, and the Court of Appeal, consisting of Scrutton, Greer, and Sankey, L.JJ., reversed the judgment of Rowlatt, J., and entered judgment for the respondents, being of opinion that on the true construction of the bills of lading, in view of the surrounding circumstances, the ship was on the agreed voyage, and therefore the question as to the effect of the deviation clause did not arise.

The respondents are the owners of a line of steamships (of which the *Cervantes* is one) engaged in carrying general cargoes between the ports of Spain and Portugal and the United Kingdom and North Germany. The business was established about a century ago. It has for many years been customary for the vessels of the line to make regular round voyages from the United Kingdom and back again, calling at ports in Spain and Portugal to discharge or pick up cargo as the case might require. At the time in question, April 1927, the *Cervantes* in the ordinary course of her owners' trade was engaged in one of such round voyages and touched at Malaga outward bound. Having there shipped the appellant's goods she proceeded along the eastern coast of Spain, touching at various ports including Cartagena, and having reached Palamos retraced her steps, touching at several ports and ultimately reached the United Kingdom. She did not touch at Malaga on the homeward voyage. The loss of the oil occurred as the consequence of heavy weather encountered between Malaga and Cartagena on the way out.

I now turn to the bills of lading. They are both in the same terms, except that in the one case the destination is "to Liverpool" and in the other "to Bradford." They are in Spanish, but we have been furnished with an agreed English translation. In the margin, together with other matter, are the words "MacAndrews Line," with a list of the ports at which the firm have offices, including Malaga, Cartagena and other ports on the east coast of Spain. The material passage is as follows: "Shipped by Leon Frenkel in the steamship *Cervantes* with destination to Liverpool with liberty to touch at any ports whatsoever although they may be outside the route without it being considered a deviation; to enter and leave ports without pilot; to assist and tow vessels in any circumstances; to discharge or load, tranship, send to destination by any means of transport, all responsibility of the ship ceasing on discharge

from dock." There follows a specification of the goods and a number of provisions not material to the question. The exception clause is a wide one and includes perils and risks of the seas. The bill of lading purports to be signed at Malaga on the 11th April 1927.

It is to be observed that the ship is not described as "now in the port of Malaga bound for Liverpool," the more usual way of describing the termini of a sea voyage, and in the case of the Bradford bill that town is obviously not such a terminus. The fact is, I think, that "destination" in both these documents means the ultimate destination of the goods which may or may not, according to circumstances be the termination of the voyage. The expression "send to destination by any means of transport" confirms this view.

The appellant insists that in both cases Liverpool is the proper port of discharge, and that on the construction of the contract the respondents were bound to carry the goods to Liverpool by one route and one only—viz., the direct route by which under ordinary circumstances a steamship at Malaga bound for Liverpool would travel, subject, of course, to permitted deviations, and contends, further, that to proceed in a direction opposite to that of the home port cannot be treated as authorised by general words such as those in the clause now in question.

The appellant strongly relied on certain decisions of high authority—one in this House. I will examine these authorities presently, but meanwhile I propose to consider the question of construction on principle.

In the first place I think the same principles of construction apply to bills of lading as to written contracts in general. It is well settled, that if the surrounding circumstances raise a latent ambiguity in any of the expressions used, parol evidence may be resorted to for the purpose of ascertaining which of the meanings of an ambiguous expression was contemplated by the parties. In the present case the question arises between the original parties to the contract, but this fact is in my opinion immaterial; so far as construction is concerned that must be the same whether the question arises as between the original parties or their respective assignees.

As to the material circumstances, in the present case there can, I think, be no dispute. The ship was one of a line pursuing a regular course of trading in accordance with which her usual and customary routes with goods from Malaga destined for Liverpool would be determined by ascertaining whether she was at Malaga on the outward or the homeward section of her voyage; if the former, her route from Malaga would be concisely described as "via Levante"—viz., "via the eastern coast of Spain," if the latter, as "Directo." It thus appears that "route" is in this case an ambiguous word.

Parol evidence would then be admissible to prove in which of these two senses it was used by the parties to the contract.

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The result of the evidence on this point is to my mind clear. The shipowners did all they could by advertisements in local papers, by personal communication with their regular shippers or their representatives at the port, and by the circulation of what are called shipping cards to intimate to those concerned whether a particular ship was sailing via Levante or Directo. In the case of the *Cervantes*, she was advertised to sail via Levante.

The appellant himself was not at Malaga but his business there was conducted by responsible persons on his behalf. None of these persons was called. In my opinion the inference from the evidence is irresistible that the appellant through his agents at Malaga knew perfectly well that the voyage in contemplation was one via Levante and accepted that position.

The judges in the Court of Appeal were accordingly justified in coming to the conclusion that on the true construction of the contract the agreed voyage was that actually undertaken. In this view the question as to the meaning and effect of the deviation clause does not arise.

Are the authorities referred to by the appellant such as to preclude one from coming to the above conclusion? The only cases which it is really necessary to consider are those of *Leduc and Co. v. Ward and others* (sup.), and *Margetson and others v. Glynn and others* (sup.), and the same case *sub. nom. Glynn v. Margetson and Co.* (69 L. T. Rep. 1; (1893) A.C. 351).

In *Leduc and Co. v. Ward and others* (sup.) no question as to the construction of the contract in reference to surrounding circumstances arose. The voyage was by a ship stated to be lying at Fiume and bound for Dunkirk. There was no evidence establishing any latent ambiguity in these words, and the parol evidence by which it was sought to give a different meaning to what the court held to be the natural and commercial meaning of the words was rightly rejected. I think the judgment of Fry, L.J. makes it quite clear that the question what was the agreed voyage was one to be determined on ordinary principles of construction. In the view taken of the construction as to the voyage the effect of the deviation clause had to be determined and was determined against the shipowner, but that question, in the view I take, does not arise in the present case.

The same remarks apply to *Margetson and others v. Glynn and others* (sup.) and *Glynn v. Margetson and Co.* (sup.). There again the voyage was described as on board a ship "lying at Malaga, bound for Liverpool," and the real question was as to the effect on such a case of a wide deviation clause. This was again decided on the principle that, the main object of the contract being ascertained, general words must be used so as not to be inconsistent with the performance of that object.

If an example of the application to the construction of a bill of lading of the general principles referred to above was required, I think it is to be found in *Evans v. Cunard*

Steamship Company (18 Times L. Rep. 374). There the ship was said to be lying at Bari bound for Liverpool. The learned Judge (Wills, J.) held that "the only practicable way to get a cargo from Bari to Liverpool is by a more or less uncertain route via the Adriatic round by Levantine or Black Sea ports," and so on.

What is meant by "practicable" is clearly "practicable in a commercial sense," and the same might well be said of the course pursued by the *Cervantes* in the present case.

Arguments were addressed to your Lordships urging the extreme inconvenience to indorsees and others to whom bills of lading are submitted for financial purposes in the course of business, but if such contracts are—and by authority it is settled that they are—to be construed according to ordinary principles of Law (see per Fry, L.J. in *Leduc and Co. v. Ward and others* (sup.)), then such an argument should be addressed to those who frame such documents, and not to the court which has to interpret them. Under the Bills of Lading Act 1855, the effect of the indorsement is merely to transfer to the indorsee the rights and interests of the indorser; the contract must be interpreted without reference to such change of interest.

I agree that the appeal fails and should be dismissed with costs.

Lord BLANESBURGH concurred.

Appeal dismissed.

Solicitors for the appellant, *Middleton, Lewis, and Clarke.*

Solicitors for the respondents, *Richards, Butler, and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 14, 15, 19, 27, and 28, 1929.

(Before SCRUTTON, SANKEY, and RUSSELL, L.JJ.)

COMPANIA MEXICANA DE PETROLEO "EL AGUILA" v. ESSEX TRANSPORT AND TRADING COMPANY LIMITED. (a)

ON APPEAL FROM THE KING'S BENCH DIVISION.

Negligence—Inflammable cargo—Explosion on vessel while loading—Subsequent fire causing loss of vessel—Explosion caused by negligence of stevedores in leaving beam unbolted—Duty of stevedores—Alleged negligence on part of ship-owner.

The plaintiffs, who were stevedores, experienced in handling dangerous cargoes, contracted to

(a) Reported by EDWARD J. M. CHAPLIN, Esq., Barrister-at-Law.

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load a vessel belonging to the defendants with a cargo of kerosene and gasoline at the port of Tampico in Mexico. In the course of the loading an explosion occurred, many of the workmen engaged were killed, and injured, and as the result of which the ship was destroyed. There was no direct evidence as to the cause of the explosion. In an action brought by the plaintiffs for damages it was found that the explosion was caused by a spark which was made by a beam falling into the hold, the fall being caused by a tray which was being hoisted up. The plaintiffs contended that the fall of the beam was caused by the negligence of the defendants in leaving it unbolted. The defendants, on the other hand, contended that the accident was caused by the faulty manipulation of the tray and they counterclaimed for the loss of their ship.

Bateson, J. having held that both parties were negligent, the defendants appealed and there was a cross-appeal by the plaintiffs.

Held (1) that the ship did not owe any duty to the stevedores to anticipate that they would be negligent and to avoid the effects of that negligence by anticipation. There was no breach of duty on the part of the ship by leaving the beam unbolted, but even if there was, the stevedores knew, or ought to have known, that it was unbolted. (2) that there was evidence that the tray was negligently drawn up by the stevedores.

Decision of Bateson, J. reversed.

APPEAL from a decision of *Bateson, J.*

By a charter-party made in Feb. 1926 the defendants, who were shipowners, agreed to carry for the Anglo-Mexican Petroleum Company Limited, who were closely associated with the plaintiff company about one-and-a-half million cases of petroleum products from Mexican ports to South American ports over a period of twelve months. The charter party provided that the ship was to employ the charterers' stevedores, and ship's agent to load the cargo. The *Essex Isles* was the seventh vessel to be nominated under the charter and she arrived at Tampico on the 8th Jan. 1927 to load a cargo of kerosene and gasoline. For the purposes of loading the vessel provided the gear, but the loading itself was done by the plaintiffs. After the work had proceeded for some time an explosion took place on board the vessel, followed by a serious fire with the result that ten stevedores were burnt to death and twenty-five others severely injured. There was no direct evidence as to the cause of the explosion. The plaintiffs accordingly instituted the present action, wherein they alleged that the explosion was caused by the negligence of the defendants' servants in leaving unbolted a hatch beam which became dislodged in the course of loading and fell into the lower hold of the ship, causing the explosion and fire, and they claimed the sum of some 20,000*l.* which they said they had expended to the extent of 1500*l.* as agents for the defendants before the explosion took place, a further sum of 8500*l.*

by way of salvage expenses. They also claimed some 10,000*l.* in respect of compensation to the injured workmen, and the relatives of those who had been killed. The defendants denied liability, and said that even if the defendants servants had left a hatch beam unbolted the accident was really caused by the negligent management of the tray on which the cargo was loaded so that it struck the beam, and they counterclaimed for the damage caused to the ship.

Bateson, J. held that both parties were negligent and that neither could prove that the other could have avoided the negligence by the exercise of reasonable care. He therefore gave judgment for the plaintiffs on the first two items of their claim and dismissed the counterclaim.

The defendants appealed and there was a cross appeal by the plaintiffs.

The facts are fully stated in their Lordships' judgments.

Clement Davies, K.C. and *Cyril Miller* for the appellants.

W. N. Raeburn, K.C. and *James Dickinson* for the respondents.

Charles Stevenson for the underwriters.

SCRUTTON, L.J.—This case took some time in the court below, and there was a very careful judgment given by the learned judge who tried it, a very experienced judge in this class of action. It has taken considerable, but not too much, time in this court, for it is a curious case as far as the facts are concerned. It arises out of a very serious explosion on board a ship loading cases of petrol and gasoline in Mexico, an explosion which unfortunately killed ten men and seriously injured some ten more, and destroyed the ship; and the stevedores brought an action against the shipowners, claiming three things: They said, first of all, "We, as your agents, before this accident happened, had paid a number of disbursements for you amounting to 1500*l.*, which had nothing to do with the explosion, and had all been incurred before the explosion."

The position about that 1500*l.* I take to be this, that it is admitted that it is due, and that if it is not interfered with and an account is taken of the sums to be recovered the plaintiffs will have credit for that 1500*l.*

The stevedores claimed in addition certain sums paid for salvage of the ship after the explosion, and lastly, the money which they were liable to pay to the dependants of their servants who were killed when working in the hold, and to the people who were injured working in the hold.

As to those, the answer of the ship was in effect their counterclaim, "You, the stevedores"—said the ship—"are liable for this explosion and its consequences, and consequently, if we have to pay salvage or compensation to the dead and injured men, we should recover that from you, because it is a

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consequence of your breach of duty to us as stevedores."

The facts are a little complicated, and as to some of the things that happened one has to—I will not say use one's imagination, but conjecture what has happened from the facts that one knows. The stevedores are Mexican shippers, who are in trade connection with a European firm, who market the gasoline or kerosene. The marketing firm have a charter with the shipowners for a series of ships extending over a year, all of which go to Tampico, to load the gasoline and kerosene.

The particular ship on which this accident happened was the *Essex Isles*, and was the seventh ship that had come under the charter. The gasoline and kerosene—particularly gasoline—are very dangerous goods. The gas emitted by them is very liable to explode, and consequently, and not unnaturally, the Mexican firm insist upon the processes of shipping and loading being carried out by people whom they control; and the practice with all these ships that came to Tampico was the same. The representatives of the stevedores, the shippers, came on board; they ascertained from the captain how many hatches he had and their sizes, and they said: "We will load in such a way at one hatch and in such and such a way at another hatch"; they then took off the hatches and fitted the holds for loading. The holds, as is usual with most ships' holds, when the hatches were taken off, had removable beams across them transversely, with removal fore and afters between the beams, and between the beam and the hatch coamings, and these beams and fore and afters had to be taken away before the cargo could be loaded into the hold. The beams, very substantial metal structures, weighing about a ton, fitted at each end into slots about 18in. deep, so that if the beams were in their proper place, to take them out meant raising them some 18in.

The particular hold at which this explosion occurred was to be worked in two ways. The stevedores, had a kind of conveyor or elevator of the sort used now in most up-to-date loadings, which by a sort of endless band conveyed a series of cases in a stream into the hold, where they were discharged and stowed. That was one way of doing it. Another way of loading, and the more old-fashioned way, was that on to a wooden tray there were piled a series of cases; to the tray was attached a sort of net which covered the cases, the net and ropes attached to the tray ended in a hook, and the hook was made fast to the derrick, and the tray, by the combination of the two derricks which were worked, was then hoisted, swung across over the hatch, dropped down the hatch, and then moved, swung, as far as it could be, towards that part of the hold where the stowage was going on. In this particular hold No. 1, it was determined by the stevedores to work the elevator in the forward part of the hold, and to work by tray in the aft part of the hold. The hold was 24ft. long by 16ft. broad. The elevator was going to

work in the forward section, there being two beams dividing the hatch into three sections. The elevator was going to work in the forward section, 16ft. by 8ft. and the tray was going to work in the aft two sections, 16ft. by 16ft.

Now to work the elevator you have to leave in the top beam.

The stevedores took off the hatches, and then the after three beams, as they did in three other holds in the ship, so that in all they took out twelve beams. They left in the forward beams, the top beam because the elevator was going to rest on it on a baulk, and the beams of the second and third decks, because nobody thought that it was necessary to take them out.

Now when one follows what was happening, one makes a guess at the sort of thing that did in fact happen. The elevator is loading cases into the forward part of the hold, where they are being stowed. The tray is going to be used to stow the after part of the hold, and as one would expect, you would begin with the part furthest aft and work up to under the hatch, and very properly, to save themselves trouble, the method of stowage is adapted which anyone who has seen ships loaded has seen dozens and hundreds of times. The tray is loaded, it is lifted from the quay; it is swung across plumb over the hatch, it is lowered down into the hatch, but stops before it gets to the bottom, and then, still hanging on to the sling from the derrick, it is pushed or moved partly by the derrick swinging and partly by the men below hauling it until it is dispatched as far aft as it can be got while hanging to the derrick, the object being, of course, to save the men the trouble of carrying the cases from the centre of the hatch to the after part of the hold, where the things are going to be stowed. When the tray is empty it has to come up, and if it is done carefully, the men who have pulled it aft to the place where it is dropped, will also hold on to it when the derricks gets a hoist on it, and let it go forward slowly until it is plumb with the centre of the hatch, when there will be a direct hoist up.

If the men below are careless, as men frequently are, when they have emptied the tray, they will not hold on carefully to the tray, as it is swinging forward on the derrick, with the result that it may swing forward of itself, further than the centre of the hatch, and if the derrick is pulled fast enough so as to get the initial pace on, if the hoist is going at such a speed it may easily swing forward so as to hit anything which happens to be in its way on the forward side of the centre of the hatch, it may be a pillar, it may be a beam, it may be men, it might be cargo. Again, anyone who has seen cargo loaded, knows perfectly well that with a fairly rough cargo and a good tramp ship the hoisting goes on in rather a rough way, and the hoist may bounce about and swing about, and may bump into the coamings and may bump into the beams. How much care must be taken with that sort of work depends of course a great deal upon the

cargo that is being hoisted, and upon the construction of the ship. It may be that the cargo is such that a little bumping does not hurt it, and the ship takes its chance. It may be casks of liquor, and then of course more care must be taken, because you run the risk of spilling the whole contents if you bump a cask hard into a beam or a pillar. But in the case of petrol or gasoline, it is quite obvious that the greatest care must be taken to avoid any risk of explosion. A spark may blow the hold up, with the greatest risk to life and to property. Anything metal in the hoist hitting another metal part in the ship may make a spark. This court, in a case which has achieved great notoriety in the world of law, the case of *Polemis v. Furness, Withy, and Co. Limited* (15 Asp. Mar. Law Cas. 398; 126 L. T. Rep. 154; (1921) 3 K. B. 560), was face to face with a similar terrible explosion which destroyed a great deal of life and property by a plank dropping and making a spark in some way—whether it had a metal binding or not one does not know—and there is no doubt that the operation of loading and unloading in an atmosphere charged with a dangerous explosive vapour should be carried on with the greatest care.

In the course of loading, on the 13th Jan. 1927, an explosion did occur, which, as I have said, killed ten men, injured seriously some ten more, and caused the ship to be towed over to the other side of the river and sunk, and I think abandoned. Now what caused that explosion? Of direct evidence there is very little, but two men who were in the hold, some thirteen months or more after the explosion, did make two declarations which, according to the practice of the Commercial Court, have been admitted in evidence.

The first man, Juan Herrera, says that he was working as stevedore in hold No. 1 of the British ship *Essex Isles* when approximately at 11 o'clock in the morning of the 13th Jan. 1927, he saw that an empty tray, upon being lifted from hold No. 1 referred to, caught a beam of the shelter deck and raised it, dislodging same from its place. He also solemnly declares that he saw that upon the beam mentioned falling to the bottom of the hold referred to, it grazed the iron column which produced large sparks causing immediately an explosion. The second man, Lazaro Garcia, says this, that he also was working as stevedore in hold No. 1 of the British ship *Essex Isles* when approximately at 11 o'clock in the morning of the 13th Jan. 1927, he saw that an empty tray, upon being lifted from hold No. 1 referred to, caught a beam of the shelter deck and raised it, dislodging same from its place—he does not say, as the first witness did, that it grazed an iron column which produced large sparks. Mr. Dodds, to whose evidence the judge had evidently attached considerable importance, who had both stowing experience and sea experience, on coming down shortly after the explosion, saw the forward beam of No. 2 deck lying at the bottom of the hold, and that

positive evidence suggests, and the learned judge finds, that the explosion was caused by that beam, the forward beam of No. 1 hold on the No. 2 deck, getting out in some way from the slots that held it, and falling, and by hitting some metal, making a spark which caused the explosion.

There were possible alternative theories. One always suspects in these explosion cases that somebody has been smoking. One knows, unfortunately, by English experience in mines, that workmen will smoke in the most dangerous conditions; but there is no evidence here which one can find that this was caused by smoking, so as to overthrow that positive evidence. There is another possible theory that the hoist swinging from the derrick and being raised too quickly and without being steadied into the middle of the hatch, the metal hook of the hoist struck some metal and made a spark, sufficient to cause the explosion. But I think that if one accepts Mr. Dodds' evidence that almost directly after the explosion he saw that beam to which I have referred at the bottom of the hold, it is much more probable that the explosion was caused by a spark made by that beam dropping on to metal, than that it was made by the hook of the hoist striking metal, because, if the latter theory was correct, you would have to account for the beam going down to the bottom of the hold.

If the explosion was caused by the swinging forward of the hoist catching the beam somehow, either by catching it by the hook or catching it by the edge of the tray, the hoist continuing and the beam coming out, was that or was that not negligence on the part of the stevedores? They are working in a most dangerous atmosphere, an atmosphere where a spark may cause an instant explosion. It appears to me that the greatest care was necessary on their part to ensure that their hoist did not strike so as to make a spark, or dislodge things which might make a spark; and I come to the clear conclusion, as the learned judge did, that there was negligence on the part of the stevedores and those supervising them, in so carelessly letting the hoist go up that it dislodged a beam which, falling, caused a spark. It is significant, although one must not attach too much importance to it, that the hoist depending on control by the signalman, a servant of the stevedores, the signalman, after the accident, disappeared—there is no suggestion that he was killed—directly after the accident happened. A further thing which supports the view at which I have arrived is the evidence given by Mr. Dodds himself, or rather the report he made shortly after the accident.

Upon the question of whether the stevedores were negligent in their operation, which in some way caused the beam to fall by careless swinging of the tray and plant, the report made on the 3rd March 1927, by Mr. Dodds, one of the principal managers of the stevedores, is of vital importance.

He says this: "From the evidence of all shore witnesses, it is perfectly clear that the

accident was caused by an empty tray which was being raised from the lower hold of No. 1 hatch catching under the shelter deck beam"—that is the beam of No. 2 deck—"on the fore side of the hatch, dislodging it and causing it to fall down below, striking the spark in all probability when it hit the 'tween deck coamings"—the 'tween deck being No. 3—"I have not the slightest doubt that this version is the correct one." Then he goes on to give his reasons, stating how early he saw the beam in the lower part of the hold, and that he personally unshackled the empty loading tray from the runners of the forward derrick, the tray at this time being on the starboard side of the deck. Then he goes on: "It is the responsibility of the ship"—this of course is a matter of dispute—"to see that any beams which are not removed for the loading or discharge of cargo are bolted in place, and it appears that on this vessel none of the beams were bolted. When the empty tray is being hoisted out, it is customary to take the strain, lift the tray slightly and then steady it until the runner is plumb with the block on the derrick head before hoisting out, in order to avoid the tray swinging around. There is no doubt that on this occasion the tray was allowed to swing unduly, otherwise it could not possibly have caught the beam."

That of course is a very clear statement that the stevedores were negligent in allowing excessive swinging of the tray, and one therefore starts upon the consideration of the legal position by coming to the conclusion that the explosion was caused by negligent work of the stevedores in allowing the tray and plant to swing so that it dislodged a beam which caused damage. The learned judge takes that view.

Now comes the troublesome part of the case, because the stevedores say: "At any rate the ship were negligent as well as we. There were two concurrent negligences, and if that is the case neither of us can recover against the other. We cannot recover against you for the sums that we have to pay to our workmen, but you cannot recover against us for the damage which you say is caused to the ship, because it is caused by both our negligences." That is the view the learned judge has taken. His judgment proceeds upon the footing which involves rejecting the claim of the stevedores for the sums they have to pay their servants, and rejecting the claim of the ship for damage done to the ship.

But the stevedores have a cross-appeal, because they say: "We want to go further than the learned judge did." They say "We want to say this, that the ultimate cause of the damage was that you had not bolted the beams, as it was your duty to do, and if you had bolted the beams, then however negligently we swung, this damage would not have happened, and therefore the proximate cause of the damage is that you negligently did not bolt that beam. If you had bolted it, it would not have come out, and there would not therefore have been a spark caused by its falling,

and consequently the liability for this loss really rests upon you. You cannot recover on your counterclaim for damage to the ship, but we can recover against you in respect of the sums that we have to pay our servants, because the cause of that payment was your negligence in not bolting the beams."

This undoubtedly is not an easy question, and I have no desire to lay down a complete code of law as to how 'tween deck beams are to be dealt with as between all people. I can conceive that there may be a different measure of liability between shipowner and charterer from that which exists between a shipowner and his stevedore, because, as has been pointed out during the argument, to find out whether anything is negligence in a particular person, you must find out what duty that person owes. If there is no duty, there is no negligence. If, to put a case which has been put in one of the authorities, you see a blind man walking straight at a deep river and do not stop him, there is no legal duty on your part to stop him, and no negligence in not stopping him. Your moral duty and your moral blame may be very great, but it is impossible to say that you, the person standing by, are negligent in not stopping the blind man walking into the river.

What is the duty of the shipowner to the stevedore whom he employs? It seems to me that such a stevedore is an invitee, and being an invitee, the duty of those who invite him is the duty laid down by Willes, J. in *Indermaur and Dames* (14 L. T. Rep., at p. 486; L. Rep. 1 C. P., at p. 288). "He"—that is the invitee—"using reasonable care on his own part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know." That is sometimes put in this way: that you expect the person you invite to use reasonable care to avoid danger which he can see or ought to see; but as to traps which by using reasonable care he would not be aware of, you are under a duty either not to create such traps, or, if you have created them, to warn him of them. I have cited Willes, J. in the case of *Indermaur v. Dames* (sup.) because it is the beginning of that law, but similar passages will be found by the present Lord Sumner in the case of *Latham v. Richard Johnson and Nephew Limited* (108 L. T. Rep. 4; (1913) 1 K. B. 398), and there is one of my own in the case of *Hayward v. Moss Empires Limited* (117 L. T. Rep. 523; (1917) 2 K. B. 899) which has been two or three times approved by members of this Court, and which is the same, substantially, with one minor alteration, as Lord Sumner's view in the case of *Latham v. Richard Johnson and Nephew Limited* (sup.).

Apply that to this case. The stevedore in this case, from very proper motives, insists upon having the work in his own hands. He is dealing with a dangerous substance, which he thoroughly understands, and he objects to having other people dealing with his work, and

consequently on this ship, and on the other ships that come in, he takes the work into his own hands. The captain informs him of the size of the hatches; he settles how he is going to work those hatches, whether he will work them only with a tray or whether he will work with a tray and an elevator, and having settled that, he goes to the hatches, and his men take off the hatches and his (the stevedore's) men take out such beams as they think necessary in order that their work may be done, and they leave in such beams as they think it is unnecessary to move. In taking out the beams they must see and must know whether they are bolted. If they are bolted, they have to take the bolts out; if they are not bolted they can hoist straight away, and the beams come out; and there is no doubt that in this ship, before the explosion took place, the stevedores had themselves taken out twelve beams, three in each hatch, and had found all of them unbolted. We have not heard what happened in No. 4 hatch, where apparently they worked both elevator and tray, but in No. 1 hatch they did leave three beams. They left in a top beam because they could not work the elevator by leaving it out. They left in the two beams below, because presumably they thought that they did not interfere in any way with the work that they (the stevedores) were going to do. And indeed Mr. Dodds, in the passage that I have read, says that when they left 16ft. square for their tray, they left a space ample for the proper working, and any swing of their tackle which did hit the lower deck beams was undue swinging. "The tray was allowed to swing unduly, otherwise it could not possibly have caught the beam."

The learned judge has found, and this is the first point upon which I part company with him, that the ship owed a duty to the stevedore to bolt the beams that the stevedores left in because they were not in any way interfering with the work that he was going to do. As between the ship and the stevedore, I am unable to take that view. It does not seem to me that those unbolted beams were in any way a trap. They were perfectly visible. Anybody looking at them could see whether or not they were bolted, and the stevedores had ample notice that the beams on the ship generally were not bolted, because every beam that they had taken out they had found not to be bolted. I am therefore unable to take the view that there was a duty owing by the ship to the stevedores to bolt the beams which the stevedores, having looked at the hatch, left in because such beams would not interfere with their work. The mere fact that the stevedores thought that those beams would not interfere with their work seems to me to relieve the ship from any liability of dealing with the beams which the stevedores themselves did not think were in their way. The stevedores knew much better the nature of their work than the ship did.

That is enough, as it seems to me, to dispose of the finding of negligence, but I think it

might also be disposed of by saying that by the work of the stevedores on the beams they did take out they had ample notice that the condition of the ship as a whole was a condition of unbolted beams; and if so, there is no question of a trap. It is a matter that they knew, or by the smallest intelligence could know, and of course it is important from that point of view to remember that the two people in charge of the loading on behalf of the stevedores, Mr. Echevaria and Mr. Guzman, were not called, so that one had not the advantage of knowing, from the people in charge of the work on behalf of the stevedores, what their view of the matter was.

If, therefore, there was no duty owing, and if there were no traps, the view taken by the learned judge appears to me to be one which we cannot support. I only notice one other matter in regard to his judgment. He appears to be impressed, as I have been impressed, with the difficulty of imagining exactly what did happen to get that beam out, because I agree that you would not expect a rope sling hauled up by a derrick with a wooden tray to catch so fast round a beam that it hoisted it out and then became separated from it. You would be much more inclined to think that the derrick itself would go, or the rope would go, or that parts of the tray and sling would go down with the beam to the bottom of the hold. As far as I can see, the learned judge has taken the view that there must have been something wrong with the beam besides the want of bolting, that is to say, that it cannot have been in the slot, or can only have been so very slightly in the slot that what may be called a "touch and go" would let it go, and leave the sling to go on. Now whether that is so or not is a matter that is easily discernible. It is not in any way a trap. If, as I think, the duty is on the stevedore and not on the ship to see that the hold, apart from traps, is in a condition in which loading can properly take place, the learned judge's view does not assist in supporting the view which I hold to be erroneous.

There is only one more matter which I may refer to, and that is the argument by which Mr. Raeburn—to whose very careful and very frank argument we are much indebted—endeavoured to support his cross appeal. He said, as I understood him: "If one really understands this case, it is really the same sort of case as the decision of the Privy Council in the case of *British Columbia Electric Railway Company v. Loach* (113 L. T. Rep. 946; (1916), 1 A. C. 719). There, a wagon with a driver and a passenger—I will say something about the passenger in a moment—drove across a track without looking to see whether anything was coming. An electric tram came along the track at a fairly fast pace, saw the wagon in time to have avoided it if the tram's brakes had been in order, but unfortunately it had a defective brake, so that although the tram could have pulled up to avoid the wagon if its brakes had been in order, owing to its brakes being out of order it could not do so. The Canadian

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courts were divided three and three as to the result of that, one side of course saying, "This is negligence on both sides. Here are people who drive on to a track without looking to see what is coming, and here is a tramcar driving with a defective brake. That is contributory negligence. The wagon cannot recover against the tram."

The Privy Council took the view that as the tram saw the wagon in time to pull up if it had had a proper brake, the real cause of the accident was that it had not a proper brake, and that consequently the negligence of the wagon and those on board it in not looking where they were going and seeing what was coming was not the immediate cause of the accident, but the immediate cause of the accident was that a tram which could have pulled up if it had had a proper brake, had not a proper brake.

There is no doubt that *British Columbia Electric Railway Company v. Loach* (sup.) is a very odd case, because the man who sued was not the driver, but he was a passenger. It is described in the judgment in this way: "One Hall took Sands"—the representatives of Sands were the plaintiffs—"with him in a cart." The jury found, for some reason which I do not understand, that the passenger in a wagon was bound to take extraordinary precautions to see if the road was clear. Well, in English law, we have parted for some time with the proposition that a passenger is identified with his driver, and is affected by the negligence of the driver. But oddly enough, there is no reference whatever in the judgment to the fact that Sands was a passenger and would not be supposed to be liable for the negligence of the driver. I have sent for the record in that case and I find that the position of Sands, according to the evidence, was that he was a timekeeper in the employ of the same people as the driver of the wagon, that the wagon was going on a job for the company, having nothing to do with the timekeeper, and that the driver says: "I got my load and was passing the office when this man Sands came up. He came out of the office and he said 'Where are you going?' I said 'Up to the other end of the road'; and he said 'I will ride with you.'" So a man who had got on just for a casual ride as a passenger was in some way held by the jury as bound to take extraordinary precautions to see that the road was clear; and I confess that I find some difficulty in understanding why that point is not referred to in the judgments of the Privy Council. But whether it be so or not, it appears to me that the case of *British Columbia Electric Railway Company v. Loach* (sup.) is an entirely different case from this case.

In *Loach's* case the man who is injured says "Yes, it is true that I was negligent, but you could have avoided my negligence by taking reasonable care with regard to me." The present case is as if the wagon had run into the tram, and the tram had sued the wagon

for the damage done, and the wagon had replied: "Yes, it is true that I unlawfully ran into you, but your fittings were not in a condition to stand being negligently run into, and that is a good defence, because I can say that the damage was caused by your fittings being in an unfit condition to be run into negligently by me."

It seems to me to be impossible in this case that a man who is negligent and who is sued for damage done by his negligence can reply "The damage would not be so much if you had taken precautions to guard against my negligence." Why the ship should be under any obligation to guard against the negligent doing of work by the stevedores, which they could have done quite properly, as Mr. Dodds says, in the space provided for them, I find myself unable to say.

The result is that I agree with the learned judge that the stevedores were negligent. I do not agree with him that the ship was negligent, because (1) I do not see any duty of the ship towards the stevedores to provide that the ship should be fit to withstand the negligence of the stevedores; and (2) so far as the finding of the learned judge rests on the defective condition, it seems to me that the stevedores knew, or ought to have known of that condition, and, knowing it, to have avoided it.

The result is that the judgment of the learned judge in favour of the stevedores must be set aside, that the ship must have judgment against the stevedores on its counterclaim, that the amount of the damage must be assessed in some way which I suppose has been provided for by the parties, or if not, must be mentioned to the court, and that in assessing that damage the stevedores will have credit for the 1500/., the amount of their first claim, about which there appears to be no dispute and the stevedores respondents must pay the costs of this appeal and the costs of the action in the court below.

SANKEY, L.J.—In pursuance of a charterparty dated the 8th Oct. 1926 and made between the Anglo Mexican Petroleum Company Limited as charterers and the defendants as owners, the defendants' steamship the *Essex Isles* proceeded to Tampico in Mexico for the purpose of loading a cargo of kerosene and gasoline. The charterparty provided that the steamer was to employ the charterers' stevedores for loading at current rates, and that the steamer was to be consigned at the loading ports to the charterers' agents. The *Essex Isles* was duly consigned to the plaintiffs, the Compania Mexicana de Petroleo "El Aguila," who were the charterers' agents referred to in the charterparty, and was supplied, when she arrived, by them, with the necessary labour for loading and stowing the cargo.

According to the evidence, the practice when the ship arrives is as follows, that the stevedores' foreman goes on board the vessel, sees the master, and arranges with him about

loading the ship; and, as the learned judge finds, and in my view rightly finds, in effect, the captain leaves the loading and stowing in the foreman's hands. The foreman, or the senior person in charge of the loading on behalf of the stevedores, was a Mr. Echevaria, and he was assisted by a Mr. Guzman, who was chosen for his ability as an interpreter, and who would be able to act as a means of communication between the captain and the Mexican labourers. It is to be noticed that at the hearing of this case neither Mr. Echevaria nor Mr. Guzman was called, nor was any statement by them other than certain documents or reports put in.

The vessel arrived at Tampico early in Jan. 1927, and immediately upon her arrival Mr. Echevaria saw the master as to the stowage and as to the various holds, and he then went ashore, got a squad of labourers, who were Mexican peons, and sent them aboard. When the peons arrived on board, they took off the hatches, and removed some of the beams and the fore and afters, and having by these means obtained access to the holds, they set up elevators, and subsequently began to load and stow the cargo, using both the elevators and certain trays by means of which they lowered the kerosene and the gasoline, some of which was in cases, into the holds.

On the 13th Jan., after the loading had gone on for a little while, there was a disastrous explosion. A number of the peons were killed in the hold, and others were so severely burnt that they died after removal to hospital. It was found impossible to extinguish the flames on the vessel; it was feared that she might set fire to the warehouse in the neighbourhood of which she had been moored, and so she was towed across the river, and eventually water was let into her holds, and she became a total wreck; and the question to be determined in this case is: Whose fault was it?

The plaintiffs issued their writ in which they claimed under three distinct heads. They claimed first of all a sum of 1500*l.* for disbursements which they had made on behalf of the vessel before the fire broke out at all. As to that there is no dispute, but the defendants say: "It will be found that you owe us a great deal more than 1500*l.* and that 1500*l.* can be deducted from it."

Then, secondly, they claimed a sum of 8500*l.* for expenses which they were put to after the accident in connection with their endeavours to extinguish the flames and to save the vessel; and, thirdly, the plaintiffs claimed a sum of 10,500*l.*, which was compensation that they had been compelled to pay under the Mexican law to the relatives of the peons who had met their death, and to the injured men.

The learned judge in effect gave judgment for the first two of those sums, the 1500*l.* and the 8500*l.* but not the 10,500*l.* compensation which the plaintiffs had been compelled to pay for the workmen. The defendants counter-

claimed for the loss of their vessel, and they took up the position that it was the plaintiffs' fault that these occurrences had happened, and that, therefore, they were entitled to receive from the plaintiffs the damage that they had sustained by reason of the fact that the *Essex Isles* had become a total loss.

The case made by the plaintiffs was of this character. They said: "You, the defendants, did not properly bolt the hatch beams as you ought to have bolted them, and as we, the stevedores, were hauling up one of the empty trays from the hold, it came into contact with one of these unbolted beams and unshipped it, the beam fell to the bottom of the hold, and in falling, somehow or other made a spark, which set fire to the highly inflammable petrol vapour"; and they said: "If you, the defendants, had done your duty and bolted that beam, even if we were negligent in dislodging it by hauling up a tray, a thing which frequently happens, it would never have become unshipped, and the explosion would never have occurred."

Now with regard to the plaintiffs' case the defendants put it in issue; and they said this "Well, even if this beam was unbolted and did become unshipped in the way you suggest, at any rate you, the stevedores, ought to have known. You had ample opportunity of seeing that the beams were unbolted and you took the risk."

Now the learned judge had a very large body of evidence before him. He had the evidence of a number of experts; he also had had the statements referred to by my Lord in the judgment he has just given, of two peons who were in the hold and described what they saw, how the beam became dislodged and fell, and one of them says he saw the spark; and after listening to the whole of the evidence, the learned judge comes to the following conclusion: "In my view"—he says—"the cause of the accident was the falling of the beam"—by which he means to say, the beam falling and striking something and creating a spark—"which was not carefully and properly secured by the crew of the ship, and which was displaced by a tray carelessly hove up by the plaintiffs' servants."

Now I agree with the learned judge, on the evidence, that that was the cause of the accident, namely, that the stevedores hauled up the tray, allowed it to come into contact with the unbolted beam, and down it fell, a spark ensued, and the explosion and subsequent fire was caused.

Those being the two findings of fact, (1) that it was the tray which dislodged the beam, and (2) that the beam was unbolted, two propositions were admitted. Firstly, that the stevedores were the servants or agents of the plaintiffs. Secondly, that the way in which they hauled up this tray, having regard to all the circumstances, was admittedly negligent.

Therefore, we start the difficult part of the case by the admission that it was the plaintiffs'

negligence which dislodged the beam. Then comes a question which I think is a double one, and which would have been submitted to a jury in the following terms: (1) Were the defendants negligent in leaving the beam unbolted? (2) Even if they were negligent in leaving the beam unbolted, did the plaintiffs know, or ought the plaintiffs to have known that it was unbolted?

I will deal with those questions separately. (1) Were the defendants negligent in leaving the beam unbolted? There can be no negligence in English law unless the person who alleges the negligence of his opponent is able to show that his opponent owed some duty, a breach of which has been committed; and I agree with my Lord, if I may be allowed to say so, in thinking that the law governing this case is that laid down in the well-known case of *Indermaur v. Dames (sup.)*, in the judgment of Willes, J., and which is in the following terms (14 L. T. Rep., at p. 486; L. Rep. 1 C. D., at p. 288): "The class to which the co-umer belongs includes persons who go, not as mere volunteers or licensees, but who go upon business which concerns the occupier, and upon his invitation express or implied." Now here, I think, the stevedores were in that position. And the learned judge continues: "With respect to such a visitor"—that is, with respect to the stevedores—"we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger of which he knows or ought to know, and that where there is evidence of neglect the question whether such reasonable care has been taken must be determined by a jury as a matter of fact."

What duty did the ship owe to the stevedores with regard to this question of bolting the beams? I wish to guard myself very carefully from laying down any general rule with regard to the duty owed by stevedores to a vessel when they are loading or unloading her. It all depends upon the particular facts in the particular case. I have already stated that the learned judge finds—a finding with which I am in agreement—that in effect the captain leaves the loading and stowing in the foreman stevedore's hands.

The learned judge finds—and I agree again with his finding—that they took out a beam in each hatchway in each deck, leaving a space of 16ft. by 16ft. for the trays to work in. They took out the fore-and-afters, and left the forward beam in each hatchway without removing it.

The cargo was of an extremely dangerous kind, gasoline and kerosene, in cases, no doubt being loaded in a very hot climate, and no doubt those persons who were charged with the loading operations would be extremely careful to see that nobody who was not used to loading such goods under such conditions would be allowed to interfere at all. In other words, when the ship arrived at Tampico, she was

handed over to what I might call these experts in loading gasoline and kerosene, in order that with their expert knowledge and their experience they might do the proper things to load her.

What was the duty of the vessel in such a case? There again, I do not want to lay down any hard and fast rule, but it appears to me at any rate that the shipowners' duty was to hand over the vessel to the plaintiffs for the purpose of its being properly loaded, and to provide such proper instruments for loading, as, for example, derricks, winches, and so forth, as a vessel usually provides. If that is the duty, there is no evidence of any breach of it. It was sought to be said that you are not handing over a vessel in a proper condition to receive the cargo if you hand it over with unbolted beams. My answer to that is the answer which appears to me to be founded upon the facts. When the ship arrived at Tampico the labourers were the people who did the actual work of opening and preparing the hatches. They opened the hatches, they took out the beams, they erected the platform, they put up the elevator; and it seems to me that from that time onwards, the superintendence and the control of the operations were vested in the plaintiffs and their men. Therefore, I cannot see that there was any breach of duty by the defendants which would entitle the plaintiffs to say that the defendants were negligent in leaving the beams unbolted.

But even if that were so, I think the second question would equally have to be determined in favour of the defendants. The second question is: Even if the defendants were negligent in leaving the beams unbolted, ought the plaintiffs to have known that the beams were unbolted? In other words: Were the plaintiffs guilty of such contributory negligence on their part as disentitled them to recover? There again I think the answer must be found upon the evidence, and the same evidence as applies to the first two questions. From the time when Mr. Echevaria put his squad on board, this vessel was in the hands of the plaintiffs' servants; they did the actual work of opening and preparing the hatches. But not only that: in opening and preparing the hatches in order that the holds might receive the cargo, they saw that every beam that they took out was not bolted, and they must have known, or ought to have known, that the beam they left in and upon which the platform was erected to enable their men to work, was in a similar condition.

We need not go into the exact number of beams here which they had taken out, but it appears to me that upon the second point also, even if the defendants were negligent in leaving the beams unbolted, the plaintiffs well knew or ought to have known that the beam upon which the platform was built was in that condition, as every other beam in the ship was.

In these circumstances, I think the plaintiffs are not entitled to recover. The 1500l. to

which I have already referred goes without question; that the plaintiffs are entitled to and there is no dispute. But the amount to which the defendants are entitled to on what appears to me to be their successful counter claim must be ascertained, in default of agreement, by the proper authority, and the £1500l. will have to be given credit for.

I agree that the appeal should be allowed and the cross appeal dismissed.

RUSSELL, L.J.: I am of the same opinion, and inasmuch as we are taking a different view from that entertained in the court below, I desire to state my reasons in my own words, but I am glad to think that I can do so quite shortly. It is unnecessary to recapitulate the facts. Before us, as the case was argued, there was no dispute, it was admitted that the stevedores were negligent in the loading, their negligence consisting of doing what Mr. Dodds described as allowing the tray to swing unduly in what he also described as a space ample for their requirements. That was the stevedores' negligence as found in the court below, and was accepted by the plaintiffs in this court.

The questions which arose upon that for our consideration were two. The first was this: Was the ship guilty of any negligence in allowing the beam to remain unbolted? and the second question was this: Assuming that to leave the beam unbolted constituted negligence in the ship, were the stevedores aware of the fact that the beam was unbolted, or ought they to have been aware of that fact?

It is upon the existence of this alleged negligence on the part of the ship that the plaintiffs' cause of action against the defendants and the plaintiffs' defence to the defendants' counterclaim rests. But the alleged negligence, as it is conceded, must not be negligence at large; it must be negligence of such a kind as that it involves the breach of some duty by the defendants to the plaintiffs. And the question resolves itself, therefore, upon this part of the case, into this: Was there any duty of the ship to the stevedores to bolt the beam?

The witnesses in the court below said in general terms that in their opinion it was the duty of the ship or of the ship's officers to bolt the beam, and the learned judge has accepted that view, and so far as that merely means this, that there may have been a duty or was a duty on the part of the ship towards, say, the charterers to bolt the beam, we need not necessarily quarrel with that. But if it means—and I think we must take it here that it was accepted in the court below to mean—that there was a duty of the ship towards the stevedores to bolt the beam, that view I feel myself unable to accept. I cannot see how such a duty can arise. The unbolted beam was perfectly safe and harmless if the loading was conducted without negligence. It only becomes a possible source of danger if the stevedores acted negligently in the course of the loading. In my opinion the ship cannot owe, and does

not owe, any duty to the stevedores to anticipate that the stevedores will be negligent, and to avoid the effects of that negligence by anticipation. For those reasons I hold that there was no negligence in the ship.

The second question is only material if there has been negligence by the ship, but I may say that as to that second question, if it arose, I am satisfied upon the facts of this case that the stevedores must have known that the beam was in fact unbolted. The evidence shows this: It shows first of all that these stevedores were most experienced people. Mr. Hartford, the plaintiffs' wharfmaster at Tampico, who gave evidence on commission, was asked: Are they people who have had a lot of experience? and the answer was, "A tremendous experience in this work." The evidence further shows this, that what has been called with sufficient accuracy for this purpose, the loading area, was handed over, or the control of it was handed over, to the stevedores for the purpose of being prepared for the loading. Further, the evidence shows that in the course of that preparation the stevedores took away and removed a number of these beams and that every single beam which they removed was in fact an unbolted beam. And finally the evidence in my opinion establishes this, that it is, as a matter of practice, quite common for a ship in ballast arriving at a port of loading for the purpose of receiving a cargo, to arrive at that port with the beams unbolted, at all events so far as concerns the two lower decks. In that state of circumstances there can to my mind be no doubt of what the answer should be to the question whether in fact those experienced stevedores knew or must be taken to have known that the beam in question was in fact unbolted; and the answer must be that they did in fact know or must be taken to have known.

In this case, as had already been pointed out, we are handicapped by the fact that the plaintiffs did not think fit to call either Mr. Echevaria or Mr. Guzman, or any other person in authority from the stevedores.

For these reasons I think that the second question should be answered in the way I have indicated. It was suggested in argument by Mr. Raeburn that the stevedores were entitled to assume, when they started loading on the Monday morning, having picked out the beams which they wished removed, and having removed them on the Saturday, that the ship had caused to be bolted those beams which had been left behind. Unfortunately for that argument, even if it were otherwise a sound one, the evidence shows this, that in regard to the particular hold which we are considering, namely, No. 1, the loading in fact started there on the Saturday immediately after the beams which had been removed had in fact been removed, so that with regard to this particular beam in question, there is no room for that particular argument.

For these reasons, which I have endeavoured to state shortly, I agree that this appeal should

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be allowed, with the results indicated by my Lord.

*Appeal allowed.
Cross appeal dismissed.*

Solicitors for the appellants, *Middleton, Lewis, and Clarke.*

Solicitors for the respondents, *Thomas Cooper and Co.*

Solicitors for the underwriters, *Parker, Garrett, and Co.*

March 18 and 19, 1929.

(Before SCRUTTON and GREER, L.JJ.)

THE YORK. (a)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Collision—Damages—Detention during repairs—Contract for sale of ship—Sellers to open up ship's boilers, &c., for approval of buyers—Permanent repairs carried out whilst boilers, etc., were being opened up—Ship unable to trade whilst permanent repairs were being carried out owing to obligation under contract to open up boilers, &c.—Whether owners entitled to damages for detention.

The respondents (plaintiffs), owners of the steamship *R. C.*, claimed damages from the appellants (defendants), owners of the steamship *Y.*, for damage sustained by the *R. C.* in collision with the *Y.* The appellants admitted liability for the collision. The damage sustained by the *R. C.* was above-water damage, consisting chiefly of indentation of certain plates. The *R. C.* accordingly continued trading, and permanent repairs were postponed. Subsequently the respondents entered into a contract for the sale of the *R. C.* By the terms of the contract the *R. C.* was described as expected ready for delivery between the 8th Jan. and the 31st Jan. It was further provided that delivery should be given at Antwerp or a United Kingdom port not later than 25th Feb.; that the contract was subject to the approval of the buyers of the vessel after inspection afloat; and that the seller should at his expense open up the engines, boilers, and tanks for the inspection of buyers afloat, and should put the *R. C.* into dry-dock for inspection of her bottom and under-water parts. The respondents elected to give delivery of the vessel in Antwerp. The *R. C.* accordingly proceeded to Antwerp, where she arrived on the 10th Jan. 1928. The buyers approved of the vessel afloat, and her engines and boilers and tanks were accordingly opened up on the 16th Jan. Whilst the inspection of the engines, boilers, &c., was being made, the collision repairs were also carried out, and it was agreed that these repairs would occupy four days. The collision repairs were in fact completed on the 24th Jan., but no dry-dock was available for the *R. C.* until the 2nd Feb. The *R. C.* went into dry-dock on the 2nd Feb.,

and came out on the 7th Feb. On the 13th Feb. she was delivered to the buyers. The district registrar allowed damages for the detention of the *R. C.* for four days, calculated upon the loss of four days' trading profits. It was admitted that four days was a reasonable period for carrying out the repairs; but the appellants contended that as the *R. C.* was incapable of trading during the four days actually occupied, owing to the inspection of her engines, boilers, &c., the respondents had not in fact suffered any loss. The report of the district registrar was confirmed by Bateson, J.

Held, that under the terms of the contract of sale, the respondents had warranted that the *R. C.* would be ready for delivery between the 8th Jan. and the 31st Jan., and that during that period the *R. C.* could not in any case have proceeded to sea. The respondents had, therefore, failed to prove that they had suffered any loss due to the ship being rendered idle by the collision. The respondents were not, therefore, entitled to recover anything for the loss of use of the *R. C.*

APPEAL from a decision of Bateson, J., confirming the report of the district registrar at Cardiff in a collision action.

On the 12th March 1927 a collision took place between the steamship *York*, belonging to the appellants, and the steamship *Royal City*, belonging to the respondents. The *Royal City* sustained damage to her bows which was not of a sufficiently serious character to necessitate permanent repairs being carried out at once. The respondents admitted liability for the collision, and the amount of the damages was referred to the district registrar at Cardiff.

After the collision the *Royal City* continued to trade, and earned profits averaging about 17l. per day. On the 21st Dec. 1927 the respondents entered into a contract for the sale of the *Royal City* to Greek owners. By the terms of the contract of sale the *Royal City* was described as "expected ready for delivery between, say, the 10th Jan. and 31st Jan. 1928, and to be delivered to buyers at Antwerp or United Kingdom port at seller's option, but not later than the 25th Feb. 1928, subject to buyer's approval after inspection afloat and to bottom examination in dry-dock." The contract further provided that the buyer should commence the inspection of the *Royal City* afloat within twenty-four hours of receiving notice of the steamer's readiness for inspection, and "if on superficial inspection is satisfied with the general condition of the steamer, seller shall at his own risk and expense open up the engines, boilers and tanks for the inspection of the steamer afloat by the buyer. . . ." For examination of the bottom and/or under-water parts, and/or tail and shaft, the respondents further agreed to put the vessel into dry-dock. On the 10th Jan. 1928 the *Royal City* arrived at Antwerp. On the 14th Jan. the discharge of the vessel was completed. On the 16th Jan. the collision repairs were begun. It was agreed that four days was a reasonable

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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period for these repairs. During the period 16th–28th Jan., whilst the collision repairs were being carried out, the boilers and tanks were opened up for the inspection of the buyer. On the 2nd Feb. the *Royal City* went into dry-dock, no dry-dock having been available prior to that date. On the 7th Feb. she came out of dry-dock, and on the 13th Feb. was handed over to the buyers.

For the detention of the *Royal City* at Antwerp the district registrar at Cardiff allowed the defendants the following items :

	£	s.	d.
Detention at Antwerp, four days at £12 18s. 10d.	51	15	4
Provisions, four days at £4 0s. 4d.	16	1	4
Stores and Maintenance, four days at £4 3s. 4d.	16	13	0
Insurance, four days	38	9	0
Management, etc., four days	3	0	0
Profit, four days at £17 9s. 8d.	69	18	8
	£195	17	4

In the reasons given for his report the district registrar stated that upon the evidence before him he came to the conclusion that the vessel was in a condition to earn and, but for the collision could and would have earned a profit, that the collision repairs were reasonably and properly executed at Antwerp, that the detention was not in any way due to the proposed purchase, and that the plaintiffs' vessel was properly detained at Antwerp for the admitted reasonable period of four days.

The appellants moved that the report be rejected and not confirmed (*inter alia*) in so far as it allowed the sum of 195*l.* 17*s.* 4*d.* for the detention at Antwerp upon the ground that this item was not supported by the evidence, and was inconsistent with the admitted facts of the case, and because the *Royal City* suffered no detention by reason of the repair of the damage she had sustained in collision with the *York*.

Bateson, J. dismissed the motion and confirmed the report. Bateson, J. held that "delivery" in the contract meant delivery for the purposes of inspection ; that the vessel was not outside the possibility of earning profit by reasons of the contract, and need not have gone through the preliminary survey at that time, but that the owners might easily have waited until the 25th Feb. before they tendered her to the buyers. The learned judge held further that the respondents were not debarred from using their ship ; that they need not have submitted her to the buyers at that time ; and that the appellants had failed to show that the *Royal City* had been repaired by the respondents at the material time under any obligation or necessity, such as existed in *The Chekiang* (17 Asp. Mar. Law Cas. 74 ; 135 L. T. Rep. 450 ; (1926) A. C. 637) and *Ruabon Steamship Company Limited v. London Assurance Company* (81 L. T. Rep. 585 ; 9 Asp. Mar. Law Cas. 2 ; (1900) A. C. 6).

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The appellants appealed.

Dunlop, K.C. and *Brightman* for the appellants.—The respondents can only recover damages for detention of their vessel if they intended and were entitled to use her for trading purposes after the 14th Jan. The evidence shows that the respondents stemmed the *Royal City* for a dry-dock (not for collision repairs) before the 10th Jan., and they were bound to keep her at Antwerp unless the purchasers disapproved of her after inspection. The buyer did in fact approve of her. The *Royal City* was being used by the respondents for the purpose of carrying out their contract of sale, and could not have been used for the purpose of trading.

Langton, K.C. and *Cyril Miller* for the respondents.—The decision of the learned registrar and of the learned judge was right and should be upheld. The respondents were in fact deprived of the opportunity of trading with the *Royal City*. The learned registrar was satisfied upon the evidence before him that there was a loss, and his finding ought not to be disturbed.

No reply was called for.

SCRUTTON, L.J.—We need not trouble you, Mr. Dunlop.

This is an appeal from the Admiralty judge confirming the decision of the district registrar at Cardiff assessing damages for collision. The only point in the case is whether the ship, if entitled to damages, can recover the loss of profits of the ship's trading when repairs had been done at a time when, even part from the collision, the ship could not have traded at all, for the simple reason that she had her engines opened up so that she could not proceed ; and stated in that way it rather looks as if the case is unarguable. But Mr. Langton has argued it, and we must deal with it.

The facts are these. A large ship, the *Royal City*, of about 5000 tons gross, met with a very slight collision with the French steamer *York*, which resulted in a visible but not very serious dent on her bow, a dent which anyone could see but which did not detract from her seaworthiness. Consequently after the collision she proceeded for some two voyages without repairing her damages. Having obtained her judgment against the *York*, she might at once have proceeded to recover her damages without repairing it, and there is no doubt that in that case she would have recovered for the damage because repairs are only a method of estimating the amount of the damage ; and there is no doubt in that case she would have recovered the estimated damages for her loss of trading profits during the four days which it is agreed is the proper time to repair the damage which the *York* did to her. But she did not take that course. At the end of Dec. 1927 her owners contracted to sell her to a Greek gentleman, and the contract of sale dated the 21st Dec. 1927 stated that the

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Royal City was "expected ready for delivery between say the 10th Jan. and the 31st Jan.," which, on the decisions, is a warranty that the facts at that time were such that she probably would be ready to deliver to the purchaser between those two dates. There was also what is in the nature of a cancelling clause—"and to be delivered . . . not later than the 25th Feb. 1928," which does not interfere in any way with the warranty contained in the "expected ready for delivery between, say, the 10th Jan. and the 31st Jan." The contract stated that the *Royal City* was due in London on the 24th Dec., and was thence going to Hamburg and Antwerp, and, therefore, it was known she would ultimately come to Antwerp, and the contract was for her "to be delivered to buyer at Antwerp or a United Kingdom port at seller's option."

I think it is quite clear on the facts that the seller intended to deliver her at Antwerp. She reached Antwerp on the 10th Jan. with her cargo on board which she had to deliver. I ought to have said further about the contract that it provides first of all that the contract was "subject to buyer's approval after inspection afloat," that is to say, the sale and purchase is subject to the buyer's approval after seeing her afloat; and the contract goes on to provide: "The buyer shall commence the inspection of the steamer afloat within twenty-four hours of receiving notice of steamer's readiness for inspection, and if on superficial inspection the buyer is satisfied with the general condition of the steamer, seller shall at his own risk and expense open up the engines, boilers and tanks for the inspection of the steamer afloat by the buyer; and if the steamer is acceptable to the buyer he is to pay for the expense of closing up such engines, boilers, tanks and machinery. The buyer shall declare acceptance or refusal of the steamer in writing within twenty-four hours after completion of such inspection afloat."

As I have said, the *Royal City* arrived at Antwerp with a cargo on board on the 10th Jan. and notice was apparently given of the steamer's readiness for inspection while the cargo was discharging. The inspection took place and the buyer was satisfied with the superficial inspection of the steamer, and so the next step had to proceed. The next step was that having got the cargo out and being ready for that work provided for by the contract, the seller had to open up the engines, boilers, and tanks for inspection. That he began to do on the 16th Jan., the work was finished on the 28th Jan., and the buyer was satisfied with what he saw on that inspection. Consequently there came the last stage, which was that the steamer having been stemmed for dry-dock, she went into dry-dock on the 2nd Feb., and the inspection of the bottom and other under parts and the tail end shaft took place in February. Meanwhile, and while the engines, boilers, and tanks were opened up and the ship, therefore, could not possibly proceed to sea or do anything, opportunity

was taken to put right the collision damage done by the *York* which could be done without going into dry-dock and which involved dealing with one plate and possibly fairing some others—work which it is agreed would take four days, and that four days' work was done between the 16th Jan. and the 28th Jan., that is to say, while the ship was in such a position owing to what was being done under the contract of sale that she could not have traded if she had wanted to.

Then comes the question, What damages ought the registrar at Cardiff to assess as the damage done by the *York*? Now there is no dispute that the owners of the *Royal City* recovered the cost of repairs. There is no dispute as to that. But they go on and say: "These repairs took four days, and therefore we are entitled to four days' loss of trading profit because you, by doing this damage, have stopped us from trading the vessel for four days." The answer made to that is this: "We have not done anything of the sort. You could not have traded at this period if there had been no collision damage because you were engaged in fulfilling your contract of sale by putting the ship into such a condition that she could not trade if she had wanted to; and what has happened is exactly what would have happened if there had been no collision and no damage at all. You would still have opened up this ship for inspection of boilers, engines, and tanks and you would not have been able to trade. But the fact that you were not able to trade is nothing to do with the collision. It was because you had sold the ship and the buyer required a certain amount of inspection which would prevent the ship from trading."

It seems to me that put in that way the case comes exactly within Lord Sumner's one sentence in *The Ikala* (17 Asp. Mar. Law Cas. 555; 140 L. T. Rep. 177; (1929) A. C. 196). The actual question in *The Ikala* was whether a ship claiming damages for collision could recover the high profits that would have been made in trading in a way in which by agreement she was prevented from doing; and the Court of Appeal and the House of Lords by a small majority held that she could not. But in the course of that case Lord Sumner, who gave the leading majority judgment—a judgment concurred in by Lord Buckmaster—said this (140 L. T. Rep. 181; (1929) A. C., at p. 205): "It has to be proved that, in doing the shipowner the wrong of laying his ship idle at the time in question, work which she would otherwise have done during the time went undone to his measurable loss." In this case, there was no work which she would otherwise have done during the time, for the reason that by her contract of sale she had incapacitated herself from doing any work at the time; and that being so, it appears to me that the ship fails to prove that the wrong of laying the ship idle was the result of the collision. His ship was idle because of the contract of sale and purchase and the work

which had to be done under it ; and the work which had to be done under the contract of sale prevented the shipowner from doing any other work at the time which the collision could have stopped him doing.

A very similar sort of point seems to me to have arisen in the case which came before the London Registrar in *The Glenfinlas* which was approved by Hill, J., in *The Kingsway* (14 Asp. Mar. Law Cas. 590 ; 122 L. T. Rep. 651 ; (1918) P. 344), approved expressly by Lord Sterndale in the case in the Court of Appeal, and, in my view, approved by myself in principle without stating the name of the case in the first passage of my judgment at (1918) P., at p. 362. In the case of *The Glenfinlas*, there was a collision ; permanent repairs were postponed, but before the permanent repairs were done, the ship struck a mine and sunk, whereupon the owners of the ship claimed, first of all, for the cost of doing the permanent repairs—because the ship when sunk was of less value to them because she was in such a condition that she required permanent repairs—and they also claimed for the loss of trading profits during the time when they would have done the permanent repairs, but for the fact that the ship was sunk. The learned registrar gave them the cost of permanent repairs, rightly and obviously, I should think, because that damage had been done to the ship, and at the time the ship was sunk she was of less value because of the damage done by the previous collision. But he said : “As regards the damages for detention, however, they were in his opinion clearly inadmissible. Being purely consequential damages they were on a different footing from the estimated cost of repairs for an actual injury to the plaintiffs’ chattel. The principle to be applied was *restitutio in integrum*, and to give damages for a loss of time which had not occurred would be to act contrary to this maxim. The claim, therefore, for loss of the use of the vessel could not be allowed.” Hill, J. (14 Asp. Mar. Law Cas., at p. 592 ; 122 L. T. Rep., at p. 653 ; (1918) P. at p. 352) in *The Kingsway*, said : “If it is certain that repairs cannot at any time be effected, as, for example, if the ship is at the time of the reference already lost unrepaid, nothing, in my opinion, can be allowed for detention. Such was the case of *The Glenfinlas*, recently before Mr. Registrar Roscoe, to which I was referred. If there neither has been, nor can be, detention during repairs, the owner can suffer no loss by reason of detention.” Lord Sterndale (Pickford, L.J., as he then was) (14 Asp. Mar. Law Cas., at p. 594 ; 122 L. T. Rep., at p. 655 ; (1918) P., at p. 352) said this : “He,” that is Hill, J., “took the view, and I should agree if it were necessary to decide it, that if at the time of a reference the ship had been in fact lost, as in the case of *The Glenfinlas*, and therefore the repairs never could be done, and there never could be a detention causing loss of profitable employment to the shipowner at all, then those damages could not be recovered. When I say

lost, I mean lost by some circumstances outside the collision.”

I put during the argument other instances where apparently the same result would follow. In the present remarkable winter all the ports of the Baltic have been permanently blocked by ice. Supposing that a vessel caught in the Baltic and detained by ice so that she could not trade at all takes the opportunity of doing repairs. She may recover the cost of repairs, but, in my view, she is not entitled to say : “I have lost so many days trading profit,” because the pre-existing condition, which has nothing whatever to do with the collision, is that however much she wanted to trade, she could not because she was held up by ice. Another case which occurred to me was the case of an embargo preventing any ship from moving or trading, and the shipowner, taking advantage of his ship being held up by the embargo, deciding to do repairs due to a previous collision. Again I do not think it would be possible for him to say : “I claim from you the loss of profit on trading,” because it was quite impossible, owing to circumstances not connected with the collision at all, namely, the embargo, that he should trade, and consequently he never lost any profits of trading because of the collision. If I understood Mr. Langton’s argument it was that it was so uncertain when the repairs could be done that you could not treat the various detentions under the contract of sale and the collision as having necessarily anything to do with each other. It appears to me on the facts that the owners of the *Royal City* intended throughout the time of the contract of sale to take the ship to Antwerp, and there go through the processes which were necessary to fulfil the contract, which I have no doubt did include making the collision repairs, because a purchaser, particularly a Greek purchaser, would certainly use the existence of a large dent in the bow unrepaid to reduce the price unless the seller undertook to repair it in order that he, the purchaser, might be satisfied.

There is one other word I desire to say, and that is this. The judgment of Bateson, J. proceeds in a large measure on a view of the contract that the word “delivery” when used does not mean delivery to the purchaser under the contract of sale, but means tendered to the purchaser in order that he may make his superficial inspection. In my view the number of times that the word “delivery” is used in the contract precludes that view of the contract, and the view therefore which Bateson, J. took, in my opinion, is not well founded because I think his construction of the contract is wrong.

The only other point I desire to make is that the learned registrar, whose report is before us, somehow managed to find that the ship, “upon the evidence before me, but for the collision, could and would have earned a profit, i.e., in those four days.” With great respect to the registrar, I am quite unable to conceive where he could find any evidence to enable him

to make that finding. The facts which I have stated seem to me to show clearly that the vessel could not have earned a profit because of her proceedings under the contract of sale, and that the collision had nothing to do with her failure to earn profit during those four days.

In those circumstances the report must be varied by striking out the group of items which are contained under the head of loss of profit, otherwise the report is confirmed. The appellants must have the costs of the appeal.

GREER, L.J.—I agree. It is unnecessary for me to say anything with regard to the facts of the case which have been stated in my Lord's judgment, but I want to say a few words about the principles that have to be applied in estimating damages.

The root principle in the law as to the measure of damages is this: Damages are intended to be a compensation for loss caused by the wrongful act of the defendant, and the fundamental rule is that those damages are such a sum of money as will put the plaintiff, so far as money can, in the same position as that in which he would have been if no wrong had been committed against him, if there had been no breach of his right. That rule may be subject to some exceptions because there have been cases in which it has been decided that there is an absolute rule of law entitling a man to a particular measure of damages, whether in the events that have happened he has suffered that damage or not. There used to be one exception in the law of landlord and tenant where a lessor could recover against his lessee damages for failure to repair at the end of the lease although the repairs would have been absolutely useless to the landlord because of the building having to come down; it was just as easy to take it down without the repairs as to take it down after the repairs had been done. However, that exception has been done away with. It has sometimes been thought that there was another exception with regard to damages for breach of contract for the sale of goods, where the difference as between market price and contract price was sometimes thought to be an absolute rule as to the measure of damage without any inquiry as to whether that difference was actually incurred by the plaintiff upon the facts as they happened in relation to the claim. But some doubt has been thrown, I think, by the case of *Pym v. Campbell* in the House of Lords, as to whether that is a rule which has survived. Be that as it may, however, I think it is quite clear upon the authority of the three cases to which my Lord has referred that that rule has no application to the claim in this case. It seems to me clear to demonstration when the facts are carefully considered that if there had been no tort committed by the defendant, still the plaintiff would have lost the use of his vessel over the four days in question; and, that being so, he has not suffered any damage by reason of the fact that he was prevented from

profitably using his vessel during the four days in question. He would have been in exactly the same position if there never had been a collision and there never had been a dent in the plates of the ship. For these reasons I agree with my Lord that these damages cannot be recovered. The three cases to which my Lord has referred appear to me to be ample authority, if authority were needed, for the decision we are giving. I should just like to quote a passage from the judgment of Scrutton, L.J. in *The Kingsway*, where the principle to which I have referred is stated. At p. 362, in the report of *The Kingsway*, in 1918, P., Scrutton, L.J. said this: "The first thing clear is that when damages which would be otherwise prospective come to be assessed, facts which have actually happened may be taken into account, and when damages are being assessed for a tort which would include some disability of the person or thing injured, it may be taken into account that before the damages come to be assessed the person or thing injured has ceased to exist, owing to circumstances not connected with the tort." The ceasing to exist is only one fact whereby it may become clear that the damages have not been suffered. The position as regards the contract of sale is certainly a fact which shows that the damages sought to be recovered have not in fact been incurred, and therefore cannot be recovered. I agree that the order should be made as my Lord has said.

Appeal allowed.

Solicitors for the appellants, *Wm. A. Crump and Son*, agents for *Gilbert Robertson and Co.*, Cardiff.

Solicitors for the respondents, *Ingledeu, Sons, and Brown*, agents for *Ingledeu and Sons*, Cardiff.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

March 22, 25, and 26, 1929.

(Before HILL, J., assisted by Elder Brethren.)

THE ZILLAH. (a)

Collision — Queenstown Harbour — Channel divided by line of buoys—Narrow channel—"Fairway"—Whether one or two "fairways"—Cork Harbour By-laws, "Description of Fairway," par. 6, by-law 41—Regulations for Preventing Collisions at Sea, art. 25.

The plaintiffs, owners of the steamship A., claimed damages from the defendants, owners of the steamship Z., in respect of a collision between the A. and the Z. in Queenstown

(a) Reported by GEOFFREY HUTCHINSON, Esq., Barrister-at-Law.

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Harbour. Queenstown Harbour at the place where the collision took place is divided by a line of Admiralty battleship mooring buoys. By the Cork Harbour By-laws ("Description of Fairway," par. 6) it is provided that at this place there shall be two fairways, the northern fairway and the southern fairway. The boundaries of these fairways are described, the line of Admiralty mooring buoys being designated as the southern boundary of the northern fairway and the northern boundary of the southern fairway. The by-laws further provide (by-law 41 of by-laws relating to navigation) that any regulations for preventing collisions at sea for the time being in force shall be deemed to apply to the port, and that "the entire fairway shall be deemed to be a narrow channel." The collision took place when the A., bound up-river, was navigating on the southern side of the northern fairway, and the Z., bound down river, was navigating on the same side of the same fairway. The by-laws defined the fairway as meaning "the space within the port for the time being reserved as a highway for vessels in motion."

Held, that there were two fairways at the place in question, and that either up-going or down-coming vessels had the right to make use of either fairway, and had been accustomed to do so. In these circumstances the collision had been brought about by the A. navigating on her wrong side of the northern fairway, and that the A. was therefore alone to blame for the collision.

DAMAGE ACTION.

The plaintiffs, owners of the steamship *Alison*, claimed damages in respect of a collision which took place between the *Alison* and the defendants' steamship *Zillah* in Queenstown Harbour on the 22nd Oct. 1928. At the place where the collision occurred Queenstown Harbour is divided by a line of Admiralty mooring buoys. The *Alison* was bound up-river to Cork, and the *Zillah* was bound down-river from Cork to Trevor. The collision took place between the line of Admiralty buoys and the northern shore. The case for the plaintiffs was (so far as material) that when both vessels were in a position to pass all clear starboard to starboard, the *Zillah*, which was on the wrong side of the channel and ought to have been to the south of the line of Admiralty buoys, improperly starboarded into the *Alison*. The case for the *Zillah* was that she was entitled to navigate down-river on the north side of the Admiralty buoys, and that, on seeing the masthead and red lights of the *Alison* about a quarter of a mile distant, she sounded one short blast and ported, in order to cross on to her own starboard side of the channel. The question upon which the case is reported is whether the whole channel of Queenstown Harbour is to be regarded as a single narrow channel, or whether it is divided by the line of the Admiralty buoys into two separate fairways.

The boundaries of the Man-of-War Outer Anchorage and the Man-of-War Inner Anchor-

age at Queenstown (within which the collision took place) are defined by Order in Council of the 10th Aug. 1903, made under the Dockyard Port Regulation Act 1865. The Order in Council further provides as follows:

8. The fairway through the Man-of-War Outer Anchorage shall, when no men-of-war are anchored in it, be considered to include the water for a space of 200ft. on each side of the line of the leading lights under Fort Camden, as shown on the chart and shall be kept clear.

9. A fairway will be kept through the Inner Man-of-War Anchorage, in such a direction with regard to His Majesty's moorings and ships as circumstances may from time to time require.

By the Cork Harbour Act 1903 (3 Edw. 7, c. cclvi.) it is provided:

60. Nothing in this Act contained shall take away, diminish or alter any rights or powers conferred on the Lords Commissioners of His Majesty's Admiralty by the Dockyard Port Regulation Act 1865, or by any orders in Council which have been or which may be in future made under the provisions of the Dockyard Port Regulation Act, and the commissioners shall not without the consent of the said Lords Commissioners exercise whilst so reserved any jurisdiction whatever over such portions by the port as have been or may be in future reserved for the use of His Majesty's Navy and known as Man-of-War anchorages except such control over navigation by by-laws as is hereinafter mentioned.

No by-laws made by the commissioners under the powers contained in this Act or in any other Act relating to the port or which relate to the navigation through the Man-of-War anchorages or which affect them in any way whatever shall be valid without the previous consent of the Lords Commissioners of the Admiralty and in any general by-laws made or issued by the commissioners it is to be expressly stated that such by-laws do not affect the Man-of-War Anchorages except where expressly so provided.

The by-laws made by the Cork Harbour Commissioners under the Cork Harbour Acts 1903-1920 are as follows:

Description of Fairway.—6. From the eastern limit of the inner Man-of-War anchorage to the White Point Buoy there are two fairways—the northern fairway and the southern fairway. The northern fairway is bounded on the north by an imaginary line from 20 fathoms south of Copper Point Buoy to the western end of Queenstown Deep-water Quay, and thence towards White Point House until Rushbrooke Church bears N.W. by W. $\frac{1}{4}$ W. and thence to White Point Buoy, showing a fixed white light, and on the south by the line of the Admiralty battleships' mooring buoys. The southern fairway is bounded on the north by the line of Admiralty battleships mooring buoys, and on the south by the line of Admiralty torpedo boat and other mooring buoys along the north of Spit Bank and Haulbowline.

2. These by laws shall not affect the Man-of-War Anchorages (as hereinafter defined) except as provided by by-law No. 53.

By-laws relating to navigation.—41. Any regulations for preventing collisions at sea for the time being in force under the provisions of the Merchant Shipping Acts shall be deemed to apply to the port, and shall be construed as if the following by-laws Nos. 42-52 (inclusive) were added thereto, and the entire fairway shall be deemed to be a

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narrow channel. Provided that where any inconsistency arises between the General Regulations and any of these by-laws the provisions of these by-laws shall have effect.

Man-of-War Anchorages.—53. The foregoing by-laws, where they refer to any part of the Man-of-War Anchorages or any other part of the dockyard port, shall apply to any merchant ships that may be temporarily using such part of the port.

E. Aylmer Digby, K.C. and Pilcher for the plaintiffs.—The whole of Queenstown Harbour must be regarded as a single narrow channel, divided into two fairways; that on the northern side of mid-channel is for the use of vessels proceeding up river, whilst that on the south side should be used by vessels proceeding down river. The *Zillah* ought not to have been in the northern fairway at all, but ought, under the rules, to have kept to that side of the narrow channel which lay on her own starboard side, that is to say, to the southern fairway.

Stephens, K.C. and Noad.—These are two separate and distinct fairways, either of which may be used by vessels proceeding either up or down channel. The *Zillah* was entitled to make use of the northern fairway, and she was in fact navigating upon her own starboard side of that fairway. The *Alison* was not on her own starboard side of the fairway, treating the northern fairway as a separate fairway, although she was admittedly on her own starboard side if the harbour is to be regarded as a single narrow channel.

HILL, J.—The collision in this case happened between two small steamships, each in charge of a pilot, at 7.15 p.m., on the 22nd Oct. 1928, in fine clear weather, and on a moonlight night in Queenstown Harbour. The place was a little above the No. 7 buoy at the Admiralty moorings at which the destroyer *Sea Wolf* was lying, heading in a N.E. or N.N.E. direction. If the line of the Admiralty buoys be regarded as the southern boundary of the channel and the north shore as the northern boundary the place of the collision was substantially to the south of the middle line of the channel. Having regard to the evidence from the *Sea Wolf*, it may possibly be that it was even south of the line of the Admiralty buoys, but I do not think that matters. Immediately before the collision there is no doubt the *Zillah* was navigating in that channel, if it is to be regarded as a separated channel, namely, the channel between the Admiralty buoys and the northern shore.

The *Alison* was proceeding up the channel at five or six knots, and the *Zillah* was coming down at about eight knots. When they were in collision the stem of the *Zillah* struck the starboard side forward of the *Alison*, and the final result was that the *Alison* sank. The *Alison* saw the *Zillah* at a distance, of about 600yds., a little more or a little less, and the *Zillah* saw the *Alison* at 500yds. or 600yds., a little more or a little less. Each went full astern at the last, but it is clear on the speeds that the interval between the sighting and the

collision was very short—not much more than a minute.

When I say the “channel,” I mean the waterway between the line of the Admiralty buoys and the north shore. I shall presently have to consider whether that is to be regarded as the channel by itself. For the moment I assume that it is so to be treated, and I consider the case from that aspect.

[The learned judge considered the evidence of the parties, holding that the cause of the collision was the failure of the *Alison* to keep to her own starboard side of mid-channel, and continued:]

But that is all on the assumption that the two ships were navigating in the same narrow channel—that is to say, the channel bounded on the south side by the Admiralty buoys and on the north by the north shore. On that assumption the case is clear. The *Alison* was in her wrong water; the *Zillah* was in her right water. The *Alison* was brought there by starboarding from mid-channel, when by porting she could have got to the other side of the channel.

The main question is, what is the true view about these waters? The plaintiffs say that the channel in this place is the water between the north shore and the south shore, in the neighbourhood of Haulbowline. They say that it is all one channel with, it is true, the Admiralty moorings down the centre, and that down-coming ships must keep to the south of the mooring buoys and the up-coming ships to the north of the mooring buoys. That is the plaintiffs' contention. If they are right then it is the *Zillah* and not the *Alison* which was in her wrong water. On the other hand, the *Zillah* says: “I was rightly proceeding down in a channel which was defined on my starboard hand by the line of the Admiralty buoys and on my port hand by the north shore. I was bound to regard that as my channel and the *Alison* was also. I ought to have been on the south side and the *Alison* on the north.

Prima facie, I have no doubt that in an ordinary way the whole of the water between the two shores at a narrow place of this kind is to be regarded as one channel, and if there were nothing else in the case, and no Admiralty rights concerned, I should conclude there was one channel off Queenstown, of which the north side was the north shore, and the south side the shallow water towards Haulbowline and the Spit Sand. But at the same time there can be no doubt that local harbour authorities have power to define the channels in the waters under their jurisdiction, as we find constantly done by a line of black buoys on one side and red buoys on the other. Nobody has suggested that the channel so indicated by the local authority is not to be regarded as a channel within the meaning of the rule.

Here the position is rather peculiar because of the over-riding authority of the Admiralty over Queenstown Harbour. As appears in Mr. Stewart Moore's Rules of the Road at Sea

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(4th edit.), at p. 375, an Order in Council was made in Aug. 1903, by virtue of the Dockyard Ports Regulation Act 1865, which defines the limits of the Dockyard port of Queenstown, and includes in those limits certain man-of-war anchorages. One of those anchorages is the man-of-war inner anchorage, and as so defined it includes the whole of the waters with which we are concerned.

That same Order in Council, while putting these waters wholly under the Admiralty, provides that a fairway shall "be kept through the inner man-of-war anchorage, in such a direction with regard to H.M. moorings and ships as circumstances may from time to time require."

The by-laws which have been put in were made by the Cork Harbour Commissioners in 1909, in pursuance of the powers vested in them by the Cork Harbour Acts 1820 to 1903; they were sanctioned by the Board of Trade on the 24th Sept. 1909, and that consent is expressed to be as required by the Cork Harbour Act 1903. That latter Act provided that nothing should take away or diminish or alter any rights or powers conferred upon the Lords Commissioners of the Admiralty by the Dockyard Port Regulation Act 1865. No Order in Council shall be made and the Harbour Commissioners shall not without the consent of the Lords Commissioners of the Admiralty exercise any jurisdiction whatever over such portions of the port as may be reserved for the use of H.M. ships at anchorage, except such control over navigation by-laws as is thereafter mentioned (Cork Harbour Act 1903, s. 60). It was laid down that no by-laws made or relating to the navigation through the man-of-war anchorages or affecting them in any way "shall be valid without the previous consent of the Lords Commissioners of the Admiralty, and in any general by-laws made in future by the Commissioners it is to be clearly stated that such by-laws do not affect the man-of-war anchorages" except where so provided for by the consent of the Lords Commissioners of the Admiralty (Cork Harbour Act 1903, s. 60). No. 2 of the by-laws in force says: "These by-laws shall not affect the man-of-war anchorages except as provided by by-law No. 53;" and by-law 53 says: "The foregoing by-laws, where they refer to any part of the man-of-war anchorages or any other part of the dockyard port shall apply to any merchant ships that may be temporarily using such parts of the port." Then I come to by-law 41, which says: "Any regulations for preventing collisions at sea for the time being in force, under the provisions of the Merchant Shipping Acts, shall be deemed to apply to the port, and shall be construed as if the following by-laws, Nos. 42 to 52 (inclusive) were added thereto and the entire fairway shall be deemed to be a narrow channel. Provided that where any inconsistency arises between the general regulations and any of these by-laws, the provisions of these by-laws shall have effect." The words are: "The

entire fairway shall be deemed to be a narrow channel." I have to ask myself what is the meaning of "fairway." I must find what is a fairway as defined by the by-laws and the interpretation clause. I find that the word "fairway" means: "the space within the port for the time being reserved as a highway for vessels in motion." I have to find what is that "fairway." No doubt, it is in contemplation that under the general over-riding jurisdiction of the Admiralty over the whole harbour, coupled with the provisions of the Order in Council, the Lords Commissioners of the Admiralty are to see that a fairway shall be kept through the inner man-of-war anchorage—that a space is to be reserved; and I ask: Reserved by whom? It is obvious to me that the consent of the Lords Commissioners of the Admiralty must be obtained to any reservation. The reservation must be made in consultation with them because they have the general control of the matter, but subject to that, and to their primary right to use what part of the harbour they please, as they please, provided they do leave a fairway, I think the reservation must be defined by the commissioners. It contemplates something to be done from time to time, and until I find that somebody has from time to time reserved a space within the port as a highway I am unable to say that this, that, or the other is a fairway.

I must look a little further. The by-laws which are published by the Harbour Commissioners are prefaced by several pages headed "Description of fairway." It does not on the face of it appear whether this description of a fairway was or was not incorporated in the document approved by the Board of Trade and consented to by the Lords Commissioners of the Admiralty. Nobody has been able to put before me the King's Printer's copy of this document, nor has a search in the *London Gazette* produced any result, I do not know; but I am very much inclined to think that it was included, for unless I read the "Description of Fairway" with the by-laws I can see no reason at all why the by-laws should have included definitions of the man-of-war outer and the man-of-war inner anchorages; there are references in the actual by-laws to the man-of-war anchorages, but no distinction is made as between the outer and the inner anchorage. Yet it has been necessary in the by-laws to define separately the outer and the inner anchorage. Therefore, it makes me think that it is highly probable that in the document which was approved, the "Description of Fairway" was included as a preliminary to the by-laws and is to be read with them.

Supposing that that is not so, I still have to ask myself what is the meaning of "Fairway" in Art. 41. To do that I have to ask myself what, for the time being, was the space within the port reserved as a highway; and, at any rate, in 1916, the commissioners were publishing along with their by-laws a "Description of Fairway"; and that I take to

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be a statement of theirs of the space within the port which was for the time being reserved as a highway. That brings me to the description. The description defines the fairway for different sections of the port, and when it comes to the inner man-of-war anchorage it says that it is not one fairway but two fairways, one to the north and the other to the south of the Admiralty battleship mooring buoys, and it describes the limits of those two fairways.

I think, therefore, that by the effect of the by-laws as explained by the reservation which is contained in the description, there was in this locality a separate "fairway" bounded on the north by an imaginary line from 20 fathoms south of Copper Point Buoy to the western end of Queenstown Deep Water Quay, and thence towards White Point House, until Rushbrooke Church bears N.W. by W. $\frac{1}{2}$ W., and thence to White Point Buoy, showing a fixed white light, and on the south by the line of the Admiralty battleships mooring buoys. There was also another "fairway" bounded on the north by the line of the battleships mooring buoys, and on the south by the line of Admiralty torpedo-boat and other mooring buoys along the north of the Spit Bank and Haulbowline. That I take to be the effect in law.

But the matter does not rest there, because upon the evidence it is pretty clear that in practice for a long time, going back long before this particular "Description of the Fairway" was published—I dare say there was some similar description; I do not know—but for a long time, ships going up and down have treated what I now call the northern fairway as a fairway which each of them was entitled to navigate. Down-coming ships have not hesitated to come down in that water. Nobody has ever heard, so far as the evidence goes, of anybody ever being censured or prosecuted for coming down in that water. It is quite true that it is usually a matter of convenience

for them because they have to drop their pilot at the Custom House which is on the north side. On the other hand, it does seem that some of the passenger ships, especially where the master has a pilot's certificate, come down to the south of the line of buoys because they are not likely to meet anybody coming up and need not reduce their speed, for they have not to put in for a pilot. It is a shorter course. That, however, does not prevent it being recognised as right for down-coming ships to proceed down the north channel. All this only shows that people in the neighbourhood of these waters regard that water as that which the commissioners have said it is, namely, a separate "fairway."

I, therefore, come to the conclusion that when by-law 41 speaks of the entire fairway being deemed to be a narrow channel, it means in this locality the entire fairway which lies between the north shore and the Admiralty battleship mooring buoys, the other fairway which lies to the south of the battleship buoys being a separate and distinct fairway.

The result is that the *Zillah* was entitled to proceed down to the north of the Admiralty buoys provided she kept on her starboard side of that fairway. The *Alison* was entitled to proceed up in those waters, but under the obligation of keeping on her starboard side thereof.

We come back to the old original position. These two ships were navigating in a narrow channel. The collision occurred in the *Zillah's* water, not in the *Alison's* water, and the *Alison* has got there by wrongly starboarding. The *Zillah* has done nothing wrong, because the only duty you could put on her would be to go full astern, and she did that before the collision and she did it within a very short time of being compelled to do so by the *Alison*. The *Alison* is alone to blame.

Solicitors: W. and W. Stocken; Pritchard and Son, agents for Batesons and Co., Liverpool.



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